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Matthew Lippman

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## THE NEW TERRORISM AND INTERNATIONAL LAW

*Matthew Lippman*<sup>†</sup>

On September 11, 2001, nineteen foreign nationals, operating as separate terrorism teams, boarded and took control of four civilian aircraft.<sup>1</sup> Two of planes crashed into the twin towers of the World Trade Center in New York and a third careened into the Pentagon in Arlington Virginia.<sup>2</sup> The passengers on a fourth realized that they were doomed to die, resisted, and in the resulting struggle spiraled into a Pennsylvania field.<sup>3</sup>

This kamikaze attack transformed the three aircraft and the 200,000 pounds of jet fuel into weapons of mass destruction and resulted in the tragic death of as many as five thousand people.<sup>4</sup> The nominal head of the Al Qaeda terrorist organization, Osama Bin Laden, later praised this “good terror” and warned that the “battle has been moved inside

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<sup>†</sup> Professor, Department of Criminal Justice, University of Illinois at Chicago; J.D., American; Ph.D., Northwestern; LL.M., Harvard.

1. See Brian M. Jenkins, *The Organization Men Anatomy Of A Terrorist Attack*, in HOW DID THIS HAPPEN? TERRORISM AND THE NEW WAR 1-2 (James F. Hoge, Jr. & Gideon Rose eds., 2001) [hereinafter TERRORISM AND THE NEW WAR]. Bin Laden’s organization was responsible for the simultaneous suicide bombings of the United States embassies in Kenya and Tanzania, in August 1998, which killed over two hundred people and injured more than 5,000 as well as the suicide bombing of the USS Cole, in Yemen, in October 2000, which resulted in the death of seventeen sailors. Bin Laden was also connected to the unsuccessful attempts to bomb the United States and Jordan during the millennium celebrations and was linked to the 1993 attack on the World Trade Center. Another assault seemingly connected to Bin Laden was the suicide truck bomb attack in 1996 on a United States military’s housing facility near Dhahran, Saudi Arabia which led to the death of nineteen American servicemen. JEFFERY D. SIMON, *THE TERRORIST TRAP: AMERICA’S EXPERIENCE WITH TERRORISM*, at xiv-xv (2d ed. 2001).

2. *Id.*

3. *Id.*

4. William J. Perry, *The New Security Mantra Prevention, Deterrence, Defense*, in TERRORISM AND THE NEW WAR, *supra* note 1, at 225.

America.”<sup>5</sup> He proclaimed that as a matter of divine dictate every American constituted the enemy and was to be killed and plundered.<sup>6</sup>

The September 11th suicide attack on the United States is emblematic of a new vicious variant of terrorism which threatens the safety and security of the global community.<sup>7</sup> The modern version of this tactic of suicide bombing was first deployed with devastating effect in the 1980's by the fundamentalist Muslim Shi'ite organization, Hizballah, in Lebanon.<sup>8</sup> Various secular pro-Syrian Lebanese groups then briefly flirted with this technique and abandoned the terror tactic in 1986.<sup>9</sup> Suicide bombing subsequently was adopted by Islamic groups in the West Bank, Gaza Strip, and Israel and in Afghanistan, Algeria, Argentina, Chechnya, Croatia, Kashmir, Kenya, Kuwait, Lebanon, Pakistan, Panama, Sri Lanka Tajikistan, Tanzania and Yemen.<sup>10</sup> This tactic is not restricted to religiously inspired movements. Over the last seventeen years the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, a Tamil group struggling for independence from the ruling Sinhalese majority, has been responsible for 171 suicide attacks.<sup>11</sup> It is increasingly clear that suicide bombers are not limited to irrational and idiosyncratic individuals; the

5. *Responsibility for the Terrorist Atrocities in the United States*, 11 September 2001, *An Updated Account*, para. 66 (Nov. 14, 2001), at <http://www.number-10.gov.uk/output/page3863.asp> (last visited Jan. 27, 2003).

6. *Id.* para. 22. See Bernard Lewis, *License to Kill*, 77 FOREIGN AFF., Nov.-Dec. 1998, at 14; Michael Scott Doran, *Somebody Else's Civil War*, in TERRORISM AND THE NEW WAR, *supra* note 1, at 31.

7. See WALTER LAQUEUR, *THE NEW TERRORISM FANATICISM AND THE ARMS OF MASS DESTRUCTION* (1999). The assassins were a twelfth century Islamic sect which engaged in assassination as religious ritual. See BERNARD LEWIS, *THE ASSASSINS: A RADICAL SECT IN ISLAM* (1967).

8. Ariel Merari, *The Readiness to Kill and Die: Suicidal Terrorism in the Middle East*, in ORIGINS OF TERRORISM PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATES OF MIND 192 (Walter Reich ed. 1998) (1990) [hereinafter ORIGINS OF TERRORISM]. Hizballah suicide bombings included the United States embassy in Beirut on April 18, 1983, resulting in 80 dead and 142 wounded; the United States Marine headquarters in Beirut on October 23, 1983, leading to 273 dead and 81 wounded and the concurrent attack on the headquarters of the French paratroopers resulting in 58 dead and 15 wounded; the Israeli government building in Tyre on November 4, 1983, leaving 88 dead and 69 wounded; and the American embassy in Kuwait on December 12, 1983, resulting in 4 dead and 15 wounded. *Id.* at 203. There, of course, is a lengthy list of historical antecedents. See Ehud Sprinzak, *Rational Fanatics*, FOREIGN POL'Y, Sept.-Oct. 2000, at 66, 68.

9. Merari, *supra* note 8, at 204.

10. Nasra Hassan, *An Arsenal Of Believers*, THE NEW YORKER, Nov. 19, 2001, at 36, 38.

11. Sprinzak, *supra* note 8, at 69. See LAQUEUR, *supra* note 7, at 191-96 (discussing the Tamil Tigers). The Tamils are Hindu while the Sinhalese are predominantly Buddhist. *Id.* at 195.

ranks of bombers include intellectually and emotionally aware and alert individuals<sup>12</sup> who have been socialized into a collective culture of rapacity and revenge.<sup>13</sup> Each death sets a standard of sacrifice as the touchstone of commitment to a cause.<sup>14</sup>

This is a tactic which demands relatively simple strategic scheming, training and resources; a single bomber strapped with a modest cache of explosives is able to penetrate the most formidable defense perimeter and inflict death and depredation on innumerable innocents.<sup>15</sup> The attacks are unpredictable and splinter a society into suspicion, fear and distrust; even a bomb which prematurely ignites serves to symbolize the continuing combustible threat.<sup>16</sup> Suicide bombing evidences an intimidating commitment to a cause and prevents the perpetrator from being subject to interrogation or public parade.<sup>17</sup> The suicide bomber now has evolved into the weapon of the militarily overmatched. Dr. Ramadan Shalah, former-Secretary-General of the Palestinian Islamic Jihad, explained that:

Our enemy possesses the most sophisticated weapons in the world and its army is trained to a very high standard. We have nothing with which to repel killing and thuggery against us except the weapon of martyrdom. It is easy and costs us only our lives . . . human bombs cannot be defeated, not even by nuclear bombs.<sup>18</sup>

The attack of September 11, 2001 was distinguished by the fact that the most prominent attackers were older, better educated and more cosmopolitan than the typical suicide bomber.<sup>19</sup> There were only loose relationships among the hijackers and the communal coercion, which was thought essential to creating a culture of death.<sup>20</sup> The potency of the hijackers' ideological indoctrination and commitment was sufficiently powerful to sustain them throughout a relatively lengthy stay amidst the materialism and mesmerizing marvels of the United States.<sup>21</sup>

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12. See Hassan, *supra* note 10, at 38.

13. See Joseph Lelyveld, *All Suicide Bombers Are Not Alike*, N.Y. TIMES, Oct. 28, 2001, at 49, 50. See generally Scott Anderson, *The Hunger Warriors*, N.Y. TIMES, Oct. 21, 2001, at 43.

14. Lelyveld, *supra* note 13, at 50.

15. Sprinzak, *supra* note 8, at 66-67.

16. *Id.*

17. *Id.*

18. *Id.* at 68.

19. Jenkins, *supra* note 1, at 8.

20. *Id.* at 7.

21. *Id.* It previously was thought that only the socially disadvantaged with limited aspirations would engage in suicide attacks, and that there was a need to provide constant

Other terrorist attacks pale in comparison to September 11, 2001.<sup>22</sup> In the past, terrorist assaults were directed at targets which were related to a group's philosophy and objectives; indiscriminate violence might diminish the terrorists' image and support, create internal schisms and risk a harsh counter-reaction.<sup>23</sup> However, in this period of prodigious violence, only the spectacular was likely to mesmerize the media.<sup>24</sup> In addition, the hijackers viewed themselves as divinely ordained to cleanse the cosmos of the corrupt and contemptible and clearly were not constrained by either conscience or constituency.<sup>25</sup> The terrorists' simultaneous attack on targets had few precedents.<sup>26</sup> Their coordinated callous campaign enabled these furious fanatics to achieve results comparable to those which would result from the deployment of weapons of mass destruction.<sup>27</sup> Combating attacks such as those of September 11, 2001 are complicated by the autonomous, multinational and decentralized nature of contemporary terrorist cells which coalesce and converge to conduct specific missions and then separate and splinter.<sup>28</sup>

Terrorist suicide bombings which possess a transnational dimension contravene the International Convention for the Suppression of Terrorist Bombings and other instruments.<sup>29</sup> This Bombing Convention requires signatory States to penalize and to punish individuals<sup>30</sup> delivering, placing, discharging or detonating an explosive or other lethal device in, into or

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encouragement and support in order to sustain their psychological propensity to engage in a suicide attack. *Id.*

22. *Id.* at 4. More than 10,000 international terrorist incidents have been recorded since 1968 and only 14, prior to September 11, 2001, resulted in 100 or more fatalities. These included 325 deaths in an Air Indian crash in 1985; 300 killed in 1993 as a result of car bombs in Bombay; 270 deaths in the 1988 crash of Pan Am 103; 241 killed in a 1983 truck bomb in Beirut; 171 in a 1989 French plane crash; 168 dead from a truck bomb attack in Oklahoma City in 1995; and 115 killed in the 1987 bombing of a Korean airliner. *Id.*

23. *Id.* at 5.

24. *Id.*

25. Jenkins, *supra* note 1, at 5.

26. *Id.* at 6. Ramzi Yousef, the man behind the first World Trade Center bombing, conspired to bring down twelve airliners in 1994. In 1998, members of Al Qaeda simultaneously attacked two American embassies. *Id.*

27. See JESSICA STERN, *THE ULTIMATE TERRORISTS* (Harvard Univ. Press 1999) (2000).

28. See Jenkins, *supra* note 1, at 8.

29. International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, S. TREATY DOC. NO. 106-6, 37 I.L.M. 249 [hereinafter *Terrorist Bombings*]. The acts of September 11, 2001 also appear to be in direct defiance of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 U.S.T. 564, 1971 U.N. Jurid. Y.B. 143 (1971) [hereinafter *Montreal Convention*].

30. *Terrorist Bombings*, *supra* note 29, art. 4.

against a place of public use, a State or government facility, a public transportation system or an infrastructure facility.<sup>31</sup> These acts are to be criminalized when committed with the intent to cause death, or serious injury<sup>32</sup> or to cause extensive destruction in those instances in which this destruction results in or is likely to result in major economic loss.<sup>33</sup> The seriousness with which terrorist bombings is treated in the Convention is clear from the obligation of the State Party on whose territory the alleged perpetrator is present to either extradite or to prosecute the offender.<sup>34</sup> States Parties are required to enact domestic legislation to punish acts prohibited under the Convention in accordance with their "grave nature," particularly where intended or calculated to provoke a "state of terror" and under no circumstances may such bombings be considered "justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature."<sup>35</sup>

Middle Eastern terrorists view suicide bombers as acts of martyrdom and as "sacred explosions" which are carried out as an expression of their sacred duty to carry out divine acts of self-determination and resistance to State repression of human and equal rights.<sup>36</sup> They point to the killing of innocents by well-armed and equipped State authorities<sup>37</sup> as constituting the true acts of terrorism.<sup>38</sup> There seems to be an inevitable pattern of endless and escalating State repression in the face of suicide bombing which, in turn, encourages an increasingly large number of individuals to enlist as martyrs to the cause of combating the infidels of the Great Satan.<sup>39</sup> Most disconcerting is the fact that few of the policy prescriptions proposed by government officials to combat suicide terrorism appear to have enhanced safety and security.<sup>40</sup>

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31. *Id.* art. 2, para. 1.

32. *Id.* art. 2, para. 1(a).

33. *Id.* art. 2, para. 1(b).

34. *Id.* art. 8.

35. *Id.* art. 5.

36. See Lelyveld, *supra* note 13; Terrorist Bombings, *supra* note 29, art. 19, para. 1. Article 19 provides that the Convention shall not affect the rights of individuals and States under international law, in "particular the purposes and principles of the Charter of the United Nations and international humanitarian law." *Id.* The Charter of the United Nations recognizes among its purposes respect for equal rights and self-determination of peoples, and respect for human rights and for fundamental freedoms. U.N. CHARTER art. 1, paras. 2-3.

37. Hassan, *supra* note 10, at 38. At the publication of Hassan's article, an estimated 215 Israelis had been killed in these explosions and 1,800 had been injured. *Id.*

38. *Id.*

39. *Id.* at 38-40.

40. Cf. Spinzak, *supra* note 8, at 72-3.

This is the new clerical culture of death and destruction.<sup>41</sup> September 11, 2001 was only the first phase; Attorney General John Ashcroft announced, in January 2000, that videotapes were discovered in Afghanistan displaying martyrdom messages from five suicide terrorists who may have entered the United States.<sup>42</sup> Four months later, Robert S. Mueller III, Director of the Federal Bureau of Investigation, warned that the same types of suicide bombings which occurred in Israel were "inevitable" in the continental United States.<sup>43</sup> A number of issues are presented by suicide bombers. Are suicide bombers, most appropriately viewed as terrorists, common criminals, religious or ideological martyrs or freedom fighters? Can the murder and maiming of civilians be justified? Are there true innocents in what is viewed by militants as a struggle for human rights and self-determination? Should a relaxed and generous legal standard be applied to combatants engaged in internationally recognized struggles for freedom? Are those involved in the bombings who are apprehended best treated as penal perpetrators, political offenders or prisoners of war? This essay sketches the development and philosophy of the new terrorism which is epitomized by suicide bombers. Three distinct phases in the developing international legal regulation of terrorism then are chronicled and critiqued.

## I. THE NEW TERRORISM

The contemporary era has ushered in a "new terrorism."<sup>44</sup> Terrorist groups, in the past, generally possessed coherent ideological platforms and aspirations and selected targets which advanced and symbolized these goals.<sup>45</sup> They were sensitive to the need to maintain political legitimacy and avoided intentionally targeting innocents.<sup>46</sup> The "new terrorists," in

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41. See Martin Kramer, *The Moral Logic of Hizballah*, in *ORIGINS OF TERRORISM* *supra* note 8, at 131, 141-57.

42. David Johnston, *U.S. Hunts 5 Men Seen on Tape, Saying They May Plan Attack*, N.Y. TIMES, Jan. 19, 2002, at A1.

43. Philip Shenon, *Suicide Attacks Certain in U.S., Mueller Warns*, N.Y. TIMES, May 21, 2002, at A1. A Palestinian immigrant was convicted of attempting to ignite a nail-studded bomb in the New York City subway in 1991, which would have been the first suicide bombing in the United States. *Id.* at A16.

