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## International Law and the War on Terrorism: The Road Ahead<sup>1</sup>

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On this, the last panel of the conference, we have been asked to consider “The Road Ahead” or, more specifically, the “application of any legal lessons learned, review of the role of international conventions on terrorism, and future military operations against terrorism.” This is not an easy task. As Yogi Berra reportedly once observed, “it’s difficult to make predictions, especially about the future.” This is particularly true given that, as Richard Posner has recently pointed out, so-called “public intellectuals” or the “experts” have a notoriously bad record when it comes to predictions.<sup>3</sup> Accordingly, in this, as in so many enterprises, caveat emptor.

Be that as it may, this chapter proceeds along the following lines. First, since any effort at “futurism” necessarily involves an analysis of present trends, it attempts to identify the most salient trends in international terrorism and

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1. I would like to express my appreciation for the excellent research assistance of Andrew Kenis, a third year student at the Villanova University School of Law, Rita Young-Jones, former reference law librarian at the Villanova University School of Law, and Charles J. Kocher, a second year student at the Villanova University School of Law. I am also grateful for a summer 2002 research grant from the Villanova University School of Law that greatly facilitated my work on this chapter.

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3. RICHARD A. POSNER, PUBLIC INTELLECTUALS (2001).

their impact on efforts to combat terrorism. Next it turns to two kinds of responses employed in combating terrorism which have been the focus of considerable scrutiny already at this conference: the so-called antiterrorism conventions, at both the global and the regional levels, and the use of coercive measures, i.e., economic sanctions and the use of armed force. As to these measures, the effort will be to evaluate their strengths and weaknesses, especially in light of current trends, and to set forth some tentative proposals for improvement.

### *Trends*

September 11th itself is a spectacular demonstration of a disquieting trend in international terrorism: the increased willingness of terrorists to kill large numbers of people and to make no distinction between military and civilian targets.<sup>4</sup> Until recently many commentators were of the view that terrorists had little interest in killing large numbers of people because it would undermine their efforts to gain sympathy for their cause. A major cause of this radical change in attitude has been aptly pinpointed by Jeffrey Simon:

Al Qaeda . . . is representative of the emergence of the religious-inspired terrorist groups that have become the predominant form of terrorism in recent years. One of the key differences between religious-inspired terrorists and politically motivated ones is that the religious-inspired terrorists have fewer constraints in their minds about killing large numbers of people. All nonbelievers are viewed as the enemy, and the religious terrorists are less concerned than political terrorists about a possible backlash from their supporters if they kill large numbers of innocent people. The goal of the religious terrorist is transformation of all society to their religious beliefs, and they believe that killing infidels or nonbelievers will result in their being rewarded in the afterlife. Bin Laden and al Qaeda's goal was to drive US and Western influences out of the Middle East and help bring to power radical Islamic regimes around the world. In February 1998, bin Laden and allied groups under the name "World Islamic Front for Jihad Against the Jews and Crusaders" issued a fatwa, which is a Muslim religious order, stating that it was the religious duty of all Muslims to wage war on US citizens, military and civilian, anywhere in the world.<sup>5</sup>

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4. It is worth noting that in 1998 bin Laden told ABC News that "he made no distinction between American military and civilian targets, despite the fact that the Koran itself is explicit about the protections offered to civilians." See Peter L. Bergen, *Excerpts from Holy War, Inc.*, 82 PHI KAPPA PHI FORUM 26, 28 (2002).

5. Jeffrey D. Simon, *The Global Terrorist Threat*, 82 PHI KAPPA PHI FORUM 10, 11 (2002).

It is important to note that there are other religious terrorist groups besides al Qaeda. Examples include Hizballah, a radical Shia Islamic group in Lebanon, Hamas (Islamic Resistance Movement), and the Palestine Islamic Jihad, all of whom use terrorism in the West Bank, Gaza Strip, and Israel to undermine Middle East peace negotiations and to establish a fundamentalist Islamic Palestinian state. There are also the Abu Sayyaf Group, a radical Islamic separatist group operating in the southern Philippines; Al Gama'a al-Islamiyya (Islamic Group), which is based in Egypt and seeks the overthrow of the Egyptian government; and the Armed Islamic Group, which is located in Algeria and plots the overthrow of the secular Algerian government and its replacement with an Islamic state.

September 11th may also demonstrate another trend: the emergence of smarter and more creative terrorists. The planning and carrying out of the terrorist operation on September 11th was diabolically clever, and the 19 hijackers were well educated and from middle to upper middle class backgrounds. Smarter and more creative terrorists, moreover, are better equipped to take advantage of the information on weapons—including weapons of mass destruction—targets, and resources necessary for a terrorist operation readily available on the Internet. Similarly, they are better able to take advantage of the various vulnerabilities of a technologically advanced society, including major networks of communications, electrical power, pipelines, and data.

Another major trend is the “globalization” of terrorism.<sup>6</sup> According to Joseph Nye, globalization is “the growth of worldwide networks of interdependence.”<sup>7</sup> In particular, Nye suggests, over the last several decades, there has been a substantial increase in “social globalization,” i.e., the spread of peoples, cultures, images, and ideas, and this has resulted in “new dimensions of military globalism: humanitarian intervention and terrorism.”<sup>8</sup> Perhaps the most salient example of social globalization resulting in terrorist military globalization is the worldwide expansion of the al Qaeda network, said to operate in more than sixty countries.<sup>9</sup> It is not the only example, however. Hizballah reportedly has operations in six continents, and Hamas and the Sri Lankan

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6. For further discussion see John F. Murphy, *The Impact of Terrorism on Globalization and Vice-Versa*, 36 THE INTERNATIONAL LAWYER 77 (2002).

7. JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 78 (2002).

8. *Id.* at 86–87.

9. See *Seeing the World Anew*, ECONOMIST, October 27, 2001, at 19.

Tigers of Tamil Eelam are said to “maintain cells far from the lands where their goals and grievances are focused.”<sup>10</sup>

An encouraging trend is the apparent decline in state sponsored terrorism. The breakup of the Soviet Union, and the emergence of the countries in central and eastern Europe from under the Soviet yoke, greatly reduced the sources of state support that terrorists could rely on. Even for those countries that remain on the US State Department’s list of sponsors of terrorism—Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria—there has been some movement away from state support of terrorism toward cooperation with the international community’s campaign against terrorism.<sup>11</sup> The main problem area is the Middle East. Although Iran and Syria, for example, have taken action against al Qaeda, they continue their active support for terrorist groups, such as Hamas and Hizballah, that primarily target Israel and its citizens, on the ground that these groups are not terrorists but national liberation movements.

Let us reflect for a moment on possible reasons for the distinctions made by Iran and Syria. It should come as no surprise that Iran and Syria should be willing to cooperate, at least to a limited extent, in efforts to suppress al Qaeda. The kind of radical Islamic fundamentalism espoused by bin Laden and al Qaeda is a serious threat not only to the United States but also to Islamic governments in the Middle East. Even though they may themselves be regarded as having radical Islamic governments, Iran and Syria are nonetheless among those threatened by al Qaeda. In contrast, Hamas and Hizballah direct their attention toward Israel, long the target of Iranian and Syrian enmity. Here, one may speculate, the greater danger for Iran and Syria may lie in *not* supporting these movements in light of the general support they enjoy among the people of the Islamic countries in the Middle East.

Interestingly, according to the latest US Department of State report, Latin America had by far the largest number of international terrorist attacks in 2000 and 2001.<sup>12</sup> Latin America, too, was a major venue for the activities of Hizballah, as well as other terrorist groups, “in the tri-border area of Argentina, Brazil, and Paraguay, where terrorists raise millions of dollars annually via criminal enterprises.”<sup>13</sup> There was also evidence of Hizballah members or sympathizers in Chile, Colombia, Venezuela, and Panama. But allegations of

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10. Paul R. Pillar, *Terrorism Goes Global: Extremist Groups Extend Their Reach Worldwide*, 19 BROOKINGS REVIEW 34 (2001).

11. See US DEPARTMENT OF STATE PATTERNS OF GLOBAL TERRORISM 2001 (May 2002), at 63.

12. *Id.* at 172.

13. *Id.* at 44.

the presence of bin Laden or al Qaeda support cells in Latin America remained uncorroborated.

Colombia was a particular problem area. In response to greatly increased violence and terror unleashed by Colombia's largest terrorist organization, the 16,000 member Revolutionary Armed Forces of Colombia (FARC), Colombia's former President Andres Pastrana decided, in February 2002, to terminate the peace process that had been a hallmark of his presidency and to reassert control over the FARC's demilitarized zone. Three Irish Republican Army members, allegedly helping the FARC prepare for an urban terror campaign, were arrested as they departed the demilitarized zone, and there were media allegations of similar support by the terrorist group Basque Fatherland and Liberty, or ETA.<sup>14</sup>

These developments in Latin America, along with an apparent comeback of the Shining Path in Peru, may have contributed to the successful conclusion of a new Inter-American Convention Against Terrorism by the OAS General Assembly on June 3, 2002 (discussed in the next section).

Perhaps the primary impact of these trends, as well as of the severity of the September 11th attacks and of the subsequent use of military force by US and select NATO forces against the Taliban and al Qaeda in Afghanistan, has been to raise an issue as to the appropriate legal regime to apply to efforts to control international terrorism. Prior to September 11th international terrorism had been treated primarily as a criminal law matter, with emphasis placed on preventing the commission of the crime through intelligence or law enforcement means, or, if prevention failed, on the apprehension, prosecution and punishment of the perpetrators. To be sure, the United States had previously used armed force on occasion against terrorism. For example, in 1986, the United States bombed Tripoli, Libya in response to Libya's apparent involvement in the bombing of a West Berlin discotheque frequented by American soldiers and the terrorist attack by Libyan backed Abu Nidal on El Al airline counters that killed five Americans and wounded many others. Similarly, in 1993, the United States bombed Baghdad, Iraq, in response to an assassination plot by Saddam Hussein against former President George Bush, and in 1998, it engaged in missile strikes against Afghanistan and the Sudan in response to the East African embassy bombings. But none of these actions involved military force of the magnitude and duration of the actions in Afghanistan after September 11th. Hence after, and in many respects because of,

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14. *Id.*

September 11th, the law of armed conflict assumed a much greater prominence than it had previously in efforts to combat international terrorism.

But the law of armed conflict has hardly occupied the field. On the contrary, as the fourth panel of this conference (Bringing Terrorists to Justice: The Proper Forum) demonstrated, the issue now may be whether the law of armed conflict or international criminal law applies. Also, it is important to note that in the wake of September 11th, various fields of law and methodologies for combating international terrorism have taken on a much greater significance. These include, among others, immigration and refugee law, international human rights law, international finance, US constitutional law, private remedies (especially civil lawsuits), cyberlaw, privacy, homeland security, arms control, disarmament, non-proliferation, intelligence gathering, and public health law.<sup>15</sup>

Given these developing trends, how has international law responded both before and after September 11th? This chapter now turns to a classic subject of international criminal law: the so-called antiterrorism conventions; it then addresses economic sanctions against state sponsors of terrorism; and, lastly, the jus ad bellum dimensions of the use of armed force against terrorists; and their sponsors.

### *Antiterrorism Conventions*

#### **Global Treaties and Conventions**

At this writing the UN or its specialized agencies have adopted twelve global, multilateral antiterrorist conventions.<sup>16</sup> These include the: Convention on Offenses and Certain Other Acts Committed on Board Aircraft (1963); Convention for the Suppression of Unlawful Seizure of Aircraft (1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); International Convention against the Taking of Hostages (1979); Convention on the Physical Protection of Nuclear Material (1979); 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

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15. For a sense of the breadth and depth of subjects now relevant to efforts to combat terrorism, see the series of articles contained in the lengthy symposium in *Law and the War on Terrorism*, 25 HARV. J. L. PUB. POLY ix-834 (2002).

16. The texts of these conventions may be found in INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM 2-131 (UN, 2001).

the Safety of Civil Aviation (1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988); Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991); International Convention for the Suppression of Terrorist Bombing (1997); and International Convention for the Suppression of the Financing of Terrorism (1999).

This plethora of conventions covering individual manifestations of terrorism has resulted due to the inability of the UN to develop a comprehensive convention against terrorism, largely because of disagreement on how terrorism should be defined. This so-called “piecemeal” approach has resolved the problem of defining terrorism by avoiding it. Although these treaty provisions are often loosely described as “antiterrorist,” the acts they cover are criminalized regardless of whether, in a particular case, they could be described as “terrorism.” Recently, however, there have been renewed efforts to reach agreement on a comprehensive text, a controversial exercise that is examined below.

The basic purpose of the individual conventions is to establish a framework for international cooperation among states to prevent and suppress international terrorism. To accomplish this goal, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, for example, requires state parties to cooperate in order to prevent, within their territories, preparations for attacks on diplomats within or outside their territories, to exchange information, and to coordinate administrative measures against such attacks.<sup>17</sup> If an attack against an internationally protected person takes place, and an alleged offender has fled the country where the attack occurred, state parties are to cooperate in the exchange of information concerning the circumstances of the crime and the alleged offender’s identity and whereabouts.<sup>18</sup> The state party where the alleged offender is found is obliged to take measures to ensure his presence for purposes of extradition or prosecution and to inform interested states and international organizations of the measures taken.<sup>19</sup> Finally, state parties are to cooperate in assisting criminal proceedings brought for attacks on

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17. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, G.A. Res. 3166, U.N. GAOR 6th Comm., 27th Sess., 2202d plen. mtg., Supp. No. 30, U.N. Doc. A/9407 (1973), art. 4, available at [http://www.undcp.org/odccp/terrorism\\_convention\\_protected\\_persons.html](http://www.undcp.org/odccp/terrorism_convention_protected_persons.html) (Jan. 21, 2003).