44. See IAN O. LESSER ET AL., *COUNTERING THE NEW TERRORISM* (1999) [hereinafter *THE NEW TERRORISM*].

45. Bruce Hoffman, *Terrorism Trends and Prospects*, in *THE NEW TERRORISM*, *supra* note 44, at 7, 8-10.

46. Jenkins, *supra* note 1, at 9. In Northern Ireland, between 1969 and 1993, fewer than twenty percent of the victims of the Irish Republican Army, were Protestant civilians; in Spain, more than sixty percent of the deaths resulting from the activities of the Basque

contrast, are driven by an apocalyptic and millenarian religiously-based worldview which posits that the world must be destroyed in order to cleanse the globe of paganism and impurity.<sup>47</sup> This predisposes contemporary terrorists to develop and to deploy nuclear, biological and chemical weapons (NBC) of mass destruction (WMD),<sup>48</sup> which are increasingly available in the global marketplace.<sup>49</sup> The trend is towards increasingly lethal terrorist incidents and an escalating number of fatalities.<sup>50</sup> This is encouraged by the enhanced technological sophistication of terrorists<sup>51</sup> who increasingly are drawn from the ranks of amateur attackers who lack the capacity to carefully calibrate and to control the consequences of their violent conduct.<sup>52</sup>

The spectacular incident also has become the currency of the contemporary terrorists who are caught in a spiral of ever-more dramatic acts of violence to attract media and public attention and to draw the young and impressionable to their ranks.<sup>53</sup> The tightly organized, hierarchical terrorist organization has been replaced by fluid, decentralized and specialized cells which temporarily cooperate and coalesce around particular projects.<sup>54</sup> The individuals involved often lack clear organizational identities and increasingly fail to claim credit or to offer an explanation for the attack.<sup>55</sup> Terrorists also increasingly transcend national boundaries and rely on technology to coordinate and cooperate in their

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separatist group, ETA, were members of the Spanish security forces. BRUCE HOFFMAN, *INSIDE TERRORISM* 162 (Columbia University Press 1999) [hereinafter *INSIDE TERRORISM*].

47. Hoffman, *supra* note 45, at 19-20.

48. See STERN, *supra* note 27. The first modern religiously motivated terrorist groups did not appear until 1980, accounting for two of the sixty-four active groups. Hoffman, *supra* note 45, at 17. In 1995, these groups accounted for nearly half (26% or 46%) of the fifty-six known terrorist groups. *Id.* Groups motivated in part or in whole by a religious or theological motivation committed ten of the thirteen highly visible terrorist acts committed in 1996. *Id.* Shi'a Islamic groups committed eight percent of all recorded terrorist incidents between 1982 and 1989, but were responsible for nearly thirty percent of deaths during this period. *Id.*

49. See Hoffman, *supra* note 45, at 30.

50. *Id.* at 12-13. Fourteen percent of all incidents in 1991 resulted in terrorist incidents. This rose to twenty-nine percent in 1995. A relatively small number of incidents accounted for these fatalities. These are termed terrorist "spectaculars." *Id.* at 12.

51. *Id.* at 29. Commonly available material, such as fertilizer, diesel fuel and icing sugar are able to inflict enormous damage when deployed by experienced operatives. *Id.*

52. *Id.* at 20-21. These individuals are difficult to profile and detect. See *id.*

53. *Id.* at 13.

54. Jenkins, *supra* note 1, at 11.

55. Hoffman, *supra* note 45, at 9.



operations and to carry out operations across the globe.<sup>56</sup> Terrorist groups also rely on a far-flung, sophisticated and difficult to penetrate international financial networks which involve cooperation with drug cartels and petty criminals and other illegitimate enterprises as well as with legitimate charitable organizations, mining interests, currency traders and businesses.<sup>57</sup>

This new terrorism also is associated with the advent of the "super-terrorist,"<sup>58</sup> individuals characterized by a megalomaniacal desire to leave a historically unprecedented mark of mass devastation and death.<sup>59</sup> These pernicious personalities are distinguished by a fascination with technological innovation and implementation rather than by a strong commitment to a political cause.<sup>60</sup> Destruction rather than doctrine is the animating aspect of their activity.<sup>61</sup> The sadistic "super-terrorist" thus belies the conventional conception of terrorists as reasonable and rationale individuals who have adopted violent tactics in order to achieve limited political objectives.<sup>62</sup>

This new terrorism is typified by Osama Bin Laden.<sup>63</sup> Bin Laden initially centered his calumny on the presence of United States troops on the soil of Saudi Arabia which, in his view, typified the Saudi regime's retreat from the proper Islamic path.<sup>64</sup> He called upon Muslims to expel

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56. See John Arquilla et al., *Networks, Netwar, and Information-Age Terrorism*, in THE NEW TERRORISM, *supra* note at 44.

57. See William F. Wechsler, *Strangling The Hydra: Targeting Al Queda's Finances*, in TERRORISM AND THE NEW WAR, *supra* note 1, at 129.

58. Cf. Ehud Sprinzak, *The Great Superterrorism Scare*, 113 FOR. POL'Y, Fall 1998, at 11.

59. Ehud Sprinzak, *The Lone Gunmen The Global War on Terrorism Faces a New Brand of Enemy*, FOR. POL'Y, Nov.-Dec. 2001, available at [http://www.foreignpolicy.com/issue\\_novdec\\_2001/sprinzakhyper.html](http://www.foreignpolicy.com/issue_novdec_2001/sprinzakhyper.html), at 1 (last visited Feb. 1, 2003).

60. *Id.*

61. *Id.*

62. See Martha Crenshaw, *The Logic of Terrorism: Terrorist Behavior as a Product of Strategic Choice*, in ORIGINS OF TERRORISM, *supra* note 8, at 7. The "new terrorism" was implicitly discussed by George J. Tenet, Director of the Central Intelligence Agency in testimony before the Senate Select Intelligence Committee in February 2002. See *Words of the C.I.A., Chief on Terror*, N.Y. TIMES, Feb. 7, 2002, at A1.

63. See PETER L. BERGEN, *HOLY WAR INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN* (Touchstone Books 2002).

64. See Osama Bin Laden, *Declaration of War Against the Americans Occupying the Land of the Two Holy Places (Expel the Infidels from the Arab Peninsula): A Message from Usama Bin Muhammad Bin Laden to his Muslim Brethren All Over the World Generally and in the Arab Peninsula Specifically* (Aug. 1996), at [http://www.terrorismfiles.org/individuals/declaration\\_of\\_jihad1.html](http://www.terrorismfiles.org/individuals/declaration_of_jihad1.html) (last visited Feb. 1, 2003) [hereinafter *Declaration of War*].

the Americans from the Arab peninsula.<sup>65</sup> In February 1998, Bin Laden launched a global campaign of terror against the United States and her allies.<sup>66</sup> This pronouncement was issued under the sponsorship of the World Islamic Front, a coalition of Bin Laden and four fundamentalist leaders from Egypt, Pakistan and Bangladesh.<sup>67</sup> Their status as self-proclaimed universal spokesmen was further inflated by audaciously characterizing the statement as a *Fatwa*, or a religious edict issued by learned and respected religious scholars.<sup>68</sup> The *Fatwa* also boldly connected the contemporary struggle to the challenges which confronted the founding fathers of Islam and portrayed the current struggle in cosmic and consequential terms.<sup>69</sup>

The *Fatwa* initially referenced a Koranic injunction to “slay the pagans” and cited a statement by the Prophet Muhammad to wage war on those who do not worship the one true God.<sup>70</sup> This was an effort to connect Bin Laden to the Prophet Muhammad who preached Islam to the pagan Arab tribes in Mecca and who then was forced to flee to Medina in 622 A.D.<sup>71</sup> The Prophet returned with his small and poorly appointed band of followers and subdued the pagans and initiated the struggle to spread Islam across the globe.<sup>72</sup> Bin Laden characterized the contemporary struggle as a continuation of this campaign against non-believers and stressed that the Arab Peninsula “has never” since created by God “been stormed by any forces like the crusader armies spreading in it like locusts, eating its riches and wiping out its plantations.”<sup>73</sup> His characterization of America and her European allies as “crusaders” was an obvious reference

65. *Id.* The Saudi Arabian government later expelled Bin Laden from the country. BERGEN, *supra* note 63, at 78-79.

66. World Islamic Front, *God's Order To Kill Americans*, in *EXTREME ISLAM ANTI-AMERICAN PROPAGANDA OF MUSLIM FUNDAMENTALISM* 290 (Adam Parfrey ed. 2001). This is analyzed in Bernard Lewis, *License to Kill*, 77 *FOREIGN AFF.*, Nov.-Dec. 1968, at 14. See also Doran, *supra* note 6, at 22.

67. World Islamic Front, *supra* note 66, at 290. The signatories were Osama Bin Laden, Ayman al-Zawahiri, Amir of the Jihad Group in Egypt; Abu-Yasir Rifa'I Ahmad Taha of the Egyptian Islamic Group; Shaykh Mir Hamzah, Secretary of the Jamiat-ul-Ulema-E-Pakistan; and Fazlur Rahman, Amir of the Jihad Movement in Bangladesh. *Id.*

68. *Id.* See Lewis, *supra* note 66, at 15.

69. World Islamic Front, *supra* note 66, at 290.

70. *Id.*

71. Doran, *supra* note 6, at 33-34.

72. *Id.*

73. World Islamic Front, *supra* note 66, at 290. The statement that this was the worst development in Arabia minimized a number of catastrophic events that occurred over the past 1,300 years. In 1258, the Mongol leader Hulegu ravished Baghdad, killed the caliph and massacred hundreds of thousands. Doran, *supra* note 6, at 37.

to the Christian campaigns of Middle Eastern conquest during the eleventh, twelfth and thirteenth centuries which Bin Laden considered to be continuing into the contemporary era.<sup>74</sup>

The *Fatwa* enumerated three grievances. First, the positioning of American troops in Saudi Arabia, home of two of the holiest Islamic sites.<sup>75</sup> Second, the bombing and continuing sanctions imposed on Iraq, which Bin Laden alleged resulted in the death of over one million people.<sup>76</sup> In addition to these alleged religious and economic transgressions, Bin Laden charged that American policy advanced the interests of the Jewish State of Israel while demonstrating little concern over the occupation of Jerusalem and the murder of Muslims.<sup>77</sup> The *Fatwa* asserted that the United States' commitment to the survival and sustenance of Israel was the rationale for America's continuing effort to fragment and weaken Iraq, Saudi Arabia, Egypt and Sudan.<sup>78</sup> Bin Laden denounced the United States' "crimes and sins" as a declaration of war on God and the Prophet Muhammad and claimed that Muslims possessed a duty to fight against the infidel invaders.<sup>79</sup>

Muslims thus were enjoined to "kill" Americans and their allies in order to liberate the holy lands.<sup>80</sup> The *Fatwa* urged the followers of Islam to "fight the pagans" until "there is no more tumult or oppression" and "justice and faith" prevail.<sup>81</sup> The United States, in Bin Laden's view, was not only benighted, it was "Satan," the tempter and corrupter of culture.<sup>82</sup> Martyrdom and a preferred place in heaven awaited those who embraced the defense of Islam and complied with "God's order to kill the Americans and plunder their money wherever and whenever they find it."<sup>83</sup>

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74. Lewis, *supra* note 66, at 17-18.

75. World Islamic Front, *supra* note 66, at 290. In 641, the "Caliph Umar decreed that Jews and Christians should be removed from Arabia" pursuant to the Prophet's injunction on the Prophet's deathbed that there should not be "two religions in Arabia." Lewis, *supra* note 66, at 16.

76. World Islamic Front, *supra* note 66, at 291. Bin Laden alleged that despite these fatalities that the Americans are once again trying to repeat the horrific massacres. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 292.

82. World Islamic Front, *supra* note 66. See Doran, *supra* note 6, at 36.

83. World Islamic Front, *supra* note 66.

Bin Laden later expressed gratitude to God for the success of the September 11, 2002 attack on the United States.<sup>84</sup> He proclaimed that this was retribution for the humiliation suffered by the Muslim nation over the past eighty years.<sup>85</sup> Bin Laden dismissed those Muslims who continued to support the United States as “hypocrites” and “apostates,” an allusion to individuals who betrayed the Islamic religion.<sup>86</sup> The statement pointed out that the United States, while professing to be opposed to terrorism, dropped a nuclear bomb on Japan which exterminated hundreds of thousands; and also killed a million people in Iraq.<sup>87</sup> Yet, Bin Laden noted that the Americans complained when “a few more than 10 were killed in Nairobi and Dar es Salaam [capitals of Kenya and Tanzania, where the American Embassies were bombed in 1998].”<sup>88</sup> He concluded that America now stands weak, vulnerable and reviled by the world.<sup>89</sup> The “blessed” action of September 11, 2002 against America was carried out by nineteen young men; a clear reference to the Prophet Muhammad and his small band of followers who, despite their youth and limited resources, vanquished the mighty forces of Mecca.<sup>90</sup>

The world, according to Bin Laden, stands divided between faith and infidelity and Muslims “must rise” to defend the faith.<sup>91</sup> He vowed that “America will not live in peace before peace reigns in Palestine, and before all the army of infidels depart the land of Muhammad, peace be upon him.”<sup>92</sup>

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84. *Bin Laden's Statement: 'The Sword Fell,'* N.Y. TIMES, Oct. 8, 2001, at B7 [hereinafter *The Sword*].

85. *Id.* The eighty year reference appears to refer to the dismantling of the Ottoman Empire. See Doran, *supra* note 6, at 49.

86. *The Sword*, *supra* note 84. Hypocrites refers to those who embraced Islam and then deserted the Prophet Muhammad during battle. Those who desert the Islam faith are apostates—a dire offense against Islam. See Doran, *supra* note 66, at 34.

87. *The Sword*, *supra* note 84.

88. *Id.* Bin Laden later argued that only seven grams of explosives were needed to kill an individual, but that the United States utilized bombs weighing seven million grams during the Afghan campaign, attesting to America's hatred of the Taliban and Muslims. Yet, when the United States embassy in Nairobi was blown apart with less than two tons, the United States alleged that it was a terrorist act while “it unscrupulously used two bombs of seven million grams each.” *'God Willing; America's End Is Near,'* N.Y. TIMES, Dec. 28, 2001, at B2 (statement of Osama Bin Laden).

89. *The Sword*, *supra* note 84.

90. *Id.* See Doran, *supra* note 6, at 34.

91. *The Sword*, *supra* note 84.

92. *Id.*

Bin Laden's grievances are a manifestation of what he views as a clash of civilizations which threatens to extinguish Islam.<sup>93</sup> The Muslim world, according to Bin Laden, is in the death grip of European civilization and culture and there can be neither negotiation nor compromise; murder, maiming and mayhem are acts of self-defense rather than terrorism.<sup>94</sup> As for those who contend that these operations "are not permissible," they are "expressing the wishes of the tyrants, the United States and its agents."<sup>95</sup> Bin Laden proclaimed that Muslims possessed a duty to defend themselves by acquiring weapons of mass destruction.<sup>96</sup>

In the end, Bin Laden's is a utopian philosophy with little thought devoted to the map of the future; he contended that only Afghanistan under the rule of the Taliban was a truly Islamic State.<sup>97</sup> There is little distinction in his thought other than the advocacy of a global *Jihad* against the United States as a tactic for dividing the Islamic and Western worlds and weakening and ultimately overthrowing existing Middle Eastern regimes.<sup>98</sup> The psychology profile of Osama Bin Laden would prove too terrifyingly typical of contemporary terrorists.

## II. SUICIDE BOMBERS; DIVINE MARTYRS

The fundamentalist Shi'ite Muslim organization, Hizballah, or the party of God, launched suicide attacks which drove the United States, France and Israel out of Lebanon.<sup>99</sup> These attacks included the suicidal bombing of the American embassy in Beirut, in April 1983, which left 80 dead and 142 wounded; and the assault on the United States Marine installation in Beirut, in October 1983, which resulted in 273 dead and 81 wounded along with the concurrent attack on the headquarters of the

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93. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATION AND THE REMAKING OF WORLD ORDER* (1996).

94. See *The Sword*, *supra* note 84.

95. *Id.*

96. See *Osama Bin Laden V. The U.S.; Edicts And Statements*, at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/edicts.html> (PBS Frontline, Hunting Bin Laden, December 23, 1998 interview with Time Magazine).

97. See Hamid Mir, *Osama Claims He has Nukes: If U.S. Uses N-arms It Will Get Same Response*, Nov. 10, 2002, at <http://www.dawn.com/2001/11/10/top1.htm>.

98. See GILLES KEPEL, *JIHAD: THE TRAIL OF POLITICAL ISLAM* (Anthony F. Roberts trans., 2000).

99. See Merari, *supra* note 8, at 192. The Japanese kamikaze pilots attacked American ships during World War II. See EDWIN P. HOYT, *THE KAMIKAZES SUICIDE SQUADRONS OF WORLD WAR II* (1983).

French paratroopers with the attendant killing of 58 and wounding of 15.<sup>100</sup> This tactic subsequently was adopted by Shi'ite and Syrian nationalist groups.<sup>101</sup>

The spiritual leader of Hizballah, Ayatollah Sayyid Muhammad Husayn Fadlallah,<sup>102</sup> found suicide bombing problematic in light of the Islamic prohibition against suicide.<sup>103</sup> Others expressed concern that this terror tactic diverted attention from the political purpose underlying the attacks and invited speculation as to the possibly perverted psychological profile of Islamic militants.<sup>104</sup>

In 1985, Fadlallah endorsed suicide bombing while avoiding the issuance of a formal *Fatwa*.<sup>105</sup> He proclaimed that Muslims lacked the resources to confront the massive and sophisticated forces of the United States and Israel and were justified in utilizing "primitive and unconventional means" in self-defense.<sup>106</sup> These bombings, when undertaken in defense of Islam, constituted *Jihad*, or religious struggle, rather than terrorism.<sup>107</sup> Fadlallah was not content to base his rationale solely on exigent circumstances. He noted that suicide bombers were indistinguishable from armed combatants who confronted overwhelming force and were certain to die after killing enemy forces.<sup>108</sup> Others extended Fadlallah's analysis and proclaimed that those who acted to protect and to preserve Islam would be rewarded in paradise.<sup>109</sup> Some continued to insist that recognition of martyrdom required a formal legal ruling in a *Fatwa*.<sup>110</sup>

The evacuation of Western forces led Fadlallah to qualify his defense of suicide bombing.<sup>111</sup> He ruled that these operations could only justified

100. Merari, *supra* note 8, at 203. A November 1983 attack on the Israeli government building in Tyre left eighty-eight dead and sixty-nine wounded and an attack on the American embassy in Kuwait, in December 1983, resulted in four dead and fifteen wounded. *Id.* Thirty-one cases of suicidal bombing occurred between 1983 and 1986. In two additional instances, the perpetrators were caught or escaped before conducting the suicide mission. *Id.*

101. *Id.* at 204. Only seven of the thirty-one incidents were perpetrated by fundamentalist Shi'ites. *Id.*

102. Martin Kramer, *The Moral Logic of Hizballah*, in *ORIGINS OF TERRORISM*, *supra* note 8, at 131, 139.

103. *Id.* at 142.

104. *Id.* at 143.

105. *Id.*

106. *Id.* at 145.

107. *Id.*

108. Kramer, *supra* note 102, at 145.

109. *Id.* at 147.

110. *Id.*

111. *Id.* at 148.

where compelling military or political purposes justified the sacrifice of human life and injury and damage to property.<sup>112</sup> Suicide bombing could not be utilized to achieve modest or limited aspirations; there must be proportionality between the death of the bombers and the aims of the mission.<sup>113</sup> These attacks were abandoned by 1985 and were viewed as a historical idiosyncrasy which was unlikely to be repeated, however, Lebanese clerics warned that this technique would once again be utilized in the event of renewed Western aggression.<sup>114</sup>

Roughly twenty-five years later, suicide bombing was adopted as a tactic by Palestinians militants.<sup>115</sup> The death toll from this terror tactic rose from 1 in 2000 to 88 in 2001 and to 176 during the first three months of 2002.<sup>116</sup> As of March 30, 2002, there had been seventy suicide attacks during the previous twenty-one months.<sup>117</sup> These bombings became increasingly lethal as crudely devised munitions comprised of fertilizer and sugar<sup>118</sup> were replaced by sophisticated instruments composed of military-grade explosives which contained longer and better-packed nails.<sup>119</sup> A March 27, 2002 attack in the seaside resort of Netanya over the Jewish Passover holiday killed twenty-six and nearly destroyed the dining room of a hotel while an assault in Haifa four days later killed fifteen and blew the roof off a restaurant.<sup>120</sup> These attacks were carried out by various Palestinian political factions which viewed their willingness to carry out

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112. *Id.*

113. *Id.*

114. Kramer, *supra* note 102, at 149.

115. See Serge Schmemmann, *In the Arabs' Struggle Against Israel, There Are Many Players*, N.Y. TIMES, March 30, 2002, at A6.

116. James Bennet, *Jerusalem Toll*, June 19, 2002, at A1.

117. John Kifner & Joel Greenberg, *A Morning Commute Is Transformed Into a Shattering Blood Bath*, N.Y. TIMES, June 19, 2002, at A10. This presumably does not include individuals apprehended prior to an attack. Israel reported that there were 140 "would-be suicide bombers" in custody. John Kifner, *Israeli Court Upholds Blowing Up Houses*, N.Y. TIMES, Aug. 7, 2002, at A6. Another report determined that from 1993 until late September 2000, there were sixty-one attempted and successful suicide attacks while from the late September until mid-June, 2002, there were 116 attempted bombings and bombings. James Bennet, *Rash of New Suicide Bombers Showing No Pattern or Ties*, N.Y. TIMES, June 21, 2002, at A1.

118. Schmemmann, *supra* note 115.

119. Douglas Frantz, *More Firepower For Palestinians*, N.Y. TIMES, Apr. 7, 2002, at A1. There was some traces of toxic chemical, possibly a pesticide or rat poison. Clyde Haberman, *Toxic Traces After Bombing Add to Jitters Of Israelis*, N.Y. TIMES, Dec. 12, 2001, at A11.

120. Frantz, *supra* note 119, at A12.

suicide attacks as the touchstone of their credibility and political commitment.<sup>121</sup>

The bombings in areas crammed with civilians were particularly devastating: In June 2002, a suicide attacker ignited a bomb packed with ball bearings and metal marbles on a crowded rush hour Jerusalem bus.<sup>122</sup> The explosive peeled back the top of the bus and left the vehicle on its side, burned and blackened.<sup>123</sup> The *New York Times* reported that the bodies of three headless women and student backpacks were strewn in seats, arms and legs were scattered around the bus and blood stained the road under the back door.<sup>124</sup> Observers described an explosion, screaming, shattered glass and witnessing bodies flung in the air.<sup>125</sup> An earlier January attack in Jerusalem at the intersection of George and Jaffa Street, the site of eight bombings or shootings in the previous sixteen months, left 113 wounded.<sup>126</sup> A police officer reported that he “saw a body with a leg missing. There was also a head, which did not belong to that body . . . [the body] was in flames.”<sup>127</sup> In early December 2002, two Palestinians ignited bombs at either end of a pedestrian mall, killing at least ten and wounding countless others.<sup>128</sup> These were the third and fourth explosions within a week.<sup>129</sup> This area was the target of a renewed suicide attack, on August 9, 2002, when a bomb was ignited at a nearby restaurant.<sup>130</sup> A witness recounted hearing a loud boom and peering out the window at people “flying through the air.”<sup>131</sup> The *New York Times* reported that bombs packed with nuts and screws scattered “limbs and chunks of flesh across the paving stones, amid fragmented glass, shredded clothing, and mannequins from a women’s clothing store. The air smelled of burned flesh and blood was spattered more than 20 feet up, above the shattered windows of a shop selling postcards and shirts.”<sup>132</sup> One witness reported

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121. Schmemmann, *supra* note 115.

122. Kifner & Greenberg, *supra* note 117.

123. *Id.*

124. *Id.*

125. *Id.*

126. James Bennet, *A Sept. 11 Survivor Is Hurt as Man Dies in Jerusalem Attack*, N.Y. TIMES, Jan. 28, 2002, at A1.

127. *Id.*

128. James Bennet & Joel Greenberg, *Scores Are Hurt-Sharon Plans to Cut His U.S. Trip Short*, N.Y. TIMES, Dec. 2, 2001, at A1.

129. *Id.* at A10.

130. *Id.*

131. *Id.*

132. *Id.*



“people laying on the floor, gushing—people without feet.”<sup>133</sup> Another saw “a lot of blood, everyone was screaming. I saw three people with their heads open.”<sup>134</sup> On March 2, 2002, a suicide bomber attacked an ultra-orthodox Jerusalem neighborhood killing at least nine individuals as they walked home from evening services.<sup>135</sup> A witness ran through the streets searching for her son and reported seeing “a huge ball of fire and horrific black smoke . . . [she witnessed] sights unimaginable in their horror,” including the charred corpse of an infant and the body of another child who lost a portion of a leg.<sup>136</sup>

In April 2002, Suha al-Taweel Arafat, who is married to Yasar Arafat, head of the Palestinian Authority, endorsed suicide attacks as a legitimate weapon of resistance against Israeli occupation.<sup>137</sup> Arafat proclaimed that she would consider it an honor to sacrifice a son to the Palestinian cause.<sup>138</sup> Sheik Muhammad Sayyed Tantawi, a leading religious scholar at the University of Cairo, stated that carrying out suicide attacks was “an Islamic commandment until the people of Palestine regain their land and cause the cruel Israeli aggression to retreat.”<sup>139</sup> Dr. Ahmad Al Tayyeb, Egypt’s highest religious jurist, declared that the “proliferation of suicide attacks” which “strike horror into the hearts of the enemies of Allah” is the solution to Israeli terror.<sup>140</sup> Abdel Aziz al-Rantisi, a leader of the militant, fundamentalist Palestinian Hamas faction, warned that so long as the Israelis were “assassinating our people, our women and our children” that they would “pay a price for every crime they commit” in “Tel Aviv or Jerusalem or anywhere else in Israel.”<sup>141</sup>

Boaz Ganor, Executive Director of the Institute for Counter-Terrorism in Israel, identified the underlying motives of suicide bombers as the fulfillment of the theological command of *Jihad*, or “Holy War,”<sup>142</sup>

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133. *Id.*

134. Bennet & Greenberg, *supra* note 128.

135. James Bennet, *In Jerusalem, Suicide Bomber Kills at Least 9*, N.Y. TIMES, Mar. 3, 2002, at A1.

136. *Id.* at A10.

137. Judith Miller, *In Interview, Arafat's Wife Praises Suicide Bombings*, N.Y. TIMES, Apr. 15, 2002, at A1.

138. *Id.*

139. *Id.* He later clarified that suicide bombing only was permissible when directed against soldiers. *Id.*

140. *Id.*

141. Tim Golden, *Fear and Rage in Gaza and Threats by Hamas: Public Braces for Possible Israeli Attack*, N.Y. TIMES, May 20, 2002, at A8.

142. Boaz Ganor, *Suicide Terrorism: an Overview* (Feb. 15, 2000), at <http://www.ict.org.il/articles/articleDet.cfm?articleid=128> (last visited Jan. 21, 2003).

and explained that the bombers were considered martyrs (*shaheed*) who were provided an eternal life in paradise, permission to view the face of Allah, the avid attention of seventy-two black-eyed virgins and the privilege to intervene on behalf of seventy of his relatives on the Day of Judgment.<sup>143</sup> Another member of the Institute, Reuven Paz, noted that these themes appeared in the handwritten letter written by Muhammad Atta to several of his fellow hijackers.<sup>144</sup> Atta wrote that “paradise has been decorated for you with the best of its decorations and ornaments and the most beautiful women are calling upon you come oh you the commander with the order of God and they have dressed the best their attire [sic].”<sup>145</sup> Atta reminded the other terrorists that this was a festive occasion since “the time between you and your marriage is only a few moments” and that God will reward you by insuring that your future is spent “with the most beautiful women in paradise.”<sup>146</sup> Atta writes that it is time to “clean” and to “purify” your heart and to “forget completely a thing which is called worldly-life for the time for playing has past and the true promise has come, how much did we waste from our years of time shouldn’t we utilize these hours to offer obedience and closeness.”<sup>147</sup>

Who are these suicide bombers? Israeli psychologist Aerial Merari, in the early 1980’s, studied thirty-six Lebanese suicide bombers and concluded that culture and religion were less important than personality.<sup>148</sup> Merari concluded that terrorist ideology offered an “excuse” for these young men who were inclined to commit suicide and served to legitimize their self-destructive act.<sup>149</sup> He argued that a charismatic political or religious leader, at most, played a secondary role in influencing individuals to undertake suicidal bombings.<sup>150</sup>

Boaz Ganor summarized the research on Hamas suicide bombers and stated that the basic profile was a young, unmarried and unemployed male from an impoverished family.<sup>151</sup> They typically were high school educated, dedicated and disciplined Muslims and expressed a desire to revenge the

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143. *Id.*

144. See Reuven Paz, *Programmed Terrorist; An Analysis of the Letter Left Behind by the September 11 Hijackers* (Dec. 13, 2001), at <http://www.ict.org.il/articles/articledet.cfm?articleid=419>.

145. *Id.*

146. *Id.*

147. *Id.* (translation of hijackers’ letter).

148. Merari, *supra* note 8, at 206.

149. *Id.*

150. *Id.* at 207.

151. Ganor, *supra* note 142.

injury or death of a close friend or relative.<sup>152</sup> Ganor argued that the decision to undertake a suicide bombing was not purely a product of an individual's personality.<sup>153</sup> Bombers were selected by religious teachers and others who were well-acquainted with their background.<sup>154</sup> Ganor found that these putative suicide bombers then underwent a lengthy process of training and even were placed in graves for several hours in order to adjust to the acceptance of death.<sup>155</sup> As the day of doom approached, the *shaheed* executed a will in which he admonished his family not to mourn since he was destined for life with Allah.<sup>156</sup> A videocassette also was recorded for purposes of propaganda.<sup>157</sup> Walter Laqueur, a leading terrorism expert, noted that suicide bombing particularly appealed to individuals with absolute confidence and certainty in their cause and a rigid value structure who lacked critical judgment.<sup>158</sup>

Palestinian therapist Dr. Eyad Sarraj contested that suicide bombing could not be understood without appreciating the plight of Palestinians.<sup>159</sup> He described the plight of Palestinians who were forced to work in jobs that Israelis rejected, leaving home early in the morning in order to run a gauntlet of surveillance and checkpoints and returning home only to rise early once again in the next morning.<sup>160</sup> In short, Sarraj described the Palestinians as the "slaves of our enemy" who were "building their homes on our villages" while "we clean their streets."<sup>161</sup> They were subjected to the humiliation of being forced to watch in silence the "torture of your friends and the humiliation of your father."<sup>162</sup> Dr. Sarraj queried, "[n]ow do you understand why we have turned into suicide killers?"<sup>163</sup>

Nasra Hassan spent three years interviewing Palestinian militants and starkly challenged the conventional wisdom that suicide bombers were

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Ganor, *supra* note 142.