18. *Id.*, art. 5.

19. *Id.*, art. 6.

internationally protected persons, including supplying all relevant evidence at their disposal.<sup>20</sup>

The key feature of these conventions requires a state party that apprehends an alleged offender in its territory either to extradite him or to submit his case to its authorities for purposes of prosecution. Strictly speaking, none of these conventions alone creates an obligation to extradite. Rather, they contain an *inducement* to extradite by requiring the submission of alleged offenders for prosecution if extradition fails. Moreover, a legal *basis* for extradition is provided either in the convention, or through incorporation of the offenses mentioned in the convention into existing or future extradition treaties between the parties. To varying degrees, the conventions also obligate the parties to take the important practical step of attempting to apprehend the accused offender and hold him in custody.

The most important goal of these provisions is to ensure that the accused is prosecuted. To this end the alternative obligation to submit for prosecution is stated quite strongly in these conventions. The obligation, however, is not to *try* the accused, much less to punish him, but to submit the case to be considered for prosecution by the appropriate national prosecuting authority. If the criminal justice system lacks integrity, the risk of political intervention in the prosecution or at trial exists. Such intervention may prevent the trial, a conviction or the appropriate punishment of the accused. Such concerns were a major factor in the insistence of the United States and the United Kingdom that Libya “surrender” the two Libyan intelligence agents accused of the bombing of Pan Am Flight 103 over Lockerbie, Scotland and their rejection of Libya’s insistence that it had the right, under Article 7 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, to submit the accused instead to “its competent authorities for the purpose of prosecution.”<sup>21</sup>

Even if the criminal justice system functions with integrity, it may be very difficult to obtain the evidence necessary to convict when the alleged offense was committed in a foreign country. This very practical impediment can be removed between states of goodwill only by patient and sustained efforts to develop and expand “judicial assistance” and other forms of cooperation between the law enforcement and judicial systems of different countries. The

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20. *Id.*, art. 10.

21. For an interesting exposition of the events leading to the Lockerbie trial, see Scott Evans, *Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review And The Political Question Doctrine*, 18 MD. J. INT’L L. & TRADE 21 (1994); Donna Azrt, *The Lockerbie “Extradition by Analogy” Agreement: “Exceptional Measure” or Template for Transnational Criminal Justice?*, 18 AM. U. INT’L L. REV. 163 (2002).

conventions create an obligation to cooperate in this respect but this obligation poses major problems for even good faith efforts among countries with different types of legal systems.<sup>22</sup>

Under the piecemeal approach, and with the passage of time, gaps in the coverage of terrorist crimes by the early conventions became apparent, and new conventions covering other international crimes were concluded. For example, the Tokyo, Hague and Montreal conventions on civil aviation did not cover attacks at airports, such as those at the Rome and Vienna airports during the 1980s. As a consequence, the International Civil Aviation Organization (ICAO) adopted a Protocol to the Montreal Convention on the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation.<sup>23</sup> Similarly, the hijacking of the Italian cruise liner “Achille Lauro” exposed the vulnerability of maritime navigation and infrastructure to terrorist attack and led to the adoption of the Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.<sup>24</sup>

It was in the 1990s, however, that UN member states sought to fill the largest gap in coverage of terrorist crimes.

#### *International Convention for the Suppression of Terrorist Bombing*

The 1990s was a decade of extraordinary developments. One of the most, if not the most, extraordinary developments was the collapse of the Soviet Union and the end of the Cold War. Also of great significance was the end of apartheid in South Africa and the coming into power of new governments in South Africa and Namibia. These and other developments led to a less confrontational atmosphere in the UN and a sharp decline in support for “wars of national liberation.” This in turn helped lessen, if not entirely eliminate, the division between the Western member states and the non-aligned member states that had frustrated previous efforts to reach agreement on measures to combat terrorism. Indeed, because of the change of atmosphere, the General Assembly decided in

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22. The problems become particularly acute in the event of a computer network attack by terrorists. See John F. Murphy, *Computer Network Attacks By Terrorists: Some Legal Dimensions*, COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW 323, 340–43 (Michael N. Schmitt and Brian T. O’Donnell eds., 2002) (Vol. 76, US Naval War College International Law Studies).

23. See Protocol for the Suppression of Unlawful Acts of Violence Against Safety of Civil Aviation, 27 I.L.M. 628 (1988).

24. See Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 27 I.L.M. 668 (1988), available at [http://www.imo.org/Conventions/contents.asp?topic\\_id=259&doc\\_id=686](http://www.imo.org/Conventions/contents.asp?topic_id=259&doc_id=686) (Jan. 21, 2003).

1997 to reincarnate the Ad-Hoc Committee on Measures to Eliminate International Terrorism (hereinafter Ad-Hoc Committee on Terrorism) to prepare as a matter of priority a draft international convention for the suppression of terrorist bombing and a subsequent international convention for the suppression of acts of nuclear terrorism.

It is worthwhile to pause for a moment at this point and consider the importance, in terms of combating international terrorism, of the General Assembly's decision to mandate the preparation of a convention against terrorist bombing. In an article published in 1990, I suggested:

A more serious deficiency is that none of the antiterrorist conventions cover those tactics most often used by terrorists, most particularly the deliberate targeting, by bombs or other weapons, of the civilian population. To understand the reason for this it is necessary to briefly return to the problem of defining terrorism.

A look at the primary components of most definitions of terrorism will help us to understand why it has proved impossible to reach agreement in the United Nations and other international organizations. These definitions almost invariably include a political purpose of motivation behind the violent act and a government as the primary target, factors that serve to distinguish terrorism from violent acts classified as common crimes. The political purpose of the violent act is to influence the policy of a government by intimidation or coercion. These same factors, however, may lead some governments to be not only unwilling to criminalize such behavior but prone to actively support it.

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Nonetheless, there appears to be a growing recognition that even favored national liberation groups cannot be permitted to engage in certain acts of violence against certain targets. Moreover, under the law of armed conflict the deliberate targeting of the civilian population is a war crime. It should be impermissible as well when the targeting takes place under circumstances not covered by the law of armed conflict. This was the conclusion reached recently by a joint group of U.S. and Soviet experts on international terrorism who recommended to their respective governments that they support the conclusion of an international convention that would make the deliberate targeting of a civilian population an international crime.<sup>25</sup>

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25. John F. Murphy, *The Need for International Cooperation in Combating Terrorism*, 13 *TERRORISM: AN INTERNATIONAL JOURNAL* 381 (1990).

The adoption by the General Assembly of the International Convention for the Suppression of Terrorist Bombing<sup>26</sup> on December 15, 1997, vividly illustrates the sea change in the attitudes of UN member states towards terrorist acts that various developments in the 1990s brought about, including, it should be noted, several major terrorist bombings directed against various states.<sup>27</sup>

Others have written about the terrorist bombing convention in some detail,<sup>28</sup> and no such effort will be undertaken here. There are a few innovative aspects about the convention, however, that deserve highlighting. In keeping with the “piecemeal” approach, the convention does not define “terrorism” but identifies and defines particular conduct that is to be condemned internationally, regardless of its motivation, and subject to criminal penalties. Article 2(1) of the convention provides:

Any person commits an offense within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or governmental facility, a public transportation system or an infrastructure facility: (a) with the intent to cause death or serious bodily injury; or (b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.<sup>29</sup>

To ensure that sympathy with the motivation behind the bombing will not serve as a legal justification of the act, Article 5 requires state parties to adopt any measures that may be necessary to ensure that criminal acts within the scope of the convention, especially when they are intended to create a state of terror, are “under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punishable by penalties consistent with their grave nature.”<sup>30</sup> None of the earlier antiterrorist conventions has a similar provision. Along somewhat similar lines, Article 11 expressly eliminates, for the first time in a UN antiterrorist

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26. See International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/Res.52/164 (Dec. 15, 1997), 37 I.L.M. 249 (1998) (ratified by US on Jun. 26, 2002) [hereinafter Terrorist Bombings Convention].

27. These included, among others, the truck bombing attack on US military personnel in Dhahran, Saudi Arabia, the poison gas attacks in Tokyo’s subways, a bombing in Colombo, Sri Lanka, bombings in Tel Aviv and Jerusalem, and a bombing in Manchester, England. See Samuel M. Witten, *Current Developments: The International Convention for the Suppression of Terrorist Bombings*, 92 AM. J. INT’L L. 774, note 3 (1998).

28. *Id.*

29. Terrorist Bombings Convention, *supra* note 26, at art. 2(1).

30. *Id.*, art. 5.

convention, the political offense exception for purposes of extradition and mutual legal assistance.<sup>31</sup> Samuel Witten notes the impact this provision is likely to have on US law and practice:

In the case of most modern U.S. bilateral extradition treaties, the political offense exception has been narrowed and is already unavailable for offenses covered under the 'prosecute or extradite' multilateral conventions such as this Convention. As a result, Article 11 will have the most significant practical effect with respect to U.S. treaty practice on mutual legal assistance treaties with political offense exceptions without excluding prosecute or extradite multilateral conventions.<sup>32</sup>

At the same time that it eliminates the political offense exception, the bombing convention adds a protection for the accused in Article 12, which provides that nothing in the convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested state party has substantial grounds for believing that the request was made "for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons."<sup>33</sup> Such a "humanitarian" provision is normally not present in the UN antiterrorist conventions, although there is a provision along similar lines in the International Convention against the Taking of Hostages.<sup>34</sup>

Article 12 does not specify who in the requested state is to decide whether "substantial grounds" exist. In the United States there has been considerable debate over whether this decision is to be made by the executive branch or by the judiciary.<sup>35</sup> Interestingly, Article 6, which sets forth the mandatory and discretionary bases of criminal jurisdiction over the offenses covered by the convention, establishes a truly universal system of jurisdiction in that it utilizes all five of the accepted bases of jurisdiction in international criminal

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31. *Id.*, art. 11.

32. Witten, *supra* note 27, at 779.

33. Terrorist Bombings Convention, *supra* note 26, at art. 12.

34. See International Convention against the Taking of Hostages, G.A. Res. 34/146, U.N. GAOR 6th Comm., 34th Sess., 105th Mtg, Supp. No. 46, U.N. Doc. A/34/819 (1979, entered into force 1983), art. 9, 1316 U.N.T.S. No. 21931.

35. For discussion of this debate, see Christopher H. Pyle, EXTRADITION, POLITICS, AND HUMAN RIGHTS 118–29 (2001).

law—territorial, nationality, universal, passive personality, and protective jurisdiction.<sup>36</sup> As noted by Witten,

[o]f particular interest to countries such as the United States that maintain many government facilities outside their territory is the Convention's unprecedented recognition of broad protective jurisdiction in Article 6(2)(b)<sup>37</sup> with respect to attacks using explosive or other lethal devices against a state or government facility of that state abroad, including an embassy or other diplomatic or consular premises. This provision would recognize the United States jurisdiction, for example, to prosecute in US courts the perpetrators of bombing attacks against all US government facilities abroad, including diplomatic and consular premises and military installations, e.g., the 1996 Al-Khobar Towers bombing in Dhahran.<sup>38</sup>

It may be noted parenthetically that a US court recently upheld its jurisdiction to consider various charges arising from the bombing of the US embassies in Kenya and Tanzania, including bombing allegedly committed by foreign nationals that resulted in the deaths of foreign nationals on foreign soil.<sup>39</sup> The coming into force of the bombing convention clearly confirms this exercise of jurisdiction.<sup>40</sup>

Another innovative provision of the bombing convention, not found in prior antiterrorism conventions, is Article 8(2), which provides for so-called conditional extradition.<sup>41</sup> That is, an accused person might be sent temporarily by her state of nationality to a requesting state for a trial or proceeding

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36. Terrorist Bombings Convention, *supra* note 26, at art. 6.

37. Under Article 6(2)(b) of the Terrorists Bombings Convention, each state party has discretion to establish its jurisdiction over offenses set forth in Article 2 when: "The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic premises of that State." In a footnote Witten points out that "the Convention will reach attacks on extraterritorial government facilities such as tourist centers, economic development offices and military facilities." He notes further that "[t]he provisions of the Bombing Convention regarding attacks on government facilities are . . . broader than those of the 1973 Internationally Protected Persons Convention, which addresses attacks only on "the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty." Witten, *supra* note 27, at 778, fn 24.

38. Witten, *supra* note 27, at 778.

39. *United States v. Bin Laden*, 92 F. Supp. 2d 189 (S.D. N.Y. 2000).

40. The Terrorist Bombings Convention entered into force on May 23, 2001. As of May 28, 2002, it had 62 parties. The United States became a party to the convention on April 19, 2002.

41. Article 8(2) of the Bombing Convention provides:

Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the

for an offense under the convention and, if convicted, would be returned to her state of nationality to serve any sentence imposed as a result of the trial or proceeding for which the extradition or surrender had been sought.

As noted above, only the sea change in the attitudes of member states of the UN toward terrorist bombing that took place during the 1990s permitted the successful conclusion of the bombing convention. At this writing, however, there are troubling developments in the Middle East that could seriously undermine the success of the convention as an antiterrorist measure. Specifically, the sudden increase in suicide bombings by Palestinians against Israeli civilians, and the celebration in some circles of the resulting carnage, risks a return to some of the divisions between Western member states and certain member states of the developing world that characterized the UN during the 1970s.