158. LAQUEUR, *supra* note 7, at 99. He writes that suicide bombers are "deeply religious but rather primitive, possessing at best an average intelligence and imagination." *Id.* at 142.

159. Eyad Sarraj, *Why We Have Become Suicide Bombers*, at <http://missionislam.com/islam/conissue/Palestine.htm> (last visited Jan. 21, 2003).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

deprived and disenfranchised.<sup>164</sup> She found that they ranged from eighteen to thirty-eight and generally were educated, economically stable and rational and normal.<sup>165</sup> Most were deeply religious and well-versed in the Koran.<sup>166</sup> Hassan confirmed that the bombers were subjected to lengthy periods of preparation and ideological indoctrination and reinforcement from other trainees and their instructors.<sup>167</sup> As the day of doom approached, the members of these secret “martyrdom cells” were feted as “living martyrs” and recorded and viewed their last testaments.<sup>168</sup> The bombers followed an established pattern of rituals as they embarked on their missions.<sup>169</sup> The instructor intoned, “[m]ay Allah be with you, may Allah give you success so that you achieve Paradise.”<sup>170</sup> The future martyr then replied that “we will meet in Paradise.”<sup>171</sup> As the martyr detonated his bomb, he intoned “Allah is great.<sup>172</sup> All praise to Him.”<sup>173</sup> His sacrifice later was praised in sermons, calendars, leaflets, posters, music, graffiti and was celebrated by the family and sponsoring organization.<sup>174</sup>

Events, however, soon outpaced Hassan’s analysis as diverse and seemingly politically unsophisticated individuals were drawn to martyrdom.<sup>175</sup> The culture of martyrdom now was attracting males as young as fourteen and fifteen as well as young people from relatively comfortable families,<sup>176</sup> including a growing number of aspiring suicide bombers from the streets of Egypt.<sup>177</sup> Eighteen-year-old Zaydan Zaydan, who unsuccessfully attempted to ignite a bomb, described his lack of education, series of modest low-end jobs and the depressed lifestyle he

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164. Nasra Hassan, *Letter From Gaza; An Arsenal Of Believers*, THE NEW YORKER, Nov. 19, 2001, at 36.

165. *Id.* at 38.

166. *Id.*

167. *Id.*

168. *Id.* at 41.

169. *Id.*

170. Hassan, *supra* note 164, at 41.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See Todd S. Purdum, *What Do You Mean ‘Terrorist?’*, N.Y. TIMES, Apr. 7, 2002, at D1.

176. See David Rohde, *Passions Inflamed, Gaza Teenagers Die In Suicidal Attacks*, N.Y. TIMES, Apr. 25, 2002, at A1. See also Nicholas D. Kristof, *Kids With Bombs*, N.Y. TIMES, Apr. 5, 2002, at A23.

177. See Tim Golden, *Young Egyptians Hearing Call of ‘Martyrdom,’* N.Y. TIMES, Apr. 26, 2002, at A1.

lived before turning to religion.<sup>178</sup> Following the Israeli incursion into the Jenin refugee camp, in March 2002, Zaydan volunteered as a martyr and the next day was equipped with a thirty pound bomb and was issued brief instructions on igniting the munitions and almost immediately was sent into Israel.<sup>179</sup> Daoud Abu Sway, a forty-six-year-old father of eight in Bethlehem, defied the image of the suicide bomber.<sup>180</sup> He prematurely ignited the explosives strapped to his body while crossing a street in Jerusalem proximate to a luxury hotel.<sup>181</sup> Daoud was driven to despair over the year long unemployment he had experienced as a result of the difficulty in circumnavigating Israeli checkpoints.<sup>182</sup> He often talked of dying as a martyr and left the house one morning and never returned.<sup>183</sup>

In February 2000, twenty-eight year-old Wafa Idris was identified as the first female suicide bomber to strike within Israel.<sup>184</sup> A divorced volunteer medic with the Palestinian Red Crescent Society, she appeared to have been angered by the suffering of civilians.<sup>185</sup> Darin Abu Eisheh ignited a bomb in March 2002 and left a note proclaiming that she was following the example of Wafa Idris.<sup>186</sup> Darin had earned a certificate with academic distinction in English language and literature and videotaped a message which was released following her death stating that every Palestinian woman "will give birth to an army of suicide attackers, even if he [the Israelis] tried to kill them, while still in their mother's wombs, shooting them at the checkpoints of death."<sup>187</sup> Her brother reflected that "when you lose hope . . . you are not worried about your life."<sup>188</sup> On April 5, 2002, Ayat al-Akhras, eighteen, ignited a bomb in a Jerusalem supermarket.<sup>189</sup> She had been raised in the Dheisheh refugee camp outside

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178. See James Bennet, *In Israeli Bed, Tells of 'Love of Martyrdom,'* N.Y. TIMES, June 8, 2002, at A1.

179. *Id.* at A8.

180. Joel Greenberg, *The Suicide Bomber; A Family Is Left 'Sad and Happy' by a Violent Death,* N.Y. TIMES, Dec. 7, 2001, at A16.

181. *Id.*

182. *Id.*

183. *Id.*

184. James Bennet, *Arab Press Glorifies Bomber as Heroine,* N.Y. TIMES, Feb. 11, 2002, at A8.

185. *Id.*

186. Joel Greenberg, *Portrait of an Angry Young Arab Woman,* N.Y. TIMES, Mar. 1, 2002, at A10.

187. *Id.*

188. *Id.*

189. Joel Greenberg, *2 Girls, Divided by War, Joined in Carnage,* N.Y. TIMES, Apr. 5, 2002, at A1.

of Bethlehem and was to study journalism and marry.<sup>190</sup> Ayat al-Akhras adhered to a routine of study and housework and, according to her family, was seemingly unaffected by the Israeli incursions.<sup>191</sup> As of June, 2002, a total of eight female suicide bombers, including the mother of a three-year-old, had engaged in suicide bombing.<sup>192</sup>

Analysts noted that suicide bombing increasingly was being carried out by secular groups.<sup>193</sup> Dr. Iyad Sarraj observed that a new culture of death and despair was being created in which young people were compensating for the powerlessness and humiliation of their parents by engaging in suicide bombing.<sup>194</sup> This technique also conveyed the despair and desperation of the Palestinian population.<sup>195</sup> The West Bank resistance was fragmenting into small autonomous cells with distinct leaders and ideologies.<sup>196</sup> As terrorists and cells were eliminated, they were replaced by even more virulently violent groups.<sup>197</sup> Dr. Nizar Rayan, a Hamas leader in the Gaza Strip explained that the aim “is to show the world that we no longer love this life without our land.”<sup>198</sup> Salah Othman, a famed Hamas fighter, explained that underlying suicide bombing was the realization that this life was not worth the “wing of a mosquito” and could not be compared to the “afterlife;” it is a mere “drop in the ocean.”<sup>199</sup>

In June 2002, Israeli forces discovered a photograph of a toddler wearing a belt studded with what resembled explosives in the family album of a senior Hamas militant.<sup>200</sup> The child was dressed in the military fatigues and red bandanna favored by Hamas fighters.<sup>201</sup> Israeli papers printed the photograph under banner headlines such as “Terror in Diapers” and

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190. *Id.* at A10. Ayat al-Akhras' bomb killed a seventeen year-old Israeli, Rachel Levy. President Bush stated that this evidenced that “the future itself is dying, the future of the Palestinian people and the future of the Israeli people.” *Id.* at A1.

191. *Id.* at A10.

192. Bennet, *supra* note 117. This article centers on a twenty-year-old female suicide bomber, Arien Ahmed. *Id.*

193. *Id.* at A10.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. Bennet, *supra* note 117, at A10.

199. *Id.*

200. Ian Fisher, *Trying to Roust Militants, Israelis Blast Palestinian Building in Hebron*, N.Y. TIMES, June 29, 2002, at A6.

201. *Id.*

“Born to Kill.”<sup>202</sup> Ghassan Khatib, the Palestinian labor minister, retorted that in the event that Israel intended the photo to convey that Palestinians were teaching their children to hate and to attack Israel that “I just want to say that is correct.”<sup>203</sup> The next day the United States announced that the Al Aksa Martyrs Brigades would be classified as a terrorist organization.<sup>204</sup> A spokesperson for the Al Aksa Brigade warned that there were a myriad of young people eager to serve as martyrs and that it was an “honor” to be singled out by the United States, “the greatest sponsor of terrorism in the world.”<sup>205</sup>

In reaction to the spread of suicide bombings, moderate Palestinian politicians began indirectly to question this tactic by raising questions concerning the practicality of the practice.<sup>206</sup> Fifty-five Palestinian intellectuals, including prominent Ramallah legislator Hanan Ashrawi, published an appeal on June 19, 2002 in the Arab-language newspaper Al Quds calling for a reassessment of military operations targeting civilians in Israel, conspicuously omitting the West Bank or Gaza.<sup>207</sup> The statement urged political groups “to stop pushing our youth to carry out these operations.”<sup>208</sup> The appeal did not directly condemn or explicitly refer to suicide bombing, but argued that the attacks were not “producing any results except confirming the hatred, malice and loathing between the two peoples” and endangering “the possibility that the two peoples will live side by side in peace in two neighboring states.”<sup>209</sup> Hanan Ashrawai later clarified that her opposition to suicide bombings in Israeli was based on political practicality rather than morality since armed attacks on the Israelis undoubtedly were ethically justified so long as they engaged in reprehensible practices such as imposition of curfews on the West Bank.<sup>210</sup>

The day the advertisement appeared, a suicide bomber killed six at a Jerusalem bus stop.<sup>211</sup> This was followed by the publication of a statement with 150 signatures advocating total and unremitting resistance through

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202. *Id.*

203. *Id.*

204. Joel Brinkley, *Palestinian Group Says It Will Increase Bombings*, N.Y. TIMES, Mar. 23, 2002, at A6.

205. *Id.*

206. James Bennet, *Gingerly, Arabs Question Suicide Bombings*, N.Y. TIMES, July 3, 2002, at A1.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at A6.

211. *Id.* at A1. The statement condemning attacks continued to appear in Al Quds for several days and attracted over five hundred supporters. Bennet, *supra* note 206, at A1.

armed force to Israel which vilified those Palestinians whom they alleged had declared war on the Palestinian resistance.<sup>212</sup> Polls indicated that the original statement limiting suicide bombing to Gaza and the West Bank was supported by ninety percent of Palestinians while support was declining for attacks within Israel.<sup>213</sup>

As of April 19, 2002, the Israeli government listed 319 people who had been killed in terrorist attacks over the past eight months.<sup>214</sup> The state social security agency was providing benefits to over 2,000 direct relatives of the deceased.<sup>215</sup> One mother whose twenty-year old son had been killed in a suicide bomb attack described her unending grief and the deep scar left by the killing of her child: "My joy in life has died. I am only a body walking. I don't understand how a mother can continue to live like this."<sup>216</sup> Families also suffer from post-traumatic stress and have difficulty eating, sleeping, leaving home and fear for their other children.<sup>217</sup> The State of Israel honors the victims of suicide attacks as having died in service to the country.<sup>218</sup> However, this provides little consolation to the families which continue to view the deaths of their loved ones as senseless, live in dread of another assault and possess little optimism for the future.<sup>219</sup>

Many more have been wounded than have died.<sup>220</sup> These victims have lost hands, legs, portions of their heads and have suffered paralysis from

212. Bennet, *supra* note 206, at A8. President George W. Bush rejected the claim that suicide bombers were martyrs and labeled them as "murderers." *Id.*

213. *Id.* Various factions, on several occasions, pledged to limit bombings to Gaza and the West Bank. See C.J. Chivers, *Palestinian Militant Group Says It Will Limit Bombings*, N.Y. TIMES, Apr. 23, 2002, at A13. In December 2001, Yasir Arafat called for a halt of suicide bombing and suicide attacks on Israel. Clyde Haberman, *Arafat Demands Halt In Attacks Against Israelis*, N.Y. TIMES, Dec. 17, 2001, at A1. This, like eight previous ceasefire initiatives, proved to have limited impact. See James Bennett, *Arafat Halts Crackdown; Israel Breaks Links to Him*, N.Y. TIMES, Dec. 14, 2001, at A18. Hamas and Islamic Jihad refused to agree to end suicide bombing in Israel. John Kifner, *Militants Reject Policy on Attacks in Israel*, N.Y. TIMES, Aug. 14, at A10.

214. Joel Brinkley, *Israelis Mourn Their Dead In Long Search for Solace*, N.Y. TIMES, Apr. 19, 2002, at A1. See *infra* note 220 (for more recent estimates of the number killed).

215. *Id.*

216. *Id.*

217. *Id.* at A11.

218. *Id.*

219. *Id.* at 214.

220. Ian Fisher, *For Israelis Wounded in Bomb Attacks, Recovery is a Battle*, N.Y. TIMES, July 8, 2002, at A6. More than 4,000 Israelis have been injured since the conflict was renewed in September 2000, almost ten times the estimate of 550 who have been killed. Roughly 1,450 Palestinians have been killed and 35,700 wounded. There is a debate concerning relative suffering. The Palestinians contend that they are being killed and wounded in greater numbers while engaged in the laudable task of resisting occupation; the



the shrapnel and nails lodged in their brains.<sup>221</sup> The injuries have been exacerbated by blast trauma caused by waves from the explosion which reverberate violently through the human body collapsing lungs, breaking small bones and destroying internal organs.<sup>222</sup> Blunt trauma and penetrating trauma also can result in those instances in which victims are thrown against a hard object and when a foreign object enters the human body.<sup>223</sup> Suicide bombs often are mixed with rat poison, an anticoagulant, which causes victims to bleed to death.<sup>224</sup> These injuries are accentuated by the mental trauma resulting from the fact that the victims' sense of security in the safety of everyday affairs is shaken and by the fact that they often harbor guilt over having survived.<sup>225</sup> The rehabilitation process demands support and strength from family and friends and requires enormous medical resources.<sup>226</sup> One neurologist was pleased that an educated young man who had been wounded in the brain and had suffered permanent mental damage was now able to work at a fast food chain.<sup>227</sup>

The result is a region in which Jews as well as Arabs constantly feel at risk and vulnerable.<sup>228</sup> One bus driver commented to the *New York Times* that an attack could occur at any time or place, whether in a supermarket or a restaurant or when walking down the street.<sup>229</sup> He noted that there was a danger in all jobs and that he would not spend his life fleeing for apparent safety.<sup>230</sup>

The Israelis have joined the Palestinians in a cycle of revenge which has led Israel to resort to various understandable, but questionable tactics.<sup>231</sup> The Israelis have targeted the organizations that support suicide

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Israelis respond that more of their victims are non-combatants, particularly women and children who are intentionally targeted. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Fisher, *supra* note 220.

227. *Id.*

228. See Joel Greenberg, *He Was Arab and Israeli and Now a Victim Too*, N.Y. TIMES, June 20, 2002, at A13.

229. Joel Greenberg, *Bombs Don't Deter Vigilant Jerusalem Bus Drivers*, N.Y. TIMES, June 23, 2002, at A10.

230. *Id.*

231. See generally *Q & A; Punishing a Terrorist by Showing Him His Victim's Humanity*, N.Y. TIMES, Apr. 6, 2002, at A19 (Susan Sachs interview with Laura Blumenfeld, author of *Revenge: A Story of Hope*).

bombers<sup>232</sup> and have engaged in selective assassinations<sup>233</sup> and the arrest of leaders and militants,<sup>234</sup> the destruction of bomb factories and infrastructures of terror,<sup>235</sup> curfews,<sup>236</sup> travel restrictions,<sup>237</sup> deportation of activists,<sup>238</sup> seizures of land on the West Bank,<sup>239</sup> placing pressure on the Palestinian leadership to halt the bombings,<sup>240</sup> and searching<sup>241</sup> and destroying the homes of the families of suicide bombers.<sup>242</sup> The Israelis also have attempted to impede suicide bombers by building a fence between the West Bank and Israel.<sup>243</sup> At times, this has led to accusations that the Israelis, themselves, have committed crimes against humanity and war crimes.<sup>244</sup> In July 2002, an Israeli F-16 fighter jet dropped a one-ton laser-guided bomb into the civilian area of Al Daraj in the Gaza Strip, killing a major Hamas military leader, Sheik Salah Shehada, as well as fourteen other people residing in the house, including nine children.<sup>245</sup> The

232. James Bennet, *Israelis Clamp Down on Nablus, Hunting Suspects*, N.Y. TIMES, Aug. 3, 2002, at A1.

233. James Bennet, *Israeli Missiles Injure Target And Kill Boys In West Bank*, N.Y. TIMES, Dec. 11, 2001, at A18. Polls indicated that seventy-four percent of Israelis supported the assassination policy, but only twenty-two percent believed it decreased terrorism. Forty-five percent thought it increased terrorism while thirty-one percent believed that it had no connection at all to terrorism. *Id.*

234. John Kifner, *Israel Threatens to Deport Relatives of 2 Fugitive Militants*, N.Y. TIMES, July 20, 2002, at A3.

235. Joel Greenberg, *More Violence Jolts Mideast Truce Efforts*, N.Y. TIMES, Dec. 10, 2001, at A6.

236. John Kifner, *City Curfews And Politics Strain Calm In West Bank*, N.Y. TIMES, July 8, 2002, at A6.

237. James Bennet, *Israeli Military Advances Into More of the West Bank; Plans a 'Crushing' Response*, N.Y. TIMES, June 23, 2002, at A10.

238. John Kifner, *Israel Demurs on Deporting Bomb Suspects' Relatives*, N.Y. TIMES, July 22, 2002, at A3.

239. John Kifner, *Jerusalem Blast Kills Six Israeli; Army Raids Start*, N.Y. TIMES, June 20, 2002, at A1, A12.

240. Tim Golden, *Militant's Claim: Arafat Can't End Attacks*, N.Y. TIMES, June 6, 2002, at A16.

241. John Kifner, *The Siege: Residents Cower in Vibrant Ramallah, Now a Ghost Town Occupied by Israelis*, N.Y. TIMES, Apr. 1, 2002, at A8.

242. John Kifner, *Israeli Court Upholds Blowing Up Houses*, N.Y. TIMES, Aug. 7, 2002, at A6.

243. Todd S. Purdum, *U.S. Criticizes Israel's New Electronic Fence Along West Bank*, N.Y. TIMES, June 18, 2002, at A6.

244. James Bennet, *U.N. Report Rejects Claims of a Massacre of Refugees*, N.Y. TIMES, Aug. 2, 2002, at A10.

245. John Kifner, *Gaza Mourns Bombing Victims; Israel Hastens to Explain*, N.Y. TIMES, July 24, 2002, at A6.

bomb leveled an area equivalent to one-half of a city block.<sup>246</sup> Sheik Sheheda was alleged to have been responsible for coordinating attacks against hundreds of civilians as well as assaults against the Israeli military.<sup>247</sup>

The international community generally has viewed the conduct of the Palestinians and Israelis as morally equivalent and to accept terrorism as a product of poverty and social deprivation.<sup>248</sup> This is consistent with, what until recently, has been the reluctance of the international community to regulate and to repress terrorism.

### III. EARLY EFFORTS TO PREVENT AND TO PUNISH TERRORISM

The International Association of Penal Law sponsored a series of International Conferences for the Unification of Penal Law, between 1926 and 1935, attended by public officials and members of private organizations which, as part of the agenda, addressed the terrorist threat.<sup>249</sup> At the Sixth International Conference, in Copenhagen, the Conference adopted a draft text on terrorism which required States to punish as "special" offenses certain specified activities including acts directed against a Head of State or his or her spouse or members of constitutional, legislative or judiciary bodies in those instances in which the criminal conduct "endangered the community or created a state of terror calculated to cause a change in or impediment to the operation of the public authorities or to disturb international relations."<sup>250</sup> These, and other

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246. *Id.*

247. *Id.* The competing claims of Israel and the Palestinians were raised in the criminal prosecution of Marwan Barghouti, who was charged with responsibility for the attacks carried out by the Aksa Martyrs Brigades. Marwan Barghouti, in turn, in his courtroom statements accused Israeli of being a terrorist State. See Serge Schmemmann, *Bitter Circus Erupts as Israel Indicts a Top Fatah Figure*, N.Y. TIMES, Aug. 15, 2002, at A3.

248. Press Release, Kofi Annan, Palestinian Authority Must 'De-Legitimate Terrorism'; Israel Must Stop Settlement Activity In Palestinian Territory (July 17, 2002), available at <http://www.un.org/News/Press/docs/2002/sgsm8306.doc.htm>.

249. Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance, and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, In An Attempts to Effect Radical Changes, U.N. Doc. A/C.6/418, paras. 22-23 (1972) [hereinafter SECRETARY GENERAL 1972], compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS (1972-2001) 93 (M. Cherif Bassiouni et al. eds., 2002).

250. Sixth International Conferences for the Unification of Penal Law Copenhagen (Aug. 31 - Sept. 3, 1935), Actes de la Conférence, art. 1, compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 100 [hereinafter

enumerated acts,<sup>251</sup> were to be incorporated into a section of domestic penal codes entitled, “[o]utrages endangering the community or creating a state of terror.”<sup>252</sup>

The Sixth Conference also expressed the view that an act which endangered the community or created a state of terror shall not be considered a political offense which was immune from extradition.<sup>253</sup> An individual who was not extradited was to be tried by the custodial State or referred to an international criminal court.<sup>254</sup> The International Conference’s deliberations resulted in the revision of some extradition treaties which were modified to preclude certain terrorist acts from the category of non-extraditable political offenses.<sup>255</sup> The removal of these offenses from the category of political crime was intended to remove safe havens for international criminals and to insure that accused terrorists would be brought before the relevant domestic or international court.<sup>256</sup>

The assassination at Marseilles of King Alexander I of Yugoslavia and Mr. Louis Barthou, Foreign Minister of the French Republic, on October 9, 1934, led the League of Nations to draft a convention on the repression of terrorism.<sup>257</sup> This culminated in the Convention of 1937 for the Prevention and Punishment of Terrorism.<sup>258</sup> Article One of the instrument

Conference for Unification of Penal Law]. These attacks are required to be calculated to cause a change in or impediment to the operation of the public authorities or to disturb international relations. *Id.*

251. *Id.* This lengthy list of acts included causing a disaster by impeding public transport or interrupting public services and utilities, causing pollution, poisoning drinking water or food, propagating contagious or epidemic diseases, or any other willful act calculated to endanger human lives, willful destruction of or damage to public buildings or public supplies, means of transport and apparatus utilized for fire and rescue operations, damage to public services or utilities, use of explosives in a public place, or any other willful act which endangers human lives and the community. *Id.* art. 2. The Draft Convention also punished inchoate acts, including incitement, conspiracy and possession or distribution of materials destined for a terrorist act and knowing assistance of terrorist acts. *Id.* arts. 3-7.

252. *Id.* pmb1.

253. *Id.* VOEU. The rationale was that these acts were particularly dangerous to mankind and were likely to jeopardize international relations and, as a result, that offenders not be immune from extradition. *Id.* The Sixth International Conference adopted a text on political offenses which, excluded from the category of political offenses, crimes which “endanger the community or create a state of terror.” *Id.*

254. *Id.*

255. *Id.* para. 27. See Thomas M. Franck & Bert B. Lockwood, Jr., *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT’L. L. 69 (1974).

256. See *supra* notes 254-57 and accompanying text.

257. *Id.*

258. Convention for the Prevention and Punishment of Terrorism, 19 L.N.T.S. 23 (1938), compiled in II INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 71 (M. Cherif

defined terrorism as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."<sup>259</sup> The Convention required States to declare as criminal, acts committed on their territory directed against another High Contracting Party causing death or grievous bodily harm or loss of liberty to Heads of States or associated individuals.<sup>260</sup> The Convention also prohibited the willful destruction of, or damage to, public property or property devoted to a public purpose belonging to, or under the authority of, another High Contracting Party.<sup>261</sup> Lastly, the Convention condemned any willful act calculated to endanger the lives of members of the public.<sup>262</sup> These offenses were to be extraditable crimes<sup>263</sup> and a State that declined extradition, under certain circumstances, was obligated to prosecute and to punish such offenses.<sup>264</sup> The Convention was only ratified by India and failed to enter into force.<sup>265</sup> The Convention significantly

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Bassiouni et al. eds., 2001) [hereinafter Convention For The Prevention And Punishment Of Terrorism]. This was accompanied by a Convention for The Creation Of An International Criminal Court (Annex).

259. *Id.* art. 1, para. 2.

260. *Id.* art. 2. Those protected include: Heads of States, persons exercising the prerogatives of the head of the State, their hereditary or designated successors, the spouses of Heads of States, persons charged with public functions or holding public positions when the act is directed against them in their public capacity. *Id.* art. 2.

261. *Id.* art. 2, para. 2.

262. *Id.* art. 2, para. 3. The Convention punishes an attempt to commit an act prohibited under the Convention as well the manufacture, obtaining possession, or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offense falling within Article Two. *Id.* art. 2, paras. 4-5. States also are to punish various acts committed within their own territory related to an act of terrorism falling within Article Two and directed against another High Contracting Party, whatever the country in which the act of terrorism is to be carried out. *Id.* This includes conspiracy, incitement, willful participation and assistance. *Id.* art. 3. The Convention also requires the regulation of certain firearms and the punishment of the modification of various acts involving the falsification or forgery of passports or other immigration documents. *Id.* arts. 13-14.

263. *Id.* art. 8.

264. Convention For The Prevention And Punishment Of Terrorism, *supra* note 249, arts. 9-10. A State which does not extradite its nationals shall prosecute and punish such offenders for acts committed on the territory of another State. *Id.* A State which declines to grant extradition of foreigners on their territory shall prosecute such individuals in those instances in which the country's laws recognize the jurisdiction of its courts over such offenses committed abroad by foreigners; and the foreigner is a national of a country which recognizes the jurisdiction of its own courts in respect of offenses committed abroad by foreigners. *Id.*

265. Franck & Lockwood, *supra* note 255, at 70. Other States signed the instrument: Albania, Argentina, Belgium, India, Bulgaria, Cuba, Dominican Republic, Egypt, Ecuador,

limited terrorism to acts meeting the intent requirement of Article One which were committed on a State's territory against another High Contracting Party.<sup>266</sup> The main focus was on attacks against Heads of State and public officials.<sup>267</sup> This transnational component, rather than the intent of the offender or impact of the act, would prove to be the touchstone of future international efforts.<sup>268</sup>

The Draft Code of Offenses Against the Peace and Security of Mankind, prepared by the International Law Commission in 1954, was indicative of a trend stressing the sanctioning of State-sponsored transnational terrorism.<sup>269</sup> The Secretariat submitted a memorandum which prohibited the undertaking or encouragement by State authorities of terrorist activities against other regimes or the toleration of organized activities calculated to carry out terrorist activities in another State.<sup>270</sup> The General Assembly failed to accept the draft code.<sup>271</sup> A subsequent version, in 1991, provided criminal punishment for individuals organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property of such a nature as to create a state of terror in the minds of public figures, groups of person or the general public.<sup>272</sup>

The trend towards condemnation of state-supported terrorism was evident in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States.<sup>273</sup> The

Spain, Estonia, France, Greece, Haiti, Monaco, Norway, Netherlands, Peru, Romania, Czechoslovakia, Turkey, Union of Soviet Socialist Republics, Venezuela and Yugoslavia. *Id.* at 70.

266. *See supra* note 254 and accompanying text.

267. *See id.*

268. Convention For The Prevention And Punishment Of Terrorism, *supra* note 258, pmbl. "The High Contracting Parties, reaffirming the principle of international law in virtue of which it is the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent the acts in which such activities take shape, undertake . . . to collaborate for this purpose." *Id.*

269. United Nations International Law Commission, Draft Code of Offenses Against the Peace and Security of Mankind (1954), 2 Y.B. Int'l L. Comm'n 112 (1954) (English translation, available at <http://www.un.org/law/ilc/texts/offfra.htm> (last visited Jan. 24, 2003)).

270. SECRETARY GENERAL 1972, *supra* note 249, para. 35.

271. *Id.* para. 36.

272. *See United Nations International Law Commission, Draft Code of Offenses Against the Peace and Security of Mankind*, G.A. Res. 45/158, U.N. GAOR, U.N. Doc. A/46/405 (1991).

273. *See Declaration On Principles Of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1971).

second principle clarified that a State shall not organize, assist, foment, finance, incite or tolerate "subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."<sup>274</sup>

The international community, however, failed to agree to formulate a general convention on terrorism and was content to address specific aspects of the issue, the most pressing of which was threats to air safety.<sup>275</sup> The International Civil Aviation Organization took the initiative in formulating three documents, the first was the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft which provided criminals sanctions to acts, whether or not presently in contravention of a State's penal law, committed by persons on board an aircraft which jeopardized the safety of a plane in flight, persons or property therein, or which jeopardized order and discipline.<sup>276</sup> The Convention applied in those instances in which the aircraft was "in flight"<sup>277</sup> and "outside the territory of any State."<sup>278</sup> Jurisdiction was vested in the State of registration of the aircraft<sup>279</sup> as well as with any State exercising criminal jurisdiction in accordance with its national law.<sup>280</sup> A State which was not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offense committed on board an aircraft other than under the territorial,<sup>281</sup> national<sup>282</sup> or protective principles<sup>283</sup> or in those instances in which jurisdiction was required to ensure State adherence to a multilateral agreement<sup>284</sup> or in which the offense involved a breach of any rules or regulations relating to flight or to the maneuver of an aircraft in flight.<sup>285</sup>

274. *Id.*

275. SECRETARY GENERAL 1972, *supra* note 249, para. 43.

276. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, art. 1, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Convention on Offenses on Aircraft].

277. *Id.* art. 1, para. 3. "An aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends." *Id.*

278. *Id.* art. 1, para. 2.

279. *Id.* art. 3, paras. 1-2.

280. *Id.* art. 3, para. 3.

281. *Id.* art. 4(b).

282. Convention on Offenses on Aircraft, *supra* note 276, art. 4(a).

283. *Id.* art. 4(c).

284. *Id.* art. 4(d).

285. *Id.* art. 4(e).

The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, of 1970, marked a major step forward in counter-terrorism and required Signatory States to punish by severe penalties the unlawful seizure of an aircraft by a person on board a plane in flight by threat of force or by any other form of intimidation.<sup>286</sup> The scope of the instrument was limited to those instances in which an international element was involved in the flight.<sup>287</sup> The Convention adopted an expanded jurisdictional provision which vested jurisdiction in the State of registration of the aircraft,<sup>288</sup> the State in which the aircraft landed with the offender on board,<sup>289</sup> the State which was the principle place of business or permanent residence, where relevant, of the lessee<sup>290</sup> and in a State which has custody over an offender and which determines not to extradite him to trial.<sup>291</sup> In such instances, States are obliged without exception to submit the case to its competent authorities for prosecution.<sup>292</sup> The Convention also does not exclude criminal jurisdiction exercised in accordance with national law.<sup>293</sup> The offense shall be considered an extraditable offense in any extradition treaty between States or in the case of Contracting States which do not

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286. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, arts. 1-2, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter Hague Convention]. An individual who is an accomplice or who attempts to commit an offense under the Convention also is liable. *Id.* art. 1.