*International Convention on the Suppression of Terrorist Financing*

As Hans Corell, Under-Secretary-General for Legal Affairs and Legal Counsel of the UN, has noted, as early as 1996, the Secretary-General had recognized the need for an international convention dealing with terrorist fund-raising.<sup>42</sup> Similarly, in May 1998, the foreign ministers of the G-8 countries issued a statement on terrorism identifying as a “priority area for further action: Preventing terrorist fund-raising. . . .”<sup>43</sup> The President of France subsequently called for the negotiation without delay of a “universal convention against the financing of terrorism” and in December 1998, the General Assembly decided that the Ad Hoc Committee on Terrorism “should elaborate a draft international convention for the suppression of terrorist financing to supplement existing international instruments.”<sup>44</sup> France introduced a draft convention that served as the basis of discussions in the committee and on December 9, 1999,

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State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1 of the present article.

See Terrorist Bombings Convention, *supra* note 26, art. 8.

42. Hans Corell, *Possibilities and Limitations of International Sanctions Against Terrorism*, in COUNTERING TERRORISM THROUGH INTERNATIONAL COOPERATION 243, 253 (Alex P. Schmid ed., 2001) [hereinafter COUNTERING TERRORISM].

43. See Clifton M. Johnson, *Introductory Note to the International Convention for the Suppression of the Financing of Terrorism*, 39 I.L.M. 268 (2000).

44. *Measures to Eliminate International Terrorism*, G.A. Res. 53/108, U.N. GAOR, 53d Sess., Agenda Item 155 (1998).

the General Assembly adopted a resolution opening for signature the International Convention for the Suppression of the Financing of Terrorism.<sup>45</sup>

Like its immediate predecessor, the bombing convention, the financing convention is a “model” antiterrorist convention that incorporates what Clifton Johnson, the chief US negotiator for the convention, has called:

increasingly standard provisions of the recent counterterrorism conventions. These include provisions: 1) limiting the Convention’s application to acts with an international element; 2) obligating States Parties to criminalize the covered offenses irrespective of the motivation of the perpetrators; 3) obligating States Parties to take into custody offenders found on their territory; 4) facilitating the extradition of offenders; 5) requiring States Parties to afford one another the greatest measure of assistance in connection with the criminal investigations or proceedings relating to the covered offenses; 6) prohibiting extradition or mutual legal assistance requests relating to a covered offense from being refused on political offense grounds; and 7) providing for the transfer of prisoners in order to assist the investigation or prosecution of covered offenses.<sup>46</sup>

Johnson goes on to point out that the financing convention adds “specific and unique provisions directed at terrorism financing.” If adopted and effectively implemented, these provisions have the potential to constitute a major step forward in the effort to combat international terrorism.

Dealing with the financing of terrorism is a delicate matter. A major problem is that terrorists often operate through “front organizations” which appear on the surface to be engaged in legitimate activities or through organizations that in fact have charitable, social or cultural goals and engage in legitimate activities to further these goals. Moreover, in some states, such as the United States, action by the government to prevent or limit the financing of organizations with charitable or similar goals could raise serious constitutional issues. In an effort to avoid such difficulties, Article 2(1) carefully limits the scope of the convention:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge

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45. See International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR 6th Comm., 54th Sess., 76th Mtg., Agenda Item 160, U.N. Doc. A/54/109 (1999), reprinted in 39 I.L.M. 270 (2000) [hereinafter Suppression of Financing Convention].

46. Johnson, *supra* note 43, at 268.

that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offense within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.<sup>47</sup>

Under paragraph 1(a) of Article 2, the convention requires actual intention that funds should be used or knowledge that they will be used to carry out one of the offenses listed in an annex to the convention. Such an intention or knowledge of how the funds are to be used is also required by paragraph 1(b). The latter paragraph, moreover, sets forth a definition of terrorism, although the definition is not identified as such. It therefore establishes an important precedent that may be drawn upon in future antiterrorism conventions.

As in the case of its predecessor conventions, the principal objective of the financing convention is to require state parties to criminalize and establish jurisdiction over the offenses set forth in the convention and to extradite or submit for prosecution the persons accused of the commission of such offenses. The financing convention goes further than its predecessors, however, in the requirements it imposes on state parties to take steps to prevent the commission of covered offenses.<sup>48</sup> In particular, as aptly summarized by Rohan Perera, Chairman of the Ad-Hoc Committee on Terrorism, the convention requires state parties to consider the following measures:

(i) Adopt regulations, prohibiting the opening of accounts, the holders or beneficiaries of which are unidentified or unidentifiable and measures to ensure that such institutions verify the real owner of such transactions.

(ii) With respect to the identification of legal entities, financial institutions when necessary are required to take measures to verify the legal existence and structure of the customer by obtaining either from the public register or from the customer or both, proof of incorporation or other relevant information.

(iii) Obligations on financial institutions to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions which have no apparent economic or obviously lawful purpose.

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47. Suppression of Financing Convention, *supra* note 45, art. 2.

48. *Id.*, art. 18.

(iv) Measures requiring financial institutions to maintain at least for 5 years, all records on transactions, both domestic or international.<sup>49</sup>

More generally, the convention provides an extensive list of measures, many drawn from the 40 recommendations of the multilateral Financial Action Task Force, for state parties to consider in identifying, tracking and blocking transactions involving terrorism financing.<sup>50</sup>

Another innovative provision in the convention is Article 5, which requires each state party to “take the necessary measures to enable a legal entity located in its territory organized under its laws to be held liable when a person responsible for the management or control of that legal entity” has committed an offense under the convention.<sup>51</sup> Normally, the antiterrorist conventions address only the issue of criminal and not civil liability.<sup>52</sup> The convention also enhances the deterrent effect of its provisions by providing for the seizure or freezing of funds and proceeds used for the commission of an offense<sup>53</sup> and by prohibiting state parties from claiming privileged communication, banking secrecy, or the fiscal nature of the offense to refuse a request for mutual assistance from another state party.<sup>54</sup>

As Clifton Johnson has suggested, the financing convention has the potential to have a considerable impact on efforts to combat terrorism.<sup>55</sup> Johnson notes further, however, that the impact the convention has in practice will depend in no small measure on “the degree to which investigators and prosecutors can establish the necessary link between the act of financing and the terrorist intention of the contributor or collector of the funds.”<sup>56</sup> This may be a heavy evidentiary burden to bear, since the contributors and recipients of funds for the commission of terrorist acts are adept at using money laundering and other techniques to disguise their purpose. Moreover, relatively few member states of the UN currently have in place the legal infrastructure or the

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49. Rohan Ferera, *International Legal Framework for Co-operation in Combating Terrorism—the Role of the UN Ad-Hoc Committee on Measures to Eliminate International Terrorism*, in COUNTERING TERRORISM, *supra* note 42, at 284.

50. Suppression of Financing Convention, *supra* note 45, at art. 18.

51. *Id.*, art. 5.

52. Elsewhere I have advocated a more extensive use of civil liability against those who commit or sponsor the commission of international crimes. See John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1 (1999).

53. Suppression of Financing Convention, *supra* note 45, at art. 8.

54. *Id.*, arts. 12 & 13.

55. Johnson, *supra* note 43, at 268.

56. *Id.* at 269.

trained personnel to cope with the techniques of terrorist financing. One may hope, however, that the cooperative arrangements called for by the financing convention will help to remedy this situation.

For the financing convention to be effective, of course, it will have to be widely ratified and implemented. At this writing there are 132 signatories and 34 parties (including the United States). The UN Security Council itself has given an enormous boost to the convention and to the effort to combat terrorist financing. On September 28, 2001, the Security Council, acting under Chapter VII of the Charter, adopted Resolution 1373,<sup>57</sup> which, by any measure, constitutes a landmark step by the Council. In this extraordinary resolution, the Council sets forth a plethora of steps that member states are *required* to take to combat terrorism. For example, the Council “[d]ecides that all States shall . . . [p]revent and suppress the financing of terrorist acts” and then sets forth explicit steps that states are to take to this end.<sup>58</sup> The Council also decides that all states shall take a large number of other steps to combat terrorism.<sup>59</sup> Among the most noteworthy of these, states are to deny safe haven to terrorists, to afford one another the greatest measure of assistance in criminal investigations or proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence necessary for such proceedings, and to prevent the movement of terrorists by effective border controls and controls on the issuance of identity papers and travel documents.

Using terms of exhortation rather than command, in Resolution 1373, the Council “[c]alls upon all States” to take a number of actions in cooperation with other states to combat terrorism, including, among others, “intensifying and accelerating the exchange of operational information,” becoming parties to the relevant antiterrorist conventions, including the International Convention for the Suppression of Financing of Terrorism, and ensuring, “in conformity with international law,” that refugee status is not abused by terrorists, and that “claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.”<sup>60</sup>

In my view, the most significant step the Council has taken in Resolution 1373 is to establish a committee (the Counter-Terrorism Committee) to monitor implementation of the resolution and to call upon all states to report to the committee, no later than 90 days after the date of adoption of the

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57. S. C. Res. 1373, U.N. SCOR, 56th Sess., U.N. Doc. S/1373/(2001).

58. *Id.*, para. 1(b), (c), and (d).

59. *Id.*, para. 2(a)–(g).

60. *Id.*, para. 3(a)–(g).

resolution, on the steps they have taken to implement the resolution.<sup>61</sup> The Council further “[e]xpresses its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter.”<sup>62</sup> Failure to establish such monitoring devices to ensure that antiterrorist measures adopted by the UN are effective in practice has been a major deficiency of past UN efforts.

A primary example of UN antiterrorist measures that have not been effectively monitored in the past as to their implementation is the antiterrorist conventions. As we have seen, a sea change in attitudes on the part of many (though not all) member states of the UN has resulted in the conclusion of “model” new antiterrorist conventions, especially the bombing and financing conventions. The conclusion of new, or even the ratification of old, antiterrorist conventions, however, is not the crucial issue. The crucial issue is the extent to which the global antiterrorist conventions have been or will be vigorously implemented. Conclusion of antiterrorist conventions is only the first step in the process. Unfortunately, many state parties seem to regard it as the last.

Vigorous implementation, moreover, encompasses more than merely ratifying the conventions, passing implementing legislation, and adopting the necessary administrative measures, i.e., creating an appropriate legal infrastructure to combat international terrorism. It requires the taking of active steps toward ensuring the primary goals of the conventions: the prevention of the crimes covered by the conventions and the prosecution and punishment of the perpetrators of the crimes. The record of the conventions in this respect is unclear.

A major part of the problem is the lack of adequate data on the extent of successful actions to prevent terrorist acts and of successful prosecutions of terrorists. Although there appears to be adequate data available on the extradition, prosecution and punishment of aircraft hijackers,<sup>63</sup> information regarding other manifestations of terrorism is quite sparse. Most of the antiterrorist conventions contain provisions requiring the state party where the alleged offender is prosecuted to communicate the final outcome of the proceedings to the Secretary-General of the UN (or to the Director-General of IAEA or the

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61. *Id.*, para. 6.

62. *Id.*, para. 8.

63. At least this was the case around 1985 when I last examined the data. See JOHN F. MURPHY, PUNISHING INTERNATIONAL TERRORISTS: THE LEGAL FRAMEWORK FOR POLICY INITIATIVES, 110–15 (1985).

Council of ICAO),<sup>64</sup> and the Secretary-General has issued reports on “Measures to Eliminate International Terrorism.”<sup>65</sup> But these reports focus primarily on the terrorist events that triggered the conventions and on a summary of the most important provisions of these conventions. There appears to be little information on the extent and success of efforts to prevent the acts the conventions cover or to prosecute the perpetrators of these acts.

Ambassador Jeremy Greenstock, Chairman of the Counter-Terrorism Committee established by Resolution 1373, has recently emphasized the importance of implementing antiterrorist measures. According to Ambassador Greenstock, “Governments were already familiar with what needed to be done. But few had done it. Resolution 1373 drew on the language negotiated by all UN members in the 12 Conventions against terrorism, but also delivered a strong operational message: get going on effective measures now.”<sup>66</sup> He reports that, as of May 30, 2002, 155 reports had been submitted to the committee from member states and others. Member states who have not submitted reports are “almost without exception those with little experience of the subject and unsophisticated law and order systems.”<sup>67</sup>

A cursory review of the reports submitted by some member states with sophisticated law and order systems (the United States, United Kingdom, Israel, Germany and Italy) that have had major problems with international terrorism reveals that the Counter-Terrorism Committee is gathering valuable information regarding the legislative, executive and judicial steps these countries are taking to combat international terrorism in general and the financing of international terrorism in particular. One of the questions that member states have been asked to respond to is: “What steps have been taken to establish terrorist acts as serious criminal offenses and to ensure that the punishment reflects the seriousness of such terrorist acts? Please supply examples of any convictions obtained and the sentence given.” However, the examples of convictions and sentences supplied in these reports are either non-existent or very brief. The US report is the most forthcoming in this respect, noting that the United

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64. See, e.g., Article 19 of the Suppression of Financing Convention, *supra* note 45.

65. See, e.g., *Measures to Eliminate International Terrorism: Report of the Secretary-General*, U.N. GAOR, 51st Sess., Agenda Item 153, U.N. Doc. A./51/336 (Sep. 6, 1996); *Measures to Eliminate International Terrorism: Report of the Secretary-General*, U.N. GAOR, 55th Sess., Agenda Item 166, U.N. Doc. A/55/179 (Jul. 26, 2000).