287. *Id.* art. 3(3). The Convention only is applicable in those instances in which the site of take-off or the site of actual landing of the aircraft on board of which the offense is committed are situated outside the territory of the State of registration of the aircraft. *Id.* It is not controlling whether the aircraft was engaged in an international or in a domestic flight. *Id.*

288. *Id.* art. 4, para. 1(a).

289. Hague Convention, *supra* note 286, art. 4, para. 1(b).

290. *Id.* art. 4, para. 1(c).

291. *Id.* art. 4, para. 2.

292. *Id.* art. 7.

293. *See id.* art. 4, para. 3. Each Contracting State shall establish jurisdiction when the offense is committed on board an aircraft registered in the State; when the aircraft lands in the territory with the alleged offender still on board; when the offense is committed on board an aircraft leased to a lessee who has his or her principal place of business or permanent residence in the State. *Id.* art. 4, para. 1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offense in the event that extradition is not granted. Hague Convention, *supra* note 286, art. 4, para. 2. The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged to submit the case to its competent authorities for the purpose of prosecution. *Id.* art. 7. The offenses enumerated in the Convention are deemed to be extraditable offenses in any extradition treaty existing between contracting parties. *Id.* art. 8. Contracting States shall afford one another judicial assistance in connection with criminal proceedings pertaining to offenses under the Convention. *Id.* art.10.



make extradition conditional on the existence of a treaty<sup>294</sup> and the Convention for the Suppression of Unlawful Seizure also may be considered a legally sufficient basis for extradition in the absence of a treaty.<sup>295</sup> States are to afford one another the greatest measure of assistance in connection with criminal offenses enumerated in the Treaty.<sup>296</sup>

The Montreal Convention for The Suppression of Unlawful Acts Against the Safety of Civil Aviation, of 1971,<sup>297</sup> provided that an individual commits an offense if he or she unlawfully and intentionally committed an act of violence against a person on board an aircraft in flight which: endangered the safety of that aircraft;<sup>298</sup> destroyed or damaged an aircraft in service so as to render it incapable of flight or safety in flight;<sup>299</sup> or destroyed or damaged air navigation facilities or interfered with their operation so as to endanger the safety of an aircraft in flight.<sup>300</sup> The Convention also called for criminal penalties against individuals who communicated false information which endangered the safety of an aircraft in flight<sup>301</sup> or who placed a device or substance on board an aircraft in service which was likely to destroy or to damage the plane so as to render it incapable of flight.<sup>302</sup> The Convention, with the exception of the destruction or damage of air navigation facilities, only was applicable in those instances in which the place of take-off or landing of the aircraft was situated outside the territory of the State of the aircraft's registration<sup>303</sup> or

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294. *Id.* art. 8, para. 3.

295. Hague Convention, *supra* note 286, art. 8, para. 2. "The offense, for purposes of extradition between Contracting Parties, shall be treated as if it has been committed not only in the place in which it occurred but also in the territories of States required to establish their jurisdiction" under the terms of the treaty. Hague Convention, *supra* note 286, art. 8, para. 4.

296. *Id.* art. 10.

297. Montreal Convention, *supra* note 29.

298. *Id.* art. 1, para. 1. An aircraft was considered to be in flight from the moment when the external doors were closed following embarkation until the moment when any such door was opened for disembarkation. *Id.* art. 2(a). The Convention also punishes an attempt to commit an enumerated offense as well as individuals who served as an accomplice to an individual who committed or attempted to commit an offense. *Id.* art. 1, para 2.

299. *Id.* art. 1, para. 1(b). An aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing. The period of service shall, in any event, extend for the entire period in which the aircraft is in flight. *Id.* art. 2(b).

300. *Id.* art. 1, para. 1(d).

301. *Id.* art. 1, para. 1(e).

302. *Id.* art. 1, para. 1(c).

303. Montreal Convention, *supra* note 29, art. 4, para. 2(a).

in which the offense was committed in the territory of a State other than the State of registration of the aircraft.<sup>304</sup> The Convention, notwithstanding the former provisions, shall also apply to the above provisions in the event that the alleged offender is located in the territory of a State other than the State of registration of the aircraft.<sup>305</sup> The provision pertaining to the destruction or damage of air navigation facilities only shall apply in those cases in which the navigation facilities are employed in international air navigation.<sup>306</sup>

The instrument further provided that States shall take measures to establish jurisdiction over the offenses listed in the Convention in those instances in which the offense is committed in the territory of the State;<sup>307</sup> the offense is committed against or on board an aircraft registered in that State;<sup>308</sup> the aircraft which was the situs of the offense lands with the offender aboard;<sup>309</sup> and in those instances in which the offense is committed against or on board an aircraft leased to a lessee who has his or her principal place of business or permanent residence in the State.<sup>310</sup> The Convention does not exclude any criminal jurisdiction exercised in accordance with national law.<sup>311</sup> Each High Contracting State also shall establish jurisdiction in those instances in which an alleged offender is not extradited for trial.<sup>312</sup> A state which fails to extradite an offender is obliged to submit the case to its competent authorities for the purpose of prosecution.<sup>313</sup> Contracting States also were required to take all practicable measures for the purpose of preventing offenses under the Convention<sup>314</sup> and were to afford one another the “greatest measure of assistance” in connection with criminal proceedings brought against offenses enumerated in the Convention.<sup>315</sup>

The 1971 Montreal Convention expanded the scope of existing counter-terrorism treaties by asserting an international interest in the

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304. *Id.* art. 4, para. 2(a).

305. *Id.* art. 4, para. 2(b).

306. *Id.* art. 4, para. 5.

307. *Id.* art. 5, para. 1(a).

308. *Id.* art. 5, para. 1(b).

309. Montreal Convention, *supra* note 29, art. 5, para. 1(c).

310. *Id.* art. 5, para. 1(d).

311. *Id.* art. 5, para. 3.

312. *Id.* art. 5, para. 2.

313. *See id.* art. 7. The extradition provisions provided for in the Hague Convention are also incorporated into the Montreal Convention. *See id.* art. 8; *see also supra* notes 292-93 and accompanying text.

314. *Id.* art. 10, para. 1.

315. Montreal Convention, *supra* note 29, art. 11.

prohibition of violence against aircraft committed by individuals who were not required to be on board; by modestly loosening the requirement that the aircraft must be in flight; and by providing for protection for aircraft undergoing preflight preparation.<sup>316</sup> This was supplemented by a 1988 protocol which required Signatory States to assume jurisdiction over a crime of violence against person and property at an airport serving international civil aviation.<sup>317</sup>

The protection of aerial commerce and transportation was viewed as being in the interests of most members of the international community and commanded a multinational consensus.<sup>318</sup> The Preamble to the 1971 Montreal Agreement noted that unlawful acts against the safety of civil aviation jeopardized the safety of persons and property, seriously impeded the operation of air services and undermined the confidence of the peoples of the world in the safety of civil aviation.<sup>319</sup> These triad of treaties advanced the international prevention and punishment of terrorism by providing for expansive jurisdictional claims,<sup>320</sup> enhanced extradition

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316. See *supra* note 273 and accompanying texts. An aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing. The period of service also shall extend for the entire period during which an aircraft is in flight. Montreal Convention, *supra* note 29, art. 2(b). An aircraft is considered to be in flight from the moment when all the external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for the persons and property on board. *Id.* art. 2(1). Individuals under the Hague Convention might be liable as accessories. See *supra* note 286 and accompanying text.

317. See Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplement, Feb. 23, 1988, 27 I.L.M. 627.

318. Secretary General 1972, *supra* note 249, paras. 42-67. See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, art. 3, 27 I.L.M. 668. This Convention prohibits the unlawful and intentional seizure or assumption of control over a vessel navigating or scheduled to navigate throughout from waters beyond the outer limit of the territorial sea of a single State. The Treaty also prohibits violence against person on board a ship which is likely to endanger the safe navigation of the ship, destruction or damage to a ship or its cargo which is likely to endanger safe navigation; placing a device or substance on board which is likely to destroy or cause damage to a ship or its cargo and which is likely to endanger the safe navigation of the ship; destruction or serious damage to navigational facilities; communication of false information which endangers the safe navigation of a ship; and injury or death of any person in the commission of or attempted commission of any of these offenses. *Id.*

319. Montreal Convention, *supra* note 29, pmbl.

320. See *supra* notes 307-12 and accompanying text.

provisions<sup>321</sup> and by requiring international cooperation and assistance in detecting and prosecuting acts of terror.<sup>322</sup>

Another area of continuing concern was the safety and security of diplomats who increasingly were the target of kidnapping, hostage-taking and other physical attacks.<sup>323</sup> These attacks led, in 1973, to the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents which was intended to prevent and to punish this threat to the "maintenance of normal international relations which are necessary for co-operation among States."<sup>324</sup> The instrument protected Heads of State and other State officials as well as officials of international organizations who at the time of the crime were entitled to special protections<sup>325</sup> against murder, kidnapping or other attack upon their person or liberty.<sup>326</sup> Protection also was extended against the intentional commission of violent attacks upon their official residences, private premises or means of transport which were likely to endanger their persons' liberty.<sup>327</sup> These offenses were to be punished by "appropriate penalties" which consider "their grave nature."<sup>328</sup> The document contained the familiar provisions for expansive jurisdictional claims,<sup>329</sup> as well as the standard requirement that States either extradite or prosecute offenders<sup>330</sup> and stipulated that crimes enumerated in the Convention shall be incorporated into extradition treaties existing between States Parties.<sup>331</sup> States Parties also were to

321. See *supra* notes 312-14 and accompanying text.

322. See *supra* notes 314-15 and accompanying text.

323. Convention on the Prevention And Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 28, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter Diplomatic Convention].

324. *Id.* pmb1.

325. *Id.* art. 1, para. 1(b).

326. *Id.* art. 2, para 1(a).

327. *Id.* art. 2, para 1(b). Article Two also incorporates a prohibition on threats, and attempts to commit an enumerated offense, as well participation as an accomplice. *Id.* art. 2, para. 1.

328. *Id.* art. 2, para. (2).

329. Diplomatic Convention, *supra* note 323, art. 3. State Parties shall take such measures as may be necessary to establish jurisdiction over crimes when the offense is committed in the territory of that State or on board a ship or aircraft registered in the State; when the alleged offender is a national of that State; when the crime is committed against an internationally protected person whose status is based on the functions which he or she exercises on behalf of that State. *Id.* art. 3, para. 1(a)-(c).

330. *Id.* art. 7.

331. *Id.* art. 8, para. 1. The Diplomatic Convention also provides that the treaty shall be a sufficient basis for extradition and States Parties which do not make extradition conditional

cooperate in the prevention<sup>332</sup> and prosecution of offenses under the Convention.<sup>333</sup>

In summary, during this initial period of multinational regulation, the international community was able to coalesce to combat crimes against interstate aircraft and diplomatic agents.<sup>334</sup> However, an agreement could not be concluded on a comprehensive convention combating the general scourge of international terrorism.<sup>335</sup> Major progress nevertheless was achieved in creating a legal architecture of processes and procedures to prevent and to punish terrorism.<sup>336</sup>

#### IV. THE MIDDLE PERIOD: THE ANTI-COLONIAL STRUGGLE AND THE LEGAL REGULATION OF TERRORISM

The prevention and punishment of terrorism was viewed by various States as conflicting with the promotion of the self-determination of peoples.<sup>337</sup> The Declaration On the Granting of Independence to Colonial Countries and Peoples, of 1961, declared that the subordination of "peoples to alien subjugation, domination and exploitation" constituted a violation of fundamental human rights and was contrary to the Charter of the United Nations.<sup>338</sup> The Declaration recognized that all peoples possessed the right to self-determination and that all armed action or repressive measures directed against dependent people "shall cease" in

on the existence of a treaty shall recognize the crimes contained in the Convention as extraditable offenses. *Id.* art. 8, paras. 2-3.

332. *Id.* art. 4. States Parties were to take all practicable measures to prevent preparations in their respective territories for the commission of crimes under the Convention and States Parties also were to exchange information and to coordinate measures to prevent penal offenses against protected persons. *Id.* art. 4(a)-(b).

333. *Id.* art. 10. The Organization of American States adopted a Convention requiring punishment of specified crimes of violence against persons to whom the State has the duty to give special protection according to international law. These acts, as well as extortion in connection with these crimes, were to be "considered common crimes of international significance, regardless of motive." Organization of American States, Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crime Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, 10 I.L.M. 255.

334. SECRETARY GENERAL 1972, *supra* note 249, paras. 62-63.

335. *See id.* para. 65.

336. *See supra* notes 307-15 and accompanying text.

337. *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960) [hereinafter *Colonial Countries And Peoples*].

338. *Id.* para. 1.

order to permit them to exercise complete independence and integrity over their national territory.<sup>339</sup>

The 1977 Protocols Additional to the Geneva Conventions,<sup>340</sup> according to some commentators, provided legal protection to guerillas and terrorists fighting for causes deemed political palatable by States in the Third World.<sup>341</sup> The first of the Protocols extended the application of the Geneva Conventions to armed conflicts in which “peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”<sup>342</sup> Article Forty-four, recognized that there were situations in which, given the nature of the hostilities, that combatants could not distinguish themselves from the civilian population.<sup>343</sup> In these situations, they retained their status as combatants provided that they openly carried their arms during a military engagement and during such time that they were visible to an adversary while engaged in a military deployment preceding the launching of an attack.<sup>344</sup> This substantially modified the traditional four-prong requirement for recognition of prisoner of war status articulated in the Geneva Conventions.<sup>345</sup>

Protocol II extended the recognition accorded to irregular forces by providing protections during armed conflicts which occurred in the territory of a High Contracting Party between its armed forces and “dissident armed forces or other organized armed groups which, under

339. *Id.* para. 4.

340. Protocol Additional to the Geneva Conventions of August 12 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 10, 1977, 1125 U.N.T.S. 3, 4(E), 272(F) [hereinafter Protocol I]; Protocol Additional To The Geneva Conventions Of August 12, 1949, And Relating To The Protection Of Victims Of Non-International Armed Conflicts, June 10, 1977, 1125 U.N.T.S. 609, 610(E), 650(F) [hereinafter Protocol II].

341. See Abraham D. Sofaer, *Agora: The U.S. Decision Not To Ratify Protocol I To The Geneva Conventions On The Protection Of War Victims (Cont'd)*, 82 AM. J. INT'L. L. 784 (1988).

342. Protocol I, *supra* note 340, art. 1, para. 4. The Geneva Conventions of 1949 applied “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Convention].

343. Protocol I, *supra* note 340, art. 44, para. 3.

344. *Id.* art. 43, para. 3(a)-(b).