66. Presentation by Ambassador Greenstock, Chairman of the Counter-Terrorism Committee (CTC) at the Symposium: *Combating International Terrorism: The Contribution of the United Nations*, held in Vienna on 3–4 June 2002, available at <http://www.un.org/Docs/sc/committees/1373/viennaNotes.htm> (Jun. 12, 2002).

67. *Id.* at 2.

States has prosecuted cases under US laws implementing the Montreal Convention (Aircraft Sabotage), the Hague Convention (Aircraft Hijacking), the Hostages Convention, and the Internationally Protected Persons Convention and giving, by way of footnotes, citations to cases involving the crimes covered by these conventions.<sup>68</sup> Even this information is skimpy, however, giving, for example, no information regarding how US law enforcement officials came to have custody of the accused.

This is a serious problem that should be resolved. It may be that the Counter-Terrorism Committee, in its future interactions with member states, could request more detailed information regarding the apprehension, rendition (where applicable), prosecution and punishment of persons who commit the crimes covered by the 12 antiterrorist conventions. Alternatively, the UN Terrorism Prevention Branch, which is part of the Centre for International Crime Prevention in Vienna, might be assigned the task of collecting such information with respect to the 11 other antiterrorist conventions.<sup>69</sup> Still other alternative approaches might be for the Security Council to establish a monitoring committee that would receive and evaluate reports from state parties to some of the major antiterrorist conventions or to draft a convention that would establish a monitoring committee for selected antiterrorist conventions and create an international obligation for state parties to submit reports to it. For any such monitoring committees, the Counter-Terrorism Committee, with its proactive approach,<sup>70</sup> could serve as an excellent model.

#### *The Draft International Convention for the Suppression of Nuclear Terrorism*

One of the tasks the newly reconstituted Ad-Hoc Committee on Terrorism was entrusted with by the General Assembly in 1996 was the preparation of a draft international convention for the suppression of acts of nuclear terrorism. The Committee began this task in 1998, immediately upon completion of the bombing convention.<sup>71</sup>

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68. The US report is attached as an annex to the Letter dated 19 December 2001 from the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, S/2001/1220 (December 21, 2001), available at <http://www.un.org/Docs/sc/committees/1373/> (Jan. 15, 2003). The information regarding US prosecutions appears at page 22.

69. In his presentation, Ambassador Greenstock suggested that the Centre for International Crime Prevention (CICP) might provide "model laws and guidance on implementation" for the 11 other antiterrorist conventions. See Presentation by Ambassador Greenstock, *supra* note 66.  
70. *Id.* at 1.

71. Corell, *supra* note 42, at 254.

The Russian Federation has been the primary proponent of a convention to combat nuclear terrorism in order to fill gaps in coverage left by the 1979 Convention on the Physical Protection of Nuclear Material.<sup>72</sup> The Convention on Nuclear Material prohibits parties from exporting or importing or authorizing the export or import of nuclear material used for peaceful purposes, unless they give assurances that such materials will be protected at prescribed levels during international transport. The convention also provides a framework for international cooperation in the recovery and protection of stolen nuclear material, and requires that state parties make certain serious offenses involving nuclear material punishable, and that they extradite or prosecute offenders. It does not, however, apply to nuclear material used for military purposes.

At this writing the draft convention<sup>73</sup> under consideration by the Ad-Hoc Committee on Terrorism would expand the definition of “nuclear material” to include objects and materials for military use and provide a clearer definition of the crime of illegal acquisition for terrorist purposes. It would also cover terrorist acts against nuclear power plants, vessels with nuclear power sources and the use of automatic nuclear devices. As noted by Hans Corell, “[i]n this regard, the new convention could cover to the broadest possible extent the possible targets, forms and manifestations of acts of nuclear terrorism. Furthermore, unlike the 1980 [actually 1979] Convention, the proposed convention would draw a distinction between acts of nuclear terrorism from other criminal acts involving the use of nuclear material by referring to the purpose of such acts.”<sup>74</sup>

To date, however, it has not proven possible to reach agreement on a final draft of the convention. The main sticking point seems to be that some members of the non-aligned movement want the convention to cover the activities of the military forces of a state. Article 4(2) of the present draft excludes acts of armed forces from the scope of the convention. Other member states have proposed extending the scope of the convention to include acts of state terrorism.<sup>75</sup>

In this commentator’s view, such proposals have a political agenda behind them and are unacceptable to Western member states. Only if the

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72. Convention on the Physical Protection of Nuclear Material, opened for signature March 3, 1980, entered into force on 8 February 1987, 1456 U.N.T.S. 101, *reprinted in* 18 I.L.M. 1419 (1979).

73. See Measures to Eliminate International Terrorism: Report of the Working Group, Sixth Committee, 53rd Sess., A/C. 6/53/L.4 (Oct. 22, 1998), at 4.

74. Corell, *supra* note 42, at 254.

75. *Id.* at 255.

convention's scope is limited to nuclear terrorism by private actors and not extended to the acts of state military forces or of government officials is there likely to be any prospect of reaching a consensus on a draft convention on the suppression of acts of nuclear terrorism.

One may also question whether the draft convention's focus on the possibility of nuclear terrorism is too narrow. Many observers, including this one, are of the view that the risk of so-called "catastrophic terrorism"<sup>76</sup> is greater from the possible use of chemical, biological, or radiological weapons than it is from the use of nuclear weapons. For this reason, a joint group of US and Soviet experts on international terrorism recommended that their governments initiate and sponsor a draft convention to cover terrorism involving weapons of mass destruction, including in particular nuclear, radiological, chemical and biological weapons.<sup>77</sup> To be sure, there is substantial debate as to how great a risk there is of terrorists employing weapons of mass destruction.<sup>78</sup> But Barry Kellman's observations may serve as a sensible middle of the road position:

Assessing risk is difficult because catastrophic terrorism is a low probability threat which, if it occurs, could have exceptionally high casualties. Yet four points can be offered without serious contradiction. First, technical obstacles to catastrophic terrorism will decline with time. The capabilities for producing lethal devices will spread, and the choke points of human activity will become more concentrated, thereby unfortunately converging the ability to make a lethal weapon with an ability to use it to devastating effect. The necessary ramification is that whatever the technological barriers to accomplishing an act of catastrophic terrorism may or may not be, those barriers will be overcome, sooner or later. Even if the risks are not now realistic, they will be.<sup>79</sup>

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76. As pointed out by Barry Kellman, *Catastrophic Terrorism—Thinking Fearfully, Acting Legally*, 20 MICH. J. INT'L L. 537, note 1 (1999):

Catastrophic terrorism is an intentionally undefined term, reflecting the fact that terrorists who aspire to inflict catastrophic injuries have a long menu of options to employ, and reflecting the conclusion that debates over whether a particular technology is or is not within this category are, essentially, inconclusive. The definition of 'catastrophic terrorism,' as opposed to conventional terrorism, turns less on what type of device is used than on the magnitude of the effects.

77. See COMMON GROUND ON TERRORISM 176–77 (John Marks and Igor Beliaev eds., 1991).

78. See, e.g., Judith Miller, *Threat of Unconventional Terrorism is Overstated Study Says*, N.Y. TIMES, October 26, 2000, at A24, col. 1. For a contrary view, see, e.g., Patrick L. Moore, *Is Catastrophic Terrorism Just Strategic 'Peanuts,'* American Bar Association Standing Committee on Law and National Security, NATIONAL SECURITY LAW REPORT, July–August 2000, at 1.

79. Kellman, *supra* note 76, at 538. See also Barry Kellman, *An International Criminal Law Approach to Bioterrorism*, 25 HARV. J. L. PUB. POL'Y 721 (2002).

With regard to the possibility of catastrophic terrorism, three other multilateral conventions, while not directed expressly against terrorism, should be noted at least parenthetically. The Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction<sup>80</sup> prohibits the development, production, or stockpiling of microbiological and biological agents (weapons) that are of potential use to terrorists. It is generally agreed, however, that this convention has been ineffective because of a lack of enforcement provisions, and an effort to remedy this situation through a protocol has apparently foundered in the face of opposition from the United States.<sup>81</sup> After years of effort, in 1993 the UN adopted the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons.<sup>82</sup> In sharp contrast to the Biological Weapons Convention, the Chemical Weapons Convention has rigorous verification procedures implemented through a new Organization for the Prohibition of Chemical Weapons, which was established at the Hague and has been functioning since 1997. Under the Chemical Weapons Convention, state parties are prohibited from using, producing or stockpiling poison gas or lethal chemical weapons, and are obliged to dispose of existing chemical weapons by the year 2010 at the latest. Lastly, the Treaty on the Nonproliferation of Nuclear Weapons (NPT),<sup>83</sup> which has as its primary goal the prevention of the spread of nuclear weapons among states, may also serve to limit the access of individual terrorists to nuclear arms.<sup>84</sup>

*Draft Comprehensive Convention on International Terrorism*

At this writing the Ad-Hoc Committee on Terrorism has a draft comprehensive convention on international terrorism before it.<sup>85</sup> Progress on this agenda item, however, has been slow and, in the opinion of this observer, likely to

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80. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, April 10, 1972, 1015 U.N.T.S. 1419, 26 U.S.T. 583.

81. See Elizabeth Olson, *US Rejects New Accord Covering Germ Warfare*, N.Y. TIMES, July 26, 2001, at A47, col. 1.

82. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons, January 13, 1993, 1974 U.N.T.S. 3, A/RES/47/391.

83. Treaty on the Nonproliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161.

84. For a brief discussion of the NPT, see John F. Murphy, *Force and Arms*, in THE UNITED NATIONS AND INTERNATIONAL LAW 97, 122–29 (Christopher C. Joyner ed., 1997).

85. See Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, 6th Sess. (28 January–1 February 2002), U.N. GAOR, 57th Sess., Supp. No. 37(A.57/37), at 4–16.

remain so. I hold with those who question the wisdom of such an exercise. The history of efforts to conclude a comprehensive convention on international terrorism—from the 1937 League of Nations Convention<sup>86</sup> to the 1972 draft convention introduced by the United States in the UN General Assembly<sup>87</sup>—has not been a happy one. Michael Reisman, an eminent authority in international law, has recently cautioned that,

[d]espite the relatively promising developments in the 1996 General Assembly resolution . . . and the 1998 Convention for the Suppression of Terrorist Bombing, the political positions which have retarded the development of an effective international legal regime in this regard have changed little. The Non-Aligned Movement's solidarity has been broken by a number of prominent defections, yet a substantial number of states still resist a definition of terrorism that might be applied to terrorist activities of groups that some wish to view as 'freedom fighters' or fighters in wars of 'national liberation.'<sup>88</sup>

Despite its limitations, the “piecemeal” approach has served the world community well. It should continue.

#### *Convention against Transnational Organized Crime*

Although the recently concluded Convention against Transnational Organized Crime<sup>89</sup> is not, strictly speaking, an antiterrorist convention, it deserves a brief mention, if only because it has extensive provisions on international cooperation that might serve as a model for the parties to the antiterrorist conventions. Moreover, as pointed out by Hans Corell, the General Assembly, in its resolution adopting the convention, recommends

that the Ad Hoc Committee established by the General Assembly in its resolution 51/210 of 17 December 1996, which is beginning its deliberations with a view to developing a comprehensive convention on international terrorism, pursuant to

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86. Convention for the Prevention and Punishment of Terrorism, 7 INTERNATIONAL LEGISLATION 862, 868 (Manley O. Hudson ed., 1941).

87. Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, U.N. Doc. A/C. 6/L. 850 (1972).

88. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 58 (1999).

89. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (2001). The text of and information regarding the convention may be found at [http://www.undcp.org/odccp/crime\\_cicp\\_convention.html](http://www.undcp.org/odccp/crime_cicp_convention.html) (Jan. 15, 2003).

Assembly resolution 54/110 of 9 December 1999, should take into consideration the provisions of the UN Convention against Transnational Organized Crime.<sup>90</sup>

As noted above, I have grave doubts about the wisdom of trying to conclude a comprehensive convention on international terrorism, but provisions in the Convention against Transnational Organized Crime may well serve as a guide to future efforts to combat international terrorism.

### **Regional Treaties and Conventions**

There are now at least eight antiterrorist conventions that have been adopted at the regional level.<sup>91</sup> It is unclear, however, the extent to which these conventions have had any operational significance. Five of these conventions have been adopted only very recently,<sup>92</sup> and it is therefore too early to evaluate them in terms of their operational efficiency. Some of these recently adopted regional conventions have noteworthy provisions, however, and these will be briefly explored below. The Organization of American States (OAS) Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, 1971, and the European Convention on the Suppression of Terrorism, 1977, are of earlier vintage and will be explored in somewhat greater detail. The terms of the South Asian Association for Regional Cooperation (SAARC) Regional Convention

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90. Hans Corell, Statement by Mr. Hans Corell to the Security Council Briefing on International Terrorism, December 9, 2000, at 9 (copy on file with author).

91. The texts of and dates of entry into force and other information concerning seven of these treaties and conventions may be found in INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM, *supra* note 16, at 134–225. These include: the OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance; the European Convention on the Suppression of Terrorism; the South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism; the Arab Convention on the Suppression of Terrorism; the Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating International Terrorism; the Convention of the Organization of the Islamic Conference on Combating International Terrorism; and the OAU Convention on the Prevention and Combating of Terrorism. The text of the Inter-American Convention Against Terrorism, adopted on June 3, 2002, is available at [http://www.oas.org/xxxiiga/english/docs\\_en/docs\\_items/AGres1840\\_02.htm](http://www.oas.org/xxxiiga/english/docs_en/docs_items/AGres1840_02.htm) (Jan. 17, 2003).

92. The five recently adopted antiterrorist conventions include the Arab Convention on Suppression of Terrorism, 1998; the Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 1999; the Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1999; the OAU Convention on the Prevention and Combating of Terrorism, 1999; and the Inter-American Convention Against Terrorism, 2002.

on Suppression of Terrorism, 1987, will be briefly examined, but there appears to be insufficient data available to allow for an evaluation of its operational significance.

*The Arab Convention on the Suppression of Terrorism*

The Arab Convention on the Suppression of Terrorism (Arab Convention) has several noteworthy features. The first is that only member states of the League of Arab States can be parties to the convention.<sup>93</sup> The second is that, unlike most of the antiterrorist conventions, the Arab Convention defines terrorism as:

[a]ny act or threat of violence, whatever its motives or purposes, that occurs for the advancement of an individual or collective criminal agenda, causing terror among people, causing fear by harming them, or placing their lives, liberty or security in danger, or aiming to cause damage to the environment or to public or private installations or property or to occupy or seize them, or aiming to jeopardize a national resource.<sup>94</sup>

The convention goes on to define “terrorist offence” as “[a]ny offence or attempted offence committed in furtherance of a terrorist objective in any of the Contracting States, or against their nationals, property or interests, that is punishable by their domestic law.”<sup>95</sup> Also included within the definition of terrorist offense are offenses stipulated in several global antiterrorist conventions,<sup>96</sup> as well as the provisions of the UN Convention of 1982 on the Law of the Sea, relating to piracy on the high seas.<sup>97</sup>

Significantly, however, the Arab Convention also provides that “[a]ll cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of

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93. Arab Convention on Suppression of Terrorism, art. 1, available at <http://www.al-bab.com/arab/docs/league/terrorism98.htm> (Jan. 17, 2003) [hereinafter Arab Convention].

94. *Id.*, art. 2.

95. *Id.*, art. 3.

96. These include the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft; the Hague Convention for the Suppression of Unlawful Seizure of Aircraft; the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; the International Convention against the Taking of Hostages; and the Arab Convention, *supra* note 93, at art. 3(a)–(e).

97. Arab Convention, *supra* note 93, at art. 3(f).

any Arab State.”<sup>98</sup> To be blunt, this provision seeks to justify the commission of terrorist acts against Israel and reflects an attitude that prevented the Ad-Hoc Committee on Terrorism from adopting measures against terrorism during the early 1970s. There appears to be no data available on the operational significance of the convention, if any.

*Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism*

The Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism (Commonwealth Treaty), like the Arab Convention, has a definition of terrorism, but, unlike the Arab Convention, has no provisions providing exceptions for “wars of national liberation.” Under the Commonwealth Treaty terrorism is defined as “an illegal act punishable under criminal law committed for the purpose of undermining public safety, influencing decision-making by the authorities or terrorizing the population, and taking the form of: [there follows a listing of various manifestations of violence or threats of violence against persons or property].”<sup>99</sup> The Commonwealth Treaty also contains an elaborate definition of “technological terrorism” involving the use or threat of use of nuclear, radiological, chemical or bacteriological (biological) weapons or their components—a provision not found in the other antiterrorist conventions.<sup>100</sup> Also noteworthy are the Commonwealth Treaty’s many detailed provisions on cooperative measures to prevent and punish terrorism, including provisions that envision the possibility of an antiterrorist unit of one state party crossing the borders of another state party in order to render assistance to the latter state in the event of a terrorist incident.<sup>101</sup> Again though, there appears to be little data on the operational significance, if any, of the Commonwealth Treaty.

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98. *Id.*, art. 2(a).

99. Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, art. 1 (1999).

100. *Id.*

101. Article 12(1) of the Treaty, for example, provides: “The parties may, at the request or with the consent of the Party concerned, send representatives of their competent authorities, including special anti-terrorist units, to provide procedural, advisory or practical aid in accordance with this Treaty.” *Id.* at art. 12.

*OAU Convention on the Prevention and Combating of Terrorism*

At this writing the current status of the OAU Convention on the Prevention and Combating of Terrorism is most uncertain because of the dissolution of the Organization of African Unity and the establishment of the African Union.<sup>102</sup> Assuming that the new organization adopts the OAU Convention, however, the convention deserves some brief comment.

Like the other recently adopted regional conventions, the OAU Convention contains a detailed definition of a “terrorist act,”<sup>103</sup> as well as extensive provisions calling for cooperation among state parties in preventing and combating terrorism. Unfortunately, like the Arab Convention, as well as the Convention of the Organization of the Islamic Conference on Combating International Terrorism,<sup>104</sup> the OAU Convention also includes a provision that “the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.”<sup>105</sup> It is worth noting that such provisions are incompatible with the approach taken by Article 5 of the UN Terrorist Bombing Convention, which provides that terrorist bombings are “under no circumstances justifiable by consideration of a political, philosophical, ideological, racial, religious or other similar nature and are punishable by penalties consistent with their grave nature.”

*Inter-American Convention Against Terrorism*

The Inter-American Convention Against Terrorism,<sup>106</sup> adopted on June 3, 2002, came about in response to the events of September 11th. The Organization of American States was the first organization to condemn the September 11th attacks, and ten days thereafter the OAS Foreign Ministers meeting in Washington instructed the OAS Permanent Council to prepare a draft text of an Inter-American Convention Against Terrorism in time for the meeting of

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102. See Corinne A. Packer and Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM J. INT'L L. 365 (2002).

103. OAU Convention on the Prevention and Combating of Terrorism, art. 1(3), available at <http://www.fidh.org/intgouv/ua/rapport/1999/antiterroconvention.pdf> (Jan. 17, 2003).

104. See Convention of the Organization of the Islamic Conference on Combating International Terrorism, art. 2, available at <http://www.oic-un.org/26icfm/c.html> (Jan. 17, 2003).

105. OAU Convention, *supra* note 103, at art. 3(1).

106. See Inter-American Convention Against Terrorism, *supra* note 77.

the OAS General Assembly on June 3.<sup>107</sup> By any measure the convention is an extraordinary instrument.

Previously, the only antiterrorist convention adopted in the Inter-American context was the OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (OAS Convention).<sup>108</sup> The OAS Convention, however, is focused narrowly on the kidnaping of diplomats, despite efforts to broaden the scope of the convention, contains many ambiguities, and fails to deal with crucial problems. Moreover, it has a total of only nine parties, including the United States, and has not been an effective international instrument for the protection of diplomats. In practice it has in effect been superceded by the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.<sup>109</sup>

By contrast, 30 of the 33 nations present at the meeting of the OAS General Assembly signed the Inter-American Convention Against Terrorism.<sup>110</sup> And there is nothing narrow about the focus of the Inter-American Convention. On the contrary, among other things, the convention defines “offenses” within the scope of its coverage as including the offenses covered by the UN antiterrorist conventions and requires state parties to the Inter-American Convention to make a declaration upon ratification that they are not parties to one or the other of the UN antiterrorist conventions if they wish these conventions to be inapplicable to them, thus creating a strong inducement on OAS member states to sign and ratify the UN antiterrorist conventions.<sup>111</sup> Also, under Article 3 of the convention, state parties “shall endeavor” to become parties to the UN antiterrorist conventions and “to adopt the necessary measures to effectively implement such instruments. . . .”<sup>112</sup> The convention further requires state parties to use the recommendations of the Financial Action Task Force and other specialized entities as guidelines for measures

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107. See Secretary of State Colin L. Powell, *Opening Remarks and Q&A With the Press Following OAS General Assembly*, June 3, 2002, <http://www.state.gov/secretary/rm/2002/10670.htm> (Jun. 4, 2002).

108. This convention was signed by the United States on Feb. 2, 1971 and entered into force for the United States on Oct. 8, 1976. T.I.A.S. No. 8413, available at <http://untreaty.un.org/English/Terrorism/Conv16.pdf> (Jan. 17, 2003).

109. For further discussion of the OAS Convention, see John F. Murphy, *Protected Persons and Diplomatic Facilities*, in *LEGAL ASPECTS OF INTERNATIONAL TERRORISM* 277, 299–303 (Alona E. Evans and John F. Murphy eds., 1977).

110. See Powell, *supra* note 107, at 2.

111. See Inter-American Convention Against Terrorism, *supra* note 91, at art. 2.

112. *Id.*, art. 3.

combating the financing of terrorism,<sup>113</sup> to deny safe haven to persons suspected of terrorism, as either refugees,<sup>114</sup> or asylum seekers,<sup>115</sup> and to reject application of the political offense exception to requests for extradition or mutual legal assistance.<sup>116</sup> On the other hand the convention permits a state party to refuse to provide mutual legal assistance if it “has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, or political opinion, or that compliance with the request would cause prejudice to that person’s position for any of these reasons.”<sup>117</sup>

By way of affirmative steps, the convention requires state parties to adopt domestic law measures to provide for the identification and seizure of funds used to finance terrorism,<sup>118</sup> to promote cooperation and the exchange of information in order to improve border and customs control measures necessary to prevent the international movement of terrorists and trafficking in arms, without prejudicing applicable international commitments regarding the free movement of people and the facilitation of commerce,<sup>119</sup> to enhance channels of communication between their law enforcement authorities,<sup>120</sup> to “afford one another the greatest measure of expeditious mutual legal assistance with respect to the prevention, investigation, and prosecution of the offenses established [in the UN antiterrorist conventions],”<sup>121</sup> and to promote technical cooperation and training programs.<sup>122</sup>

Significantly, Article 18 of the convention requires the state parties to hold periodic meetings of consultation, with a view to “[t]he full implementation of this Convention. . . .”<sup>123</sup> The Secretary General of the OAS is to convene a meeting of consultation of the state parties after receiving the 10th instrument of ratification (under Article 22 the convention is to enter into force on the 30th day following the date of deposit of the sixth instrument of ratification). Also, the Inter-American Committee against Terrorism, established in 1998, has been revitalized and become active.

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113. *Id.*, art. 4(2).

114. *Id.*, art. 12.

115. *Id.*, art. 13.

116. *Id.*, art. 11.

117. *Id.*, art. 14.

118. *Id.*, art. 5.

119. *Id.*, art. 7.

120. *Id.*, art. 8.

121. *Id.*, art. 9.

122. *Id.*, art. 16.

123. *Id.*, art. 18.

The Inter-American Convention Against Terrorism, then, has the potential to become an important instrument for the effective implementation, at least on a regional basis, of the UN antiterrorist conventions. Whether it will do so remains to be seen. It might be useful to this end for the OAS to establish a liaison with the UN's Counter-Terrorism Committee.

*European Convention on the Suppression of Terrorism*

The European Convention on the Suppression of Terrorism (European Convention)<sup>124</sup> was an early attempt to deal with a primary obstacle, especially during the 1970s, in the way of efforts to combat terrorism, the political offense exception to international extradition. To this end, Article 1 of the convention lists a series of offenses, none of which “for the purposes of extradition between Contracting States” are to be regarded “as a political offense or as an offense connected with a political motive or as an offense inspired by political motives.”<sup>125</sup> Under Article 2, the convention invites state parties to exclude additional acts of violence against persons or property from the political offense exception.<sup>126</sup> At the same time, Article 13 of the convention allows a state party to register a reservation permitting it to reject a request for extradition on the ground that the offense is of a political character—notwithstanding that a listed offense is involved:

provided that it undertakes to take into 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) that cruel or vicious means had been used in the commission of the offense.<sup>127</sup>

Under Article 5 of the Convention a requested state may refuse to extradite an accused if it:

has substantial grounds for believing that the request for extradition for an offense mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality,

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124. See European Convention on the Suppression of Terrorism (1977), reprinted in INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM, *supra* note 16, at 139, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/090.htm> (Jan. 17, 2003).

125. This description of the European Convention is taken largely from Murphy, *supra* note 52, at 13–15.

126. European Convention, *supra* note 124, art. 2.

127. *Id.*, art. 13.

or political opinion, or that the person's position may be prejudiced for any of these reasons.<sup>128</sup>

Should a state party decide not to extradite an offender covered by the convention, under Article 7 it must "submit the case, without exception whatsoever and without undue delay to its competent authorities for the purpose of prosecution."<sup>129</sup>

Although the convention is an antiterrorism initiative, it nowhere attempts to define terrorism. In attempting to exclude a variety of common crimes as well as "terrorism" from the political offense exception to extradition, the convention may have attempted too much, because many states, upon signing or ratifying the convention, reserved the right to refuse to extradite for an offense which they consider as political.<sup>130</sup> This defect, if such it be, has largely been cured, at least among state parties who are members of the European Union, by the EU's 1996 Convention relating to the Extradition between Member States.<sup>131</sup> Article 5 of the EU Convention eliminates the political offense exception in extradition between state parties and paragraph 4 of that article provides that reservations to the European Convention shall not apply to extradition between member states.<sup>132</sup> However, a member state may limit the ambit of Article 5 of the EU Convention to the violent crimes listed in Articles 1 and 2 of the European Convention.<sup>133</sup> Moreover, paragraph 3 of Article 5 preserves the right to refuse extradition if the fugitive might be persecuted or punished on account of his race, religion, nationality or political opinion.<sup>134</sup>

Adoption of the EU Convention, then, would appear to have removed, at least partially, the "internal inconsistency" of the European Convention that raised serious doubts as to its effectiveness in practice.<sup>135</sup> Moreover, some early hold outs, such as Ireland and France, have become parties to the

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128. *Id.*, art. 5.