345. POW Convention, *supra* note 342, art. 42, para. 2. This requires that militias or volunteer corps, including organized resistance movements, are commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war. *Id.*

responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>346</sup> The General Assembly significantly also did not include terrorism as an offense encompassed within the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; the instrument was limited to the offenses enumerated in the Nuremberg Charter, apartheid and genocide.<sup>347</sup>

The Protocols to the Geneva Conventions, while maintaining the integrity of the distinction between civilians and combatants,<sup>348</sup> took the unprecedented step of formally recognizing that irregular combatants were entitled to the status of lawful combatants.<sup>349</sup> This constituted a significant step in legitimizing armed attacks by terrorist organizations.<sup>350</sup> Indicative of this trend was the proposal proffered by Thomas M. Franck and Bert B. Lockwood Jr. who, in 1974, argued that the prospects for preventing terrorist violence rested on the commitment of regimes to internal democracy.<sup>351</sup> In return, they urged terrorist groups to agree to limit themselves to attacks on governmental and military officials with the understanding that captured militants would be treated as prisoners-of-war.<sup>352</sup>

The influence of this movement towards recognizing the legitimacy of armed groups fighting for self-determination can be seen in the International Convention Against the Taking of Hostages of 1979.<sup>353</sup> The Convention was adopted in response to the upsurge in Middle Eastern hostage taking<sup>354</sup> and required States to punish by appropriate penalties any person who seized or detained and threatened to kill, to injure or continued to detain another person in order to compel a State, international organization or individual or group of individuals to perform

346. Protocol II, *supra* note 340, art. 1, para. 1. The Protocol is not applicable to internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature. *Id.* art. 1, para. 2.

347. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Dec. 16, 1968, 754 U.N.T.S. 73, 8 I.L.M. 68.

348. Protocol I, *supra* note 340, arts. 50-52.

349. *See supra* notes 340-46 and accompanying text.

350. *See* Sofaer, *supra* note 341 and accompanying text.

351. *See* Franck & Lockwood, *supra* note 255, at 88-89.

352. *See id.*

353. International Convention Against The Taking Of Hostages, G.A. Res. 34/146, U.N. GAOR, Supp. No. 46, at 245, U.N. Doc. A/34/786 (1979) [hereinafter Hostage Convention].

354. *Id.* pmbl. The preamble recognized that the taking of hostages is an "offense of grave concern to the international community" and that it is "urgently necessary to develop international co-operation" between States to prevent, prosecute and punish acts of the taking of hostages as "manifestations of international terrorism." *Id.*

or abstain from doing any act as a condition for the release of the hostage.<sup>355</sup> The Convention, however, provided that the treaty shall not apply to an act of hostage-taking committed during armed conflicts, including situations in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.<sup>356</sup>

As late as January 1990, the General Assembly adopted a resolution which, while condemning terrorism, stressed that the document was without prejudice to the right of self-determination, freedom and independence of peoples.<sup>357</sup> The resolution provided particular support to "peoples under colonial and racist regimes or other forms of alien domination or the right of these peoples under colonial and racist regimes or other forms of alien domination, or the right of these peoples to struggle legitimately to this end and to seek and receive support."<sup>358</sup>

The lingering influence of this Third World support for anti-colonial struggles and self-determination can be seen in the Arab Convention on the Suppression of Terrorism, of 1998, which provided that an act committed in a "situation of struggle by any means, including the armed struggle against foreign occupation and aggression for liberation and self-determination is not to be considered a crime."<sup>359</sup> Acts undertaken "in defense of the soil unity of any Arab state are also not be considered crimes."<sup>360</sup> The Convention of the Organization of the Islamic Conference, in 2000, adopted similar language in providing that an "armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination . . . shall not be considered a terrorist crime."<sup>361</sup> A similar provision was incorporated into the Organization of African Unity's Convention on the Prevention and Combating of Terrorism, of 1999, which provided that "the struggle waged by peoples . . . for their liberation or self-determination, including armed struggle

355. *Id.* art. 1.

356. *Id.* art. 12. See also Convention on the Safety of United Nations and Associated Personnel, U.N. GAOR, 49th Sess., 84th plen. Mtg., at arts. 9-11, U.N. Doc. A/Res./49/59 (1995)

357. See U.N. GAOR, 44th Sess., 72nd plen. mtg., U.N. Doc. A/Res/44/29 (1989).

358. *Id.* para. 17.

359. The League Of Arab States, The Council of Arab Interior and Justice Ministers (Apr. 22, 1998), *The Arab Convention On The Suppression Of Terrorism*, art. 2, compiled in II INTERNATIONAL TERRORISM: MUTLILATERAL CONVENTIONS, *supra* note 258, at 393.

360. *Id.*

361. Organization Of The Islamic Conference, *Convention Of The Organization Of The Islamic Conference On Combating International Terrorism*, compiled in II INTERNATIONAL TERRORISM: MUTLILATERAL CONVENTIONS, *supra* note 258, at 429.



against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts."<sup>362</sup>

This middle period of counter-terrorist activity presented the tension between the condemnation of terrorism and the international endorsement of the self-determination of peoples, particularly those formerly under colonial control.<sup>363</sup> The combating of European hegemony, for many States, was the primary pernicious threat.<sup>364</sup> This movement was gradually eclipsed by events, but lingered in documents produced by former-colonial countries in the Middle East and Africa.<sup>365</sup>

## V. THE CONTEMPORARY PERIOD

The growing unrest in North Africa, the Middle East, Central Europe and Southeast Asia led to unprecedented United Nations initiatives to prevent and to punish terrorism.<sup>366</sup> In July, 1990, the United Nations Secretariat prepared a report on international action against organized crime and terrorism.<sup>367</sup> The report noted the enhanced sophistication of the organization, tactics and weapons of terrorist organizations demanded multinational action against this growing threat,<sup>368</sup> particularly in light of the increasing transnational cooperation between terrorists.<sup>369</sup> There also was evidence of coalitions between terrorists and drug traffickers.<sup>370</sup> The report noted that existing treaties had introduced a requirement that State Parties apprehend alleged offenders present in their territory and either extradite them or submit the case to their own prosecutorial authorities.<sup>371</sup> This system was limited by the practical impediment of obtaining the evidence necessary to convict an accused when the alleged offense was

362. Organization Of African Unity, *Convention On Prevention And Combating Of Terrorism* (July 14, 1999), art. 3(1), compiled in II INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, *supra* note 258, at 417, 419. The Convention, however, provides that "political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defense," *Id.* art. 3(2).

363. *See supra* notes 337-56 and accompanying text.

364. *See supra* notes 339 and accompanying text.

365. *See supra* notes 359-62 and accompanying text.

366. *See* GILES KEPEL, *JIHAD THE TRAIL OF POLITICAL ISLAM* 205-321 (Anthony F. Roberts trans., 2002).

367. U.N. Secretariat, *Effective National and International Action Against: (A) Organized Crime; (B) Terrorist Criminal Activities*, U.N. Doc. A/Conf.144/15 (1990) [hereinafter U.N. Secretariat].

368. *Id.* para. 56.

369. *Id.* para. 74.

370. *Id.* paras. 82-7.

371. *Id.* para. 67.

committed abroad.<sup>372</sup> Accordingly, increased cooperation between countries was required.<sup>373</sup> The existing treaties also suffered from the limited number of States Parties<sup>374</sup> and by a lack of resolve to vigorously enforce their requirements.<sup>375</sup> The instruments also failed to encompass the intentional targeting of civilian populations by bombs or other weapons<sup>376</sup> and neglected to address the threat of weapons of mass destruction.<sup>377</sup>

The United Nations Secretary General issued a report, in October 1991, which articulated the views of the European Community<sup>378</sup> and of the Union of Soviet Socialist Republics<sup>379</sup> condemning and calling for a program of action against terrorism.<sup>380</sup> The Sixth Committee responded by recommending the adoption of a resolution on measures to eliminate international terrorism.<sup>381</sup> In January 1992, the United Nations General Assembly adopted an unprecedented and historic comprehensive resolution on terrorism, entitled "Measures To Eliminate International Terrorism."<sup>382</sup> The resolution, in part, urged States to fulfill their

372. *Id.* para. 68.

373. U.N. Secretariat, *supra* note 367.

374. *Id.* para. 70.

375. *Id.* para. 72.

376. *Id.* para. 70.

377. *Id.* para. 72. The Secretariat's report proposed a new Model Treaty on Mutual Assistance in Criminal Matters as well as a new Model Treaty on Extradition. *Id.* para. 81.

378. Secretary-General, Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of Those Forms of Terrorism: Report of the Secretary-General: Convening Under the Auspices of the United Nations, of an International Conference to Define Terrorism and to Differentiate It from the Struggle of Peoples for National Liberation, U.N. Doc. A/46/346/Add.1 (1991) *compiled in* II INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, *supra* note 258, at 482.

379. Secretary-General, Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of Those Forms of Terrorism: Report of the Secretary-General: Convening Under the Auspices of the United Nations, of an International Conference to Define Terrorism and to Differentiate It from the Struggle of Peoples for National Liberation (1991), *compiled in* I INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, *supra* note 249, at 487.

380. *See supra* notes 378-79 and accompanying texts.

381. *Report of the Sixth Committee, Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Cause Some People to Sacrifice Human Lives, Including Their Own, In Attempt to Effect Radical Changes*, U.N. A/46/654 (1991), *compiled in* I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 482.

382. G.A. Res. 46/51, U.N. GAOR, 46th Sess., U.N. Doc. A/Res./46/51 (1992).

obligations under international law and to take "effective and resolute measures" for the "speedy and final elimination" of international terrorism.<sup>383</sup> The resolution went on to call on States to: prevent the preparation and organization within their territories of "terrorist and subversive acts" against other States and their citizens;<sup>384</sup> ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts;<sup>385</sup> conclude special agreements on a bilateral, regional and multilateral basis;<sup>386</sup> exchange relevant information concerning the prevention and combating of terrorism;<sup>387</sup> and to promptly take all necessary steps to implement existing conventions and to harmonize these treaties with domestic legislation.<sup>388</sup> The resolution also requested the Secretary-General to seek and to report on the views of Member States concerning the nature, methods and means of international terrorism.<sup>389</sup>

In 1994, the United Nations General Assembly adopted a resolution on human rights and terrorism which unequivocally condemned "all acts, methods and practices of terrorism in all its forms and manifestations."<sup>390</sup> These acts were denounced as destructive of human rights, fundamental freedoms, democracy and of the economic and social development of States.<sup>391</sup>

The Sixth Committee, in December, 1994, recommended the adoption of a resolution on the elimination of international terrorism.<sup>392</sup> The same session the General Assembly adopted a declaration on measures to eliminate international terrorism<sup>393</sup> which solemnly declared that Member States unequivocally condemned terrorism as criminal and unjustifiable<sup>394</sup> and constituted a grave violation of the purposes and principles of the United Nations.<sup>395</sup> Criminal acts intended or calculated to provide a state

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383. *Id.* para. 4.

384. *Id.* para. 4(a).

385. *Id.* para. 4(b).

386. *Id.* para. 4(c).

387. *Id.* para. 4(d).

388. G.A. Res. 46/51, *supra* note 382, para. 4(e).

389. *Id.* paras. 12-14.

390. G.A. Res. 48/122, U.N. GAOR, Supp. No. 49, U.N. Doc. A/48/122 (1993).

391. *Id.* para. 1.

392. *Report of the Sixth Committee, Measures to Eliminate International Terrorism*, U.N. Doc. A/49/743 (1994), compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 506.

393. G.A. Res. 49/60, U.N. GAOR, 49th Sess., Supp. No. 49, at 303, U.N. Doc. A/49/60 (1995).

394. *Id.* para. 1.

395. *Id.* para. 2.

of terror for political purposes were unjustifiable, whatever considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature which may be invoked to justify them.<sup>396</sup> States were to refrain from organizing, instigating, assisting or participating in terrorist acts in the territories of other States<sup>397</sup> and were to take effective measures to combat international terrorism.<sup>398</sup> The resolution reaffirmed the measures to combat international terrorism set forth in the previous measure on combating international terrorism,<sup>399</sup> adding a requirement that States ensure that individuals who received asylum have not engaged in terrorist activity.<sup>400</sup> States were to exchange information concerning the prevention and combating of terrorism<sup>401</sup> and the effective implementation of conventions and to conclude mutual judicial assistance and extradition agreements.<sup>402</sup> States also were urged to review the adequacy of international agreements and to ratify existing conventions.<sup>403</sup>

The General Assembly, in 1996, reaffirmed the resolution 49/60 of December 1994 and called on the Secretary-General to submit an annual report on the implementation of Paragraph Ten of the Declaration on Measures to Eliminate International Terrorism.<sup>404</sup> This paragraph requested the Secretary-General to assist in implementing the Declaration by reviewing the status and implementation of existing multilateral, regional and bilateral agreements;<sup>405</sup> collecting data on the incidence of terrorist incidents, national laws and prosecutions;<sup>406</sup> reviewing the adequacy of existing international instruments;<sup>407</sup> and assisting States in organizing workshops and training courses on combating crimes connected with international terrorism.<sup>408</sup>

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396. *Id.* para. 3.

397. *Id.* para. 4.

398. *Id.* para. 5.

399. G.A. Res. 49/60, *supra* note 393, para. 5(a)-(f). See *supra* notes 382-89 and accompanying text.

400. G.A. Res. 49/60, *supra* note 393, para. 5(f).

401. *Id.* para. 6.

402. *Id.* para. 7.

403. *Id.* para. 8.

404. G.A. Res. 50/52, U.N. GAOR, 50th Sess., U.N. Doc. A/Res./50/53 (1996).

405. G.A. Res. 49/60, *supra* note 393, para. 10(a).

406. *Id.* para. 10(a)-(b).

407. *Id.* para. 10(c).

408. *Id.* para. 10(d).

The General Assembly also adopted another in a continuing series of resolutions on Human Rights and Terrorism,<sup>409</sup> which expressed solidarity with the victims of terrorism,<sup>410</sup> condemned the destruction of human rights, fundamental freedoms and democracy resulting from terrorist acts<sup>411</sup> while, at the same time, calling upon States to take all necessary and effective measures in accordance with international standards of human rights to prevent, combat and to eliminate acts of terrorism.<sup>412</sup> The General Assembly further urged relevant United Nations bodies to pay appropriate attention to terrorism,<sup>413</sup> requested the Secretary-General to continue to explore the establishment of a United Nations voluntary fund for victims of terrorism<sup>414</sup> and called on the Secretary-General to transmit the resolution to Member States for comment.<sup>415</sup> This was a significant recognition that terrorism contravened the human rights of peoples and that State retaliation for such acts also might jeopardize fundamental freedoms.<sup>416</sup>

In accordance with the recommendation of the Sixth Committee,<sup>417</sup> the United Nations General Assembly adopted Resolution 51/201, in 1996, which reaffirmed the organization's condemnation of terrorism.<sup>418</sup> Annexed to the Convention was a supplement to the 1994 Declaration on Measures to Eliminate International Terrorism.<sup>419</sup> The resolution established an Ad Hoc Committee to prepare draft conventions on the suppression of terrorist bombing and on nuclear terrorism as a step towards the development of a comprehensive legal framework on international terrorism.<sup>420</sup> The committee was to report to the General Assembly.<sup>421</sup> The supplemental instrument affirmed the General

409. G.A. Res. 50/186, U.N. GAOR, 50th Sess., 99th plen. mtg., U.N. Doc. A/Res/50/186 (1996).

410. *Id.* para. 1.

411. *Id.* para. 2.

412. *Id.* para. 3.

413. *Id.* para. 8.

414. *Id.* para. 6.

415. G.A. Res. 50/186, *supra* note 409, para. 7.

416. *See supra* notes 410-11 and accompanying text.

417. *Report of the Sixth Committee, Measures to Eliminate International Terrorism*, U.N. Doc. A/51/631 (1996), compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 531.

418. G.A. Res. 210, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/210 (1997).

419. *Id.* Annex.

420. *Id.* para. 9.

421. *Id.* para. 12.