129. *Id.*, art. 7.

130. Murphy, *supra* note 52, 14–15.

131. See Convention relating to the Extradition between Member States, OJ 96 C 313/02 of 27 September 1996.

132. *Id.*, art. 5.

133. *Id.*

134. *Id.*

135. See Geoff Gilbert, *The "Law" and "Transnational Terrorism,"* 26 NETHERLANDS Y.B. INT'L L. 3, 21 (1995).

European Convention,<sup>136</sup> and English and French courts have applied it when surrendering fugitives.<sup>137</sup> Hence, although one could wish there was more of it, there is some evidence that the European Convention has been of some use to European efforts to combat terrorism.

*SAARC Regional Convention on Suppression of Terrorism*

Like the European Convention, the SAARC Regional Convention on Suppression of Terrorism (SAARC Convention),<sup>138</sup> in Article I, lists a number of offenses and provides that, for the purpose of extradition, they shall not be regarded as political offenses. Further, under Article II, any two or more state parties may agree among themselves for purposes of extradition to include any other offenses involving violence, in which case this offense, too, shall not be regarded as a political offense.<sup>139</sup> Unlike the European Convention, the SAARC Convention contains no provision for reservations to the requirement that the listed offenses be regarded as nonpolitical offenses. Article VII, however, provides for an exception to extradition requirements:

if it appears to the requested State that by reason of the trivial nature of the case or by reason of the request for the surrender or return of a fugitive offender not being made in good faith or in the interests of justice or for any reason it is unjust or inexpedient to surrender or return the fugitive offender.<sup>140</sup>

Although all seven members of SAARC (Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka) are parties to the convention, it is unclear the extent to which it has had operational significance. As of 1993 it appeared that some member states of SAARC had not yet enacted the enabling legislation required to give effect to the convention.<sup>141</sup>

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136. Initially, Ireland did not even sign the convention, claiming that to ratify it would violate its constitution, and France, while an initial signatory, did not ratify because of opposition from the French Left, which had traditionally opposed the extradition of political offenders. See Murphy, *supra* note 52, at 14–15.

137. See Gilbert, *supra* note 135, at 21.

138. See SAARC Regional Convention on Suppression of Terrorism (1987), reprinted in INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM, *supra* note 16, at 147, available at <http://untreaty.un.org/English/Terrorism/Conv18.pdf> (Jan. 17, 2003).

139. *Id.*, art. II.

140. *Id.*, art. VII.

141. See Report of the Secretary-General, *Measures to Eliminate International Terrorism*, U.N. Doc A/51/336, Sep. 6, 1996, at 42.

*Coercive Measures Against Terrorists And  
State Sponsors Of Terrorists*

**Economic Sanctions**

As briefly noted above, the primary goal of the International Convention for the Suppression of the Financing of Terrorism and a primary goal of the just concluded Inter-American Convention Against Terrorism is to impose economic sanctions against terrorists by denying them financing as well as against private organizations who support them by seizing and freezing their funds. A detailed discussion of United States and other countries' efforts to block the financing of international terrorism is beyond the scope of this chapter. It is worth noting parenthetically, however, that, according to recent newspaper reports, members of al Qaeda may be turning to trade in gold, diamonds, and gems to finance their terrorist network in response to the freezing of their bank accounts.<sup>142</sup> Also, al Qaeda reportedly increasingly relies heavily on the Internet and on an informal money transfer system, known as "hawala" in Arabic, to move its funds. Hawala relies on trust and networks of friends and family to move its funds and leaves no paper or electronic trails. It is, of course, impossible to monitor or freeze an account if there is no bank account or electronic movement of money. Lastly, again according to recent newspaper reports, the United States is beginning to face growing resistance among its European allies over how it identifies terrorists and their financiers. European officials are reportedly questioning the listing of several individuals and organizations whose links to extremist causes are less clear than those of al Qaeda or the Taliban.<sup>143</sup>

The focus of this section of the chapter is on economic sanctions against state sponsors of terrorism and, more specifically, mandatory economic sanctions imposed by the UN Security Council under Chapter VII of the UN Charter. Economic sanctions imposed unilaterally by the United States, or in concert with like minded states, not pursuant to Security Council mandate, are outside the scope of this chapter.

Although it was its invasion of Kuwait rather than its sponsorship of terrorism that precipitated Security Council action against Iraq, in its famous Resolution 687,<sup>144</sup> the Council "[r]equires Iraq to inform the Security Council that

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142. See, e.g., Sengupta, *U.N. Report Says al Qaeda May be Diversifying Its Finances*, N.Y. TIMES, May 23, 2002, at A15, col. 1.

143. See Johnson et al., *Bush Faces Widening Gap With Europe*, WALL ST. J., May 21, 2002, at A 15, col. 6.

144. S. C. Res. 687, U.N. SCOR 46th Sess., U.N. Doc. S/687/(1991).

it will not commit or support any act of international terrorism or allow any organization directed toward commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism.”<sup>145</sup> Evidence that Iraq has failed to carry out this requirement is considerable.<sup>146</sup>

Economic sanctions imposed by the Security Council against Iraq have become a highly contentious issue, with critics contending that they hurt the people but not the government of Iraq and that the Security Council actions are lacking in legitimacy because of dominance by the permanent members.<sup>147</sup> To meet these criticisms and to ensure the continuance of economic sanctions against Iraq, the Security Council recently agreed to a major revision of the sanctions, including the adoption of new so-called “smart sanctions.”<sup>148</sup> Under the new sanctions regime, UN export controls on purely civilian goods purchased by Iraq are lifted. Indeed, all contracts for export of goods to Iraq under the oil for food program are presumed approved unless found to contain items on a “Goods Review List” (GRL).<sup>149</sup> The GRL consists of so-called “dual use” items that may have both a legitimate civilian use and a potential military use in a prohibited nuclear, chemical, biological, ballistic missile or conventional military program. These items will be subjected to additional scrutiny by the Iraq Sanctions Committee established by the Security Council. Perhaps most important, Resolution 687 remains in force, with its requirements that Iraq destroy its nuclear, chemical and biological weapons programs, and limit its ballistic missiles range to 150 km.

It remains to be seen, however, whether the new “smart” sanctions will be any more effective than the old “dumb” sanctions were in inducing Iraq to fulfill its obligations under Resolution 687. This commentator, for one, remains skeptical. We will return to this issue when we turn to the use of military force to combat terrorism later in this chapter.

Prior to its recent actions with respect to al Qaeda and the Taliban, the most elaborate set of actions that the Security Council had undertaken with respect to international terrorism was with respect to Libya. In response to evidence of Libyan complicity in the destruction of Pan Am flight 103 over Lockerbie, Scotland and of *Union de transports aeriens* (UTA) flight 772, the

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145. *Id.*, para. 32.

146. See, e.g., PATTERNS OF GLOBAL TERRORISM 2001, *supra* note 11, at 65.

147. See, e.g., Jose E. Alvarez, *The Once and Future Security Council*, 18 WASH. QTRL'Y 3 (1995).

148. See S. C. Res. 1409, U.N. SCOR, 57th Sess., U.N. Doc. S/1409/(2002) and S. C. Res. 1382, U.N. SCOR, 56th Sess., U.N. Doc. S/1382/(2001).

149. S. C. Res. 1382, *supra* note 148.

Council adopted a resolution urging the Libyan Government to provide “full and effective” responses to requests made by the French, the UK, and the US Governments concerning these catastrophes.<sup>150</sup> When the Libyan Government failed to do so, the Council decided that this failure constituted a threat to international peace and security.<sup>151</sup> Acting under Chapter VII of the Charter, the Council decided that states should adopt various sanctions against Libya unless it responded to the requests for cooperation. To avoid these measures Libya also had to commit itself “definitely to cease all forms of terrorist action and all assistance to terrorist groups and . . . promptly, by concrete actions, demonstrate its renunciation of terrorism.”<sup>152</sup> In a third resolution the Council applied further comprehensive sanctions against Libya in 1993.<sup>153</sup>

Although they had previously strongly resisted a proposal along these lines, in 1998, the United States and the United Kingdom agreed to a trial of the two persons charged with the bombing of Pan Am flight 103 before a Scottish Court sitting in the Netherlands. The Security Council welcomed this initiative,<sup>154</sup> and decided that the Libyan Government was to ensure the appearance in the Netherlands of the two accused persons.<sup>155</sup> The Council also decided that it would suspend the sanctions it had imposed against Libya once the Secretary-General had reported to the Council that the two accused persons had arrived in the Netherlands for trial and the Libyan Government had satisfied the French judicial authorities with regard to the bombing of UTA flight 772.

On April 5, 1999, the Secretary-General reported to the Council that the two accused persons had arrived in the Netherlands for trial and that the French authorities had informed him that the Libyan Government had satisfied the Council’s demands with respect to the bombing of UTA flight 772. Accordingly, the President of the Council announced that the sanctions against Libya had been suspended.<sup>156</sup>

On January 31, 2001, a three judge Scottish Court, sitting at Camp Zeist, the Netherlands, convicted Abdelbaset Ali Mohamed al Megrahi, a Libyan intelligence agent, of murdering 270 people in the 1988 bombing of Pan Am flight 103. The second Libyan defendant, Al Amin Khalifa Fhiman, former

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150. S. C. Res. 731, U.N. SCOR, 47th Sess., U.N. Doc. S/731/(1992).

151. S. C. Res. 748, U.N. SCOR, 47th Sess., U.N. Doc. S/748/(1992).

152. *Id.*

153. S. C. Res. 883, U.N. SCOR, 48th Sess., U.N. Doc. S/883/(1993).

154. S. C. Res. 1192, U.N. SCOR, 53d Sess., U.N. Doc. S/1192/(1998).

155. *Id.*, at para. 4.

156. Statement of the President of the Council, April 8, 1999, S/PRST/1999/10.

manager of the Libyan Arab Airlines in Malta where the bomb originated, was acquitted.<sup>157</sup> The court sentenced Megrahi to life in prison, and his conviction was upheld on appeal.<sup>158</sup>

The Council's actions against Libya, then, have had a quite extraordinary denouement. Less successful were the Council's measures against Afghanistan prior to September 11th and against Sudan. With respect to Afghanistan, the Council, acting under Chapter VII of the Charter, demanded that the Taliban hand over Osama bin Laden, who had been indicted by the United States for the August 7, 1998 bombings of the US embassies in Kenya and Tanzania, to "appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice."<sup>159</sup> By the same resolution the Council decided to impose economic sanctions against the Taliban as of November 14, 1999, if they failed to accede to this demand. When the Taliban had not turned Osama bin Laden over by November 14, 1999, the Council announced on November 15, 1999, that the sanctions were to come into effect.

As to the Sudan, the Security Council became involved in response to a Sudan backed assassination attempt on the life of the President of Egypt in Addis Ababa, Ethiopia on June 26, 1995. In a resolution adopted on January 31, 1996, the Council declared that "those responsible for that act must be brought to justice," called upon the Government of the Sudan immediately to "extradite to Ethiopia for prosecution the three suspects sheltering in the Sudan and wanted in connection with the assassination attempt. . . ." and further called upon the Sudan to "[d]esist from engaging in the activities of assisting, supporting and facilitating terrorist elements and act in its relations with its neighbors and with others in full conformity with the Charter of the UN and with the Charter of the Organization of African Unity."<sup>160</sup> When the Government of the Sudan did not comply with this request, the Council, acting under Chapter VII of the Charter, decided to impose certain economic sanctions against the Sudan.<sup>161</sup>

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157. See Peter Finn, *Libyan Convicted of Lockerbie Bombing: Second Man acquitted in Attack*, WASH. POST, Feb. 1, 2001, at A 1.

158. *Al Megrahi v. Her Majesty's Advocate*, Appeal No. C104/01 (J.C. 2002) (Scot.), available at <http://www.scotcourts.gov.uk/download/lockerbieappealjudgement.pdf> (Jan. 17, 2003).

159. S. C. Res. 1267, U.N. SCOR, 54th Sess., U.N. Doc. S/1267/(1999), para. 2.

160. S. C. Res. 1044, U.N. SCOR, 51st Sess., U.N. Doc. S/1044/(1996), para. 4.

161. S. C. Res. 1070, U.N. SCOR, 51st Sess., U.N. Doc. S/1070/(1996).

Economic sanctions imposed by the Security Council are often regarded as an alternative to the use of force in dealing with state sponsors of terrorism. When the Council declines to impose economic sanctions, or when sanctions imposed by the Security Council fail to induce a target state to cease its sponsorship or support of international terrorism, however, the controversial issue of what measures of self-help may be taken by states acting without Council authorization may arise. It is to this issue that we turn in the next section of this chapter.

### Use of Armed Force

Other participants in this conference have addressed the *jus ad bellum* aspects of the war on terrorism, and I will try to minimize overlap with the presentations of these other participants. To this end I will largely limit my comments to the possible future use of armed force against terrorists in countries other than Afghanistan and against their state sponsors. As to the use of armed force against al Qaeda and the Taliban, I will just state my view that it has been fully consonant with the *jus ad bellum* limitations of the UN Charter.<sup>162</sup> I will not address any of the *jus in bello* issues.