Assembly's condemnation of terrorism<sup>422</sup> as contrary to the purposes and principles of the United Nations,<sup>423</sup> stressed the desirability of insuring that political asylum was not extended to terrorists<sup>424</sup> and urged States to insure that terrorists and those involved in the financing, planning or incitement of terrorism were expeditiously extradited or subjected to trial.<sup>425</sup> Member States were urged to share expertise and information regarding the activities of terrorist groups.<sup>426</sup>

The newly-formed Ad Hoc Committee, in 1997, was presented with and endorsed draft resolutions on the suppression of acts of nuclear terrorism sponsored by the Russian Federation<sup>427</sup> along with a proposed instrument on the prohibition of terrorist bombing proposed by the major industrialized countries and the Russian Federation.<sup>428</sup>

The proposed International Convention for the Suppression of Terrorist Bombing was endorsed by the Sixth Committee<sup>429</sup> and adopted by the United Nations, as the Convention for the Suppression of Terrorist Bombings.<sup>430</sup> Article Two provided that an individual committed an offense within the confines of the Convention by unlawfully and

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422. *Id.* Annex, para 1.

423. *Id.* Annex, para. 2.

424. G.A. Res. 210, *supra* note 418, Annex, paras. 3-4.

425. *Id.* Annex, paras. 5-7.

426. *Id.* Annex, para. 8.

427. See Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, Convention on the Suppression of Acts of Nuclear Terrorism, Drafts Submitted by the Russian Federation, U.N. Doc. A/AC.252/L.3 (1998), *compiled in* INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 550.

428. See Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, Preliminary Working Document Submitted by France on Behalf of the Group of Seven Major Industrialized Countries and the Russian Federation, U.N. Doc. A/AC.252/L.2 (1997), *compiled in* I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 558. See Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, U.N. Doc. A/52/37 (1997), *compiled in* I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 565.

429. *Report of the Sixth Committee, Measures to Eliminate International Terrorism*, U.N. Doc. A/52/653 (1997), *compiled in* I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 645.

430. Convention For The Suppression Of Terrorist Bombings, U.N. Doc. A/Res/52/164 (1998), *compiled in* II INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, *supra* note 258, at 183 [hereinafter Terrorist Bombings]. See also International Civil Aviation Organization: Final Act of the International Conference On Air Law and Convention on the Marking of Plastic Explosive for the Purpose Of Detection, U.N. Doc. S/22393/Corr.1, 30 I.L.M. 721 (1991).

intentionally delivering, placing, discharging or detonating an explosive or other lethal device “into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility.”<sup>431</sup> This offense required an intent to cause death or serious bodily injury<sup>432</sup> or an intent to cause extensive destruction where such destruction resulted in or was likely to result in a major economic loss.<sup>433</sup> In addition to the perpetrator, liability was extended to individuals who served as accomplices,<sup>434</sup> organizers or directed others to commit an offense<sup>435</sup> or in any other fashion intentionally contributed to the commission of an offense punishable by the Convention.<sup>436</sup> The Convention was inapplicable in those instances in which the offense was committed within a single State, the alleged offender and the victims were nationals of that State, the putative offender was found in the territory of that State and no other State could claim a basis to exercise jurisdiction under the Convention.<sup>437</sup> States Parties with custody over an offender, in the event that they did not extradite the offender, were obliged “to submit the case without undue delay to its competent authorities for the purpose of prosecution.”<sup>438</sup> Offenses punishable under the Convention were to be punishable by “appropriate penalties which take into account the grave nature of those offenses.”<sup>439</sup> States Parties were to afford one another the “greatest

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431. Terrorist Bombings, *supra* note 430, art. 2.

432. *Id.* art. 2, para. 1(a).

433. *Id.* art. 2, para. 1(b).

434. *Id.* art. 2, para. 3(a).

435. *Id.* art. 2, para. 3(b).

436. *Id.* art. 2, para. 3(c).

437. Terrorist Bombings, *supra* note 430, art. 3. Each State Party shall establish jurisdiction over the offenses within the Convention “when the offense is committed in the territory,” on board a vessel or aircraft of that State; or “the offense is committed by a national of that State.” *Id.* art. 6. “A State may also establish jurisdiction over any such offense when the offense is committed against a national of that State; or the offense is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or the offense is committed by a stateless person who has his or her habitual residence in the territory of that State; or the offense is committed in an attempt to compel that State to do or abstain from doing any act; or the offense is committed on board an aircraft which is operated by the Government of that State.” *Id.* art. 6, para. 2.

438. *Id.* art. 8. The offenses under the condition shall be deemed to be included as an extraditable offense in any extradition treaty between States Parties. *Id.* art. 9. “A State Party which makes extradition conditional on the existence of a treaty . . . may consider this Convention as a legal basis for extradition.” *Id.* Offenses within the Convention shall not be considered political offenses for purposes of extradition. *Id.* art. 11.

439. *Id.* art. 4(b).

measure of assistance” in investigations or in criminal or extradition proceedings.<sup>440</sup>

There is little doubt that this Convention prohibited the planning and carrying out of suicide bombings.<sup>441</sup> States Parties were required to adopt domestic legislation criminally condemning acts within the Convention, particularly “where they were intended or calculated to provoke a state of terror in the general public, in a group of persons or in particular persons.”<sup>442</sup> Such acts were “under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature” and were to be punished by penalties which reflected the “grave nature of this criminal conduct.”<sup>443</sup> This significantly negated claims of religious justification for suicide bombing.<sup>444</sup> An argument for Palestinian resistance and self-determination also might be made under Article Nineteen which provided that the Convention shall not affect rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.<sup>445</sup> However, the targeting of civilians cannot be justified under humanitarian principles and violates the fundamental norms of discrimination between civilians and combatants as well as the requirement of proportionality between the resulting military advantage and the harm resulting to non-combatants.<sup>446</sup>

440. *Id.* art. 10, para. 1.

441. *See supra* notes 29-35 and accompanying text.

442. Terrorist Bombings, *supra* note 430, art. 5.

443. *Id.*

444. *See supra* notes 36-40 and accompanying text.

445. Terrorist Bombings, *supra* note 430, art. 19, para. 1. “The activities of armed forces during an armed conflict . . . are not governed by the Convention.” *Id.* art. 19, para. 2.

446. *See* AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES AND THE PALESTINIAN AUTHORITY WITHOUT DISTINCTION-ATTACKS ON CIVILIANS BY PALESTINIAN ARMED GROUPS 22-23 (2002). *See* Protocol I, *supra* note 340, arts. 48-52. The sustained utilization of suicide bombing may very well constitute a crime against humanity. *See* AMNESTY INTERNATIONAL, *supra*, at 24-25 quoting Rome Statute Of The International Criminal Court, art. 7, para. 1-2(a), U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (1998) [hereinafter Rome Statute]. Article 7, para. 1 defines a crime against humanity as a specified act of violence or persecution committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” *Id.* art. 7, para. 1. An attack against any civilian population is defined as “a course of conduct involving the multiple commission of acts” . . . [of violence or persecution] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” *Id.* art. 7, para. 2(a).



The Terrorist Bombing Convention included the contemporary clauses providing for expansive jurisdiction<sup>447</sup> as well as a requirement that States either extradite or prosecute offenders.<sup>448</sup> A criticism might be made that the Convention did not extend to purely domestic bombings.<sup>449</sup>

The Russian Federation continued to warn of the dangers of terrorist utilization of weapons of mass destruction, radiological material and of attacks on nuclear power plants.<sup>450</sup> These attacks were particularly attractive since even a modest assault would promote significant fear and psychological disorientation.<sup>451</sup>

The Draft Convention on the Suppression of Acts of Nuclear Terrorism, which remains under active consideration, made an important contribution by requiring Signatory States to prohibit "the use or threat of use of nuclear material, nuclear fuel, radioactive products or waste, or any other radioactive substances, their radioactive properties or a combination of radioactive properties with toxic, explosives or other dangerous properties."<sup>452</sup> The Convention also prohibited the deployment or destruction of "any nuclear installation, nuclear explosive or radiation-dissemination devices . . . [or] manufacture of home-made nuclear devices, for the purpose of causing death or serious injury to any person or harming his health, causing substantial damage to property or the environment," or compelling an individual, group, organization or State to commit or refrain from the commission of any act.<sup>453</sup> There was no requirement under the Convention that the perpetrator possess a political or terrorist motive.<sup>454</sup> A central concern has been the fact that the Convention applied to individuals and to non-States groups and did not extend to State policies

447. See *supra* note 437 and accompanying text.

448. See *supra* note 438 and accompanying text.

449. See *supra* note 437 and accompanying text.

450. *Explanatory Note To The Draft Convention On The Suppression Of Acts Of Nuclear Terrorism (A/AC.252/L.13) Submitted by the Russian Federation*, U.N. Doc. A/AC.252/L.3/Add.1, paras. 1-2 (Jan. 14, 1998), compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 659.

451. *Id.* para. 2. See Convention on the Prohibition of the Development, Production and Stockpiling Of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 1015 U.N.T.S. 163, 26 U.S.T. 583; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 101, 18 I.L.M. 1419; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, May 13, 1993, 1974 U.N.T.S. 3, 32 I.L.M. 800.

452. Draft Convention On The Suppression Of Acts Of Nuclear Terrorism, art. 1(1), U.N. Doc. A/AC.252/L.3 (1977), compiled in II INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, *supra* note 258, at 219 [hereinafter Nuclear Terrorism].

453. *Id.* art. 1, para. 1(b).

454. See *supra* notes 352-53.

involving the proliferation of nuclear weapons, posing of nuclear threats or nuclear degradation of the environment.<sup>455</sup>

The draft Convention contained the now familiar requirement that States assert broad jurisdictional claims over such offenses<sup>456</sup> and take measures to prosecute these offense in those instances in which extradition of an alleged offender is refused.<sup>457</sup> There are broad provisions for States to assist one another in prosecutions<sup>458</sup> and to exchange information in order to prevent, suppress, uncover and to investigate offenses encompassed within the Convention.<sup>459</sup> States also are to take measures to prevent preparations in their territories for the commission of offenses within or outside their territories, including illegal activities by persons, groups or organizations which encourage, instigate, organize or participate in or conceal nuclear terrorism.<sup>460</sup>

In 1999, the General Assembly adopted a resolution on Measures to Eliminate International Terrorism which called upon the Ad Hoc Committee to continue to elaborate a draft international convention for the suppression of nuclear terrorism as well as an instrument prohibiting terrorist financing.<sup>461</sup> The Committee also was called upon to consider the creation of a comprehensive legal framework of instruments regulating international terrorism, including "considering on a priority basis, the elaboration of a comprehensive convention on international terrorism."<sup>462</sup>

France submitted a memorandum on the financing of terrorism which stressed that terrorist armament, recruitment and training were dependent

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455. See Nuclear Terrorism, *supra* note 452, art. 2, para. 1. See *Report Of The Working Group, Measures To Eliminate International Terrorism*, U.N. Doc. A/C.6/55/L.2 (Oct. 19 2000), compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 827, 845. "This Convention shall apply exclusively to acts by specific natural persons (in an individual capacity or as part of non-State groups or other associations) and its scope shall not include the questions of the non-proliferation of nuclear weapons or [other] threats posed by States, international intergovernmental organizations or other subjects of international law." Nuclear Terrorism, *supra* note 452, art. 2, para. 1.

456. Nuclear Terrorism, *supra* note 452. States are to assert territorial jurisdiction, nationality jurisdiction, jurisdiction over acts to compel a State to perform or to refrain from any act, passive personality or an act directed against a national of a State. *Id.* art. 5.

457. *Id.* art. 5, para. 2. The case shall be submitted without undue delay to competent authorities for the purpose of prosecution and proceedings in accordance with domestic legislation. *Id.* art. 7, para. 1.

458. *Id.* art. 9.

459. *Id.* art. 11.

460. *Id.* art. 4(1).

461. G.A. Res. 108, U.N. GAOR, 53d Sess., U.N. Doc. A/53/108 (1999).

462. *Id.* para. 11.

on the free flow of illicit sources of funding.<sup>463</sup> The Convention for the Suppression of the Financing of Terrorism,<sup>464</sup> adopted by the General Assembly in 1999, required Signatory States to criminally condemn the provision of funds with the intention that they should be used, or in the knowledge that they were to be used, to carry out an act violative of a specified terrorist convention,<sup>465</sup> or 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 an armed conflict, when the purpose is to intimidate a population or to compel a government or international organization to perform or refrain from performing any act.<sup>466</sup> This does not encompass individuals who, in good faith, donated funds to an organization which conveyed the cash to a terrorist group.<sup>467</sup> The Convention, as with other instruments, is not applicable in those instances in which an offense is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis for asserting jurisdiction under the Convention.<sup>468</sup>

The traditional "prosecute" or "extradite" standard also is incorporated into the Convention.<sup>469</sup> States Parties are required to take

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463. Draft International Convention for the Suppression of the Financing of Terrorism, Working Document Submitted by France, U.N. Doc. A/AC.252/L.7/Add.1 (1999), compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 778.

464. Convention for the Suppression of the Financing of Terrorism, U.N. Doc. A/54/109 (1999), compiled in II INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, *supra* note 258, at 231.

465. *Explanatory Note to the Draft Convention on the Suppression of Acts of Nuclear Terrorism (A/AC.252/L.13) Submitted by the Russian Federation*, paras. 1-2, U.N. Doc. A/AC.252/L.3/Add.1 (1998), compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS *supra* note 249, at 659 [hereinafter *Explanatory Note*].

466. *Id.* para. 2.

467. *See id.*

468. *Id.* para. 3. States Parties shall take such measures as may be necessary to establish jurisdiction over offenses within the Convention when the offense is committed in the territory of that State, the offense is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State, the offense is committed by a national of that State. *Id.* art. 7, para. 1. A State Party may also establish jurisdiction over such an offense when the act was directed towards or resulted in the carrying out of an offense in the territory of or against a national of the State resulted in the carrying out of an offense against a State or government facility of that State abroad, including diplomatic or consular premises, the offense was directed or resulted in an offense committed in an attempt to compel that State to do or to abstain from any act, the offense was committed by a stateless person whose habitual residence is within the territory of the State or the offense is committed on board an aircraft operated by the State. *Id.* art. 7, para. 2.

469. *Id.* arts. 10-11.

necessary measures to hold legal entities civilly, criminally or administratively liable for offenses under the Convention.<sup>470</sup> States Parties also shall take appropriate measures for the identification, detection and freezing or seizure of funds used or allocated for the purpose of contravening the Convention;<sup>471</sup> these funds as well as the proceeds derived from violations of the Convention are subject to forfeiture.<sup>472</sup> States Parties shall consider mechanisms for utilizing such funds to compensate the victims of terrorist offenses.<sup>473</sup> States Parties are to afford one another the greatest measure of assistance in connection with criminal investigations or criminal extradition proceedings.<sup>474</sup> Signatories may not refuse a request for mutual legal assistance on the grounds of bank secrecy.<sup>475</sup> The Convention also includes an inventory of measures for insuring transparency in banking regulations.<sup>476</sup>

A central concern with the Convention on the Suppression of the Financing of Terrorism is that it does not prohibit the intentional transmittal of funds to terrorist groups or to terrorist-support groups with the knowledge that the fund will be used to support the non-terrorist activities of militant groups.<sup>477</sup>

In summary, the contemporary period has witnessed as determination on behalf of the United Nations to act against international terrorism.<sup>478</sup> The General Assembly adopted a non-binding resolution condemning and controlling terrorism<sup>479</sup> as well as resolutions on human rights and terrorism.<sup>480</sup> The United Nations also adopted conventions on terrorist bombings<sup>481</sup> as well as on the financing of terrorist organizations<sup>482</sup> and

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470. *Id.* art. 5.

471. *Explanatory Note, supra* note 465, art. 8, para. 1.

472. *Id.*

473. *Id.* art. 8, para. 4.

474. *Id.* art. 12, para. 1.

475. *Id