At this writing there are numerous newspaper reports that the Bush administration is developing a doctrine of preemptive action against states and terrorist groups trying to develop weapons of mass destruction.<sup>163</sup> United States Vice President Dick Cheney reportedly has given as the rationale for such a doctrine the inadequacy of the Cold War approaches of arms control treaties and the policy of deterrence for present circumstances. One newspaper report quoted Cheney as saying: "In terror, we have enemies with nothing to defend. A group like al-Qaeda cannot be deterred or reasoned with. This struggle will not end in a treaty or accommodation with terrorists—it can only end in their complete and utter destruction."<sup>164</sup>

It seems clear that al Qaeda cannot be deterred or reasoned with. But all indications are that the likely first target of the new doctrine is Iraq and most particularly the regime of Saddam Hussein.<sup>165</sup> It is at least debatable whether

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162. Besides the presentations at the conference, for an analysis of the *jus ad bellum* dimensions of the use of armed force in Afghanistan, see, e.g., Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001); Jack M. Beard, *America's New War on Terror: The Case for Self-Defense under International Law*, 25 HARV. J. L. PUB. POL'Y 559 (2002).

163. See, e.g., David E. Sanger, *Bush to Formalize a Defense Policy of Hitting First*, N.Y. TIMES, June 17, 2002, at A1, col. 1; Lydia Adetunji, *Bush to lay out first-strike policy against terrorism*, FINANCIAL TIMES, June 11, 2002, at 3, col. 1; and Thom Shanker, *Defense Secretary Tells NATO to Beat Terrorists to Punch*, N.Y. TIMES, June 7, 2002, at A8, col. 3.

164. Adetunji, *supra* note 163.

165. See, e.g., Sanger, *supra* note 163.

Saddam Hussein can be deterred or reasoned with. There is substantial evidence that, unlike al Qaeda or Palestinian suicide bombers, Saddam Hussein cares greatly about his own survival and the survival of his regime.

To be sure, there is no question of the evil nature of Saddam Hussein and his regime. He is, after all, a man who used chemical weapons against both his own people and in the war with Iran. Because of this history and Iraq's invasion of Kuwait, Security Council Resolution 687 demands that Iraq renounce terrorism and eliminate its weapons of mass destruction under international inspection. For the last three years, however, Iraq has barred the UN inspectors,<sup>166</sup> and it is widely assumed that it has been developing its capacity for chemical and biological weapons during this time. Margaret Thatcher, the former British Prime Minister known as the "Iron Lady," has recently come out strongly in favor of the removal of Saddam Hussein:

Saddam must go. His continued survival after comprehensively losing the Gulf War has done untold damage to the West's standing in a region where the only unforgivable sin is weakness. His flouting of the terms on which hostilities ceased has made a laughingstock of the international community. His appalling mistreatment of his own countrymen continues unabated. It is clear to anyone willing to face reality that the only reason Saddam took the risk of refusing to submit his activities to U.N. inspection was that he is exerting every muscle to build WMD [weapons of mass destruction]. We do not know exactly what stage that has reached. But to allow this process to continue because the risks of action to arrest it seem too great would be foolish in the extreme.<sup>167</sup>

There is a great variety of views on the issue of whether, as a *policy* matter, Saddam should be removed. One alternative view is that he can be contained, and the appropriate policy is to ensure the destruction or degradation of Saddam's weapons of mass destruction, if necessary by the use of armed force.<sup>168</sup> A variant of this view is that there should be a new "Bush doctrine" that would eschew the use of force to overthrow Saddam under present circumstances but state explicitly that certain actions or "triggers" would result

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166. **Editor's Note:** UN weapons inspectors returned to Iraq in November 2003, pursuant to Security Council Resolution 1441. U.N. SCOR 58th Sess., U.N. Doc. S/1441/(2002).

167. Margaret Thatcher, *Don't Go Wobbly*, WALL ST. J., June 17, 2002, at A18, col. 4. For another strong statement favoring the removal of Saddam Hussein, see Lawrence F. Kaplan, *Why the Bush Administration will go after Iraq*, THE NEW REPUBLIC, Dec. 10, 2001, at 21.

168. For an article setting forth this view, although the author of the article rejects it, see Kaplan, *supra* note 167.

in military action and the overthrow of the Saddam regime. Examples of such “triggers” might include further evidence about Saddam’s links with al Qaeda,

any transfer of weapons of mass destruction to al Qaeda or similar groups; direct complicity in the September 11th attacks or any such attacks in the future; involvement in the September–October 2001 anthrax attacks; or the harboring of groups that carry out terrorism against the United States. Bush could also make clear that a range of other Iraqi actions unrelated to terrorism—significant progress toward the acquisition of a nuclear weapon; another attempted invasion of Kuwait; an attack on Israel; or the use of force against American troops—would also be considered redlines that would produce a policy of overthrow.<sup>169</sup>

This chapter does not examine the detailed policy arguments that have been advanced in favor of and against a policy of removal of the Saddam Hussein regime. Rather, for present purposes, it assumes that the policy decision has been made to remove Saddam and that the use of armed force will be required to do so. The question then arises whether this policy can be implemented in a manner consistent with US international legal obligations, especially those set forth in the UN Charter. Time and space limitations require that this chapter examine this question only briefly.<sup>170</sup>

The examination starts from the basic proposition that, under the UN Charter, the use of military force is permitted in only two instances: in individual or collective self-defense under Article 51 of the Charter or pursuant to a Security Council resolution adopted by the Council under Chapter VII of the

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169. See Philip H. Gordon and Michael E. O’Hanlon, *Should the War on Terrorism Target Iraq? Implementing a Bush Doctrine on Deterrence*, THE BROOKINGS INSTITUTION, Policy Brief 93, at 8 (2002).

170. Because of the recent nature of its formulation, there has been relatively little legal commentary on the Bush Administration’s announced intention to remove Saddam Hussein from power, if necessary by force. An exception is Anthony Clark Arend, *Iraq: First Make the Case*, WASH. POST, Apr. 17, 2002, at A15. Also, there are a number of writings on the use of force against terrorism that are relevant to the Bush Administration’s plans. See especially Reisman, *supra* note 88. Some other writings of note include Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq*, 13 EUR. J. INT’L L. 1 (2002); Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq*, 13 EUR. J. INT’L L. 21 (2002); Nigel White and Robert Cryer, *Unilateral Enforcement of Resolution 687: A Treaty Too Far?*, 29 CAL. W. L. REV. 243 (1999); Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT’L L. 537 (1999); and Ruth Wedgwood, *Responding To Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT’L L. 559 (1999).

Charter.<sup>171</sup> I am not among those who favor a doctrine of “humanitarian intervention,” either as *lex lata* or as *de lege feranda*.

Let us consider the second exception first. There is little doubt that the Security Council could adopt a resolution authorizing member states to use armed force to remove Saddam Hussein from power. Indeed, a good argument could be made that Security Council Resolution 678,<sup>172</sup> which authorized the use of force against Iraq in the Gulf War, would have permitted the removal of Saddam Hussein if, as a policy matter, a decision was made to do so.<sup>173</sup> Assuming arguendo that the Council will not adopt a new resolution explicitly authorizing Saddam’s removal, the issue arises whether any previous Security Council resolutions adopted with reference to Iraq implicitly provide such authorization.

The United States and the United Kingdom have, in the past, argued that Security Council resolutions have implicitly authorized the use of force against Iraq. For example, the United States, the United Kingdom, and France relied on Resolution 688<sup>174</sup> as support for the establishment by armed force of refugee camps in Northern Iraq in 1991, and later in Southern Iraq, as well as the creation of “no-fly” zones in both parts of the country. But this was a highly tenuous argument.<sup>175</sup> As noted by Christine Gray,

Security Council Resolution 688 was not passed under Chapter VII and it did not authorize the use of force: it demanded that Iraq end the repression of its civilian population and allow access to international humanitarian organizations. This did not stop the USA and the UK from claiming that their actions in the continuing clashes with Iraq over the no-fly zones were ‘consistent with’, ‘supportive of’, ‘in implementation of’ and ‘pursuant to’ Resolution 688.<sup>176</sup>

Reliance on implied Security Council authorization was also used by the United States and the United Kingdom to justify military actions against Iraq for non-cooperation with UN weapons inspectors under the Resolution 687 ceasefire regime. Both countries also added another justification for their use of armed force against Iraq. Christine Gray has aptly summarized the circumstances. She is worth quoting at some length:

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171. For further discussion of the Charter paradigm, see Murphy, *supra* note 84.

172. S. C. Res. 678, U.N. SCOR, 45th Sess., U.N. Doc S/678/(1990).

173. For a brief discussion of this point, see John F. Murphy, *Force and Arms*, in 1 UNITED NATIONS LEGAL ORDER 247, 287–288 (Oscar Schachter and Christopher C. Joyner eds., 1995).

174. S. C. Res. 688, U.N. SCOR, 46th Sess., U.N. Doc S/688/(1991).

175. For my view of this argument, see Murphy, *supra* note 68, at 290–91.

176. Gray, *supra* note 170, at 9.

Thus in December 1998 the USA and UK undertook *Operation Desert Fox* in response to the withdrawal by Iraq of cooperation with the UN weapons inspectors; this was a major operation lasting four days and nights and involving more missiles than used in the entire 1991 conflict. The USA and UK referred to Security Council Resolutions 1154 and 1205 as providing the legal basis for their use of force; these resolutions had been passed under Chapter VII, but had not made express provision for the use of force. The first said that Iraq must, under Resolution 687, accord immediate and unrestricted access to UNSCOM and IAEA inspectors and that any violation would have “the severest consequences for Iraq.” The second resolution condemned the decision by Iraq to stop cooperation with UNSCOM and demanded that Iraq rescind its decision. Although these resolutions did not explicitly authorize force, the UK argued that they provided a clear basis for military action; by Resolution 1205 the Security Council had implicitly revived the authority to use force given in Resolution 678. The USA also said that its forces were acting under the authority provided by the Security Council resolutions. But this argument of implied authorization was not accepted by other states; in the Security Council debate following the operation only Japan spoke out clearly in its favor. . . .

The argument of implied authorization was not used on its own by the USA and the UK; this justification was supplemented by the claim that the use of force was a lawful response to a breach by Iraq of the ceasefire. Thus the USA argued that Iraq had repeatedly taken actions which constituted flagrant, material breaches of its obligations: following these breaches of its obligations . . . the “coalition” had exercised the authority given by Security Council Resolution 678 for Member States to employ all necessary means to secure compliance with the Council’s resolutions and restore international peace and security in the area. The UK, in the Security Council debate, said that Resolution 687 made it a condition of the ceasefire that Iraq destroy its weapons of mass destruction and agree to the monitoring of its obligations to destroy such weapons. By Iraq’s flagrant violation of the ceasefire resolution the Security Council implicitly revived the authority to use force given in Resolution 678 (1990).<sup>177</sup>

In my view Gray has convincingly responded to the US and UK arguments:

the argument of material breach has been criticized by commentators because it arrogates to individual states power that properly resides with the Security Council. It is for the Security Council to determine not only the existence of a breach of the ceasefire, but also the consequences of such a breach in cases where there is a binding ceasefire imposed by the Security Council. Moreover, it seems doubtful whether any breach of Resolution 687 not itself involving the

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177. *Id.* at 11–12.

use of force can justify the USA and UK in turning to force in response. Those who support this doctrine of material breach seem impatient of disagreement within the Security Council; they revive Cold War arguments that when the Security Council is unable to act because of a permanent member then the USA and the UK can go ahead to use force, if there has been a breach of a prior resolution passed under Chapter VII, even in the absence of express authorization. But this has dangers for the Security Council: it discounts the words of the resolutions reserving the Security Council's right to consider further action; it also discounts statements in debates that it is for the Security Council to take further action. This undermines the authority of the Security Council and ignores the careful negotiations between states attempting to reach agreement on controversial issues. . . .<sup>178</sup>

It might also be noted that, as discussed above, the Security Council has recently adopted a resolution<sup>179</sup> that establishes a new system of "smart sanctions" to induce Iraq to fulfill its responsibilities under Resolution 687. Arguably, implicit in this resolution is a requirement that member states give these sanctions a chance to work. If so, the use of armed force now would seem incompatible with this resolution.

Assuming, again *arguendo*, that existing Security Council resolutions would not authorize the use of force to remove Saddam's regime from power, the issue arises whether such an action could be justified as an exercise of individual or collective self-defense under Article 51 of the UN Charter. In pertinent part, Article 51 provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . ." This and other language in Article 51 has been the subject of much critical analysis and debate.<sup>180</sup> Professor Michael Glennon has recently argued that Article 51 is "incoherent," that indeed "international 'rules' concerning use of force are no longer considered obligatory by states," and that therefore "Article 51, as authoritatively interpreted by the International Court of Justice, cannot guide responsible US policy-makers in the US war against terrorism in Afghanistan or elsewhere."<sup>181</sup>

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178. *Id.* at 12–13.

179. See S. C. Resolution 1409, U.N. SCOR, 57th Sess., U.N. Doc. S/1409/(2002).

180. For discussion and citations, see LORI F. DAMROSCH ET AL, *INTERNATIONAL LAW* 955–73 (4th ed. 2001).

181. Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the UN Charter*, 25 HARV. J. L. PUB. POL'Y 539, 540, and 541 (2002). See also MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTION AFTER KOSOVO* (2001); Michael J. Glennon, *The Case for Anticipatory Self-Defense*, WEEKLY STANDARD, Jan. 28, 2002, at 24.

This is not the place or time to address Glennon's views, except to say that, in my view, they are seriously wrongheaded.<sup>182</sup> It suffices for present purposes to note that, if Glennon is right, and Article 51 and indeed all of the UN Charter norms on the use of force are inoperative, we are largely wasting our time at this conference. Interestingly, Glennon himself states that he has "attempted merely to suggest what the rules are *not*, not what the rules *should be*."<sup>183</sup> Apparently he believes that, with rules of the UN Charter on the use of force inoperative, we should simply make up the rules as we go along—a sure prescription for a return to the "law of the jungle" in my view.

Be that as it may, let us return for present purposes to the text of Article 51 of the UN Charter. By its terms Article 51 seems to require the presence of an "armed attack" as a condition precedent for the use of force in individual or collective self-defense. To demonstrate that Iraq had committed an armed attack on the United States, it would appear necessary, at a minimum, that some evidence be forthcoming that Iraq was involved in some direct way with the planning of, or otherwise directly supported, al Qaeda's September 11th attack. Such support was at least part of the case in favor of the legitimacy as an act of self-defense of the use of armed force against the Taliban in Afghanistan. There is some evidence of contact between Iraqi intelligence agents and al Qaeda members prior to September 11th,<sup>184</sup> but, at least to my knowledge, there is no evidence at this point of Iraq's involvement in the September 11th attack.

One of the hotly debated issues over Article 51 is whether it permits an exercise of anticipatory self-defense, i.e., the use of armed force to prevent an armed attack, not just to respond to a completed armed attack.<sup>185</sup> A literal reading of Article 51 would seem to bar anticipatory self-defense, but many have argued, focusing on the term "inherent" in Article 51 and citing an ambiguous drafting history of that article, that Article 51 is a savings clause,

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182. Some, but by no means all, of the problems with Glennon's views are identified in Charles H. Tiefer's review of Glennon's book, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo*, 96 AM J. INT'L L. 489 (2002).

183. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the UN Charter*, *supra* note 181, at 557.

184. According to Lawrence Kaplan, "Czech Prime Minister Milos Zeman announced on November 9 that, in the months preceding the attacks in New York and Washington, September 11th ringmaster Mohammed Atta met twice in Prague with senior Iraqi intelligence agent Ahmed Khalil Ibrahim Samir Al-Ani. . . . According to Zeman, the two men explicitly discussed an attack on Radio Free Europe's headquarters in Prague." Kaplan, *supra* note 167, at 123.

185. For discussion of the debate over anticipatory self-defense and additional citations, see DAMROSCH ET AL, *supra* note 180, at 968–72.

preserving the right to self-defense under customary international law as it existed prior to the adoption of the UN Charter. Assuming *arguendo* that Article 51 permits an exercise of anticipatory self-defense, at least a colorable argument can be made that the use of force to remove Saddam would fall within the scope of that doctrine. There is considerable evidence that al Qaeda has actively sought the possession of weapons of mass destruction. Iraq's meetings with al Qaeda members, and its provision of bases to various Middle Eastern terrorist groups,<sup>186</sup> raise the possibility that Iraq might supply al Qaeda or other terrorist groups with weapons of mass destruction, especially biological weapons. Iraq's past use of chemical weapons makes such a scenario plausible. A key element of the customary international law of self-defense, as formulated by US Secretary of State Daniel Webster in a diplomatic note to the British in 1842 during the *Caroline* incident, was that self-defense must be limited to cases in which "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."<sup>187</sup> This requirement of an imminent armed attack is at first blush clearly lacking in the case of Iraq. But the concept of imminence arguably takes on a new meaning when al Qaeda or other terrorist groups may be supplied biological weapons. Under such circumstances it will often be impossible to know when an attack is imminent, since the terrorist group will decide when it will be launched with no forewarning.

When Israel destroyed the Iraqi nuclear reactor near Baghdad in a preemptive attack in 1981, there was general outrage expressed in the UN, and the Security Council adopted a resolution<sup>188</sup> that condemned the attack. Michael Reisman has suggested that "now the general consensus is that it [the attack] was a lawful and justified resort to unilateral preemptive action."<sup>189</sup> Perhaps. But in any event the situation has changed dramatically from 1981. Now the threat from Iraq is not nuclear weapons but chemical and biological weapons. Moreover, now the threat is not so much that Iraq will use such weapons but rather that it will make such weapons available to terrorist groups that will not be deterred by the threat of massive retaliation. Under these circumstances, it may be argued, it would be suicidal to wait for clear evidence of an imminent attack. As Dean Acheson once said in a different context, "the law is not a suicide pact."

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186. See PATTERNS OF GLOBAL TERRORISM 2001, *supra* note 11, at 65.

187. 2 MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906).

188. S. C. Res. 487, U.N. SCOR, 36th Sess., U.N. Doc. S/487/(1981).

189. Reisman, *supra* note 88, at 18.

Many, perhaps most, will not find this argument convincing. As part of an advocate's brief, however, it perhaps has a measure of cogency. At this writing, the Bush administration has reportedly concluded that military support to opposition forces or fomenting a coup should be tried over the next few months to dislodge Saddam before any decision is made to engage in an all out military assault.<sup>190</sup> President Bush has reportedly not yet decided on a single cause of action, but there are "some indications" that he "may give the covert strategy and international sanctions time to run their course."<sup>191</sup> Such an approach would be less problematic from an international law standpoint than an all out military assault and likely to engender much less negative reaction. Condoleezza Rice, President Bush's National Security Adviser, has reportedly stated that a "critical component" of the administration's new military strategy is establishing "a common security framework for the great powers," in which the United States, Russia, China, Japan and Europe "share a common security agenda" in which they work together to keep terrorists and rogue states from challenging that system.<sup>192</sup> Avoiding precipitous action on Iraq and working as closely as possible with the other great powers would seem the best way to build such a common security framework and to develop a common security agenda.<sup>193</sup>

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190. See Christopher Marquis, *Bush Officials Differ on Way to Force Out Iraqi Leader*, N.Y. TIMES, June 19, 2002, at A7, col. 1.

191. *Id.*

192. *Id.* at A6.

193. As this article is being reviewed in the page proof stage, the United States, the United Kingdom and other member states of a "coalition of the willing" are bringing to a successful conclusion the armed conflict stage of Operation IRAQI FREEDOM. Time does not permit the revision of this article to include a detailed analysis of the legal basis for the launching of the armed attack against Iraq. A few preliminary observations may be in order, however. First, in its report to the Security Council on the commencement of hostilities, the United States relies on previously adopted Security Council resolutions, including Resolution 1441 (November 8, 2002), as the legal basis for its resort to armed force. See Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (Mar. 21, 2003), U.N. Doc. S/351/(2003). The British justification for the attack also stresses the argument that previous Security Council resolutions, including Resolution 1441, authorize the use of armed force against Iraq. See Statement by the Attorney General Lord Goldsmith in Answer to a Parliamentary Question (regarding the legal basis for the use of force against Iraq), *at* (Apr. 30, 2003). It is noteworthy that neither the US nor the British statements cite self-defense and Article 51 of the UN Charter as a justification.

Resolution 1441 adds a substantial complexity to the mix, in that it constitutes what I would call a "masterpiece of deliberate diplomatic ambiguity" that masked real differences of view between the United States and the United Kingdom, on the one hand, and France, Germany and Russia, on the other, on how Iraq's failure to fulfill its obligations under Security Council Resolution 687 should be handled. To the United States, for example, the words "serious

At this juncture it would seem fruitless to speculate about possible military action against other state sponsors of terrorism, including the other two members of the “axis of evil,” Iran and North Korea, except to suggest that in current circumstances neither case would seem to call for the use of armed force.<sup>194</sup> The use of US military force against al Qaeda cells or other terrorist groups is likely to be undertaken with the consent and indeed active participation of the host country, as at present in the Philippines or possibly in the future in Indonesia. The goal should be to continue to develop an understanding on the part of all states that terrorism is a common action that can be defeated only through a common effort.

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consequences” were code words for the use of armed force, but this was not the interpretation favored by France, Germany, and Russia. See Bob Sherwood, *Military force: pre-emptive defence of breach of international law?*, FINANCIAL TIMES, Mar. 11, 2003, at 11, col. 2. Lord Goldsmith’s statement argues that the absence of an explicit requirement in Resolution 1441 of a further decision of the Security Council before resort to force may take place shows that no requirement was intended by the Council. To the contrary, however, the drafting history of Resolution 1441 demonstrates that France, Russia and Germany viewed the absence of an explicit authorization in the resolution as precluding the use of armed force without a further decision of the Security Council. See, e.g., *World Urges Iraq to Comply with U.N.* CNN International at (Apr. 28, 2003).

Assuming *arguendo* that, on balance, existing Security Council resolutions, including Resolution 1441, do not authorize the use of force against Iraq because of its failure to eliminate its weapons of mass destruction as required by Resolution 1441, this should not be the end of the analysis. There is considerable evidence, and more is likely to be disclosed in the near future, that, far from helping to enforce Resolution 687, France and Russia engaged in deals with the Saddam Hussein government that undermined its enforcement. Moreover, in refusing to accept a US and UK proposal that the Security Council adopt a resolution explicitly authorizing the use of force if Iraq failed to carry out its obligations to disarm, France, Germany and Russia arguable failed to fulfill their obligation as members of the Council to allow the Council to perform its collective security functions to maintain international peace and security. As Edward Luck, a long time observer and commentator on the United Nations, recently noted: “The United Nations, sadly, has drifted far from its founding vision. Its Charter neither calls for a democratic council nor relegates the collective use of force to a last resort. It was a wartime document of a military alliance, not a universal peace platform.” Edward C. Luck, *Making the World Safe for Hypocrisy*, N.Y. TIMES, Mar. 22, 2003, at A11, col. 1.

Further, as Jacques de Lisle has recently suggested, there may be a virtue in acting in an “almost legal” manner and, if so, the United States and other members of the coalition cannot justly be accused of engaging in lawless behavior. Jacques de Lisle, *Illegal? Yes. Lawless? Not so Fast: The United States, International Law, & the War in Iraq*, Foreign Policy Research Institute (Mar. 28, 2003). Professor de Lisle also suggests that, if after the armed conflict in Iraq is over, there is substantial evidence uncovered of weapons of mass destruction and plans to use them as well as of the heinous nature of the Iraq regime, this would “greatly strengthen the US and its partners’ arguments for the near-legality and, thus, the legitimacy of their war in Iraq.” *Id.* at 9. 194. It is worth noting that even the “Iron Lady” has not called for the use of military force against either Iran or North Korea. Thatcher, *supra* note 167.

*The Road Ahead: Conclusions and Recommendations*

Most of my conclusions and recommendations are set forth in previous sections of this chapter. In this, the concluding section of the chapter, I hope to highlight a few especially important points and, with trepidation, speculate a bit about the future.

A general observation is that we have reached the stage where *implementing* the legal regime that has been developed to combat terrorism is of paramount importance. We now have in place an impressive array of antiterrorist conventions, at both the global and regional levels, that covers almost all possible manifestations of terrorism. To be sure it might be useful to develop a convention directed toward the possible use of weapons of mass destruction by terrorists but otherwise coverage is impressive. Until recently, however, there has been little effort to ensure that these conventions constitute an operative system for combating terrorism. In contrast, establishment of the Counter-Terrorism Committee by the Security Council to oversee efforts to combat terrorism, especially the financing of terrorism, and adoption of the Inter-American Convention Against Terrorism are significant steps to this end.

The “catastrophic terrorism” of September 11th may so “concentrate the mind wonderfully”<sup>195</sup> that we will finally give the problem of terrorism the kind of attention it deserves. The unprecedented cooperation among states, inside and outside of the UN, that followed September 11th is a prime example of the high priority efforts to combat terrorism currently enjoy. But the risk of becoming complacent is always present, and may become greater if, as time goes on, no new examples of catastrophic terrorism occur. In this connection it is worth noting that in the past al Qaeda has demonstrated great patience in its planning of terrorist attacks, with such attacks coming at three year intervals.

Moreover, we are still engaged in a struggle to establish the proposition that the acts of terrorism covered by the antiterrorist conventions are illegitimate at all times and under all circumstances whatever the political motivation of the terrorist. The support, explicit or tacit, given by many states to the Palestinian suicide bombings in Israel and on the West Bank graphically illustrates the problem. Although this is a subject outside the scope of this conference, it is crucially important to efforts to combat terrorism that a peaceful resolution of the conflict between Israel and the Palestinians be found.

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195. This paraphrases, of course, the famous quote from Samuel Johnson, “Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.” RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 74 (Suzy Platt ed., 1989).

Besides the antiterrorist conventions we need to use other tools at our disposal more effectively if we are to succeed in this “war on terrorism.” As indicated previously in this chapter, the record of economic sanctions applied against state sponsors of terrorism is spotty at best. The record of economic sanctions against Iraq has been egregiously bad. We need to work further on “smart sanctions” that will have a real impact on the governments of state sponsors of terrorism while sparing the general population of the targeted country.

Finally, I return to Ms. Rice’s reported comment calling for the establishment of “a common security framework for the great powers” within which they “share a common security agenda” and work together to keep terrorists and rogue states from challenging the system. With respect I would suggest that we already have such a common security framework: the UN Security Council and Chapter VII of the UN Charter. Contrary to Professor Glennon’s fulminations, in the face of numerous obstacles, this common security framework has from time to time served us well. It is now time for the great powers to recommit themselves to making the collective security system of the UN work as envisaged by its founders. Such a pledge is long overdue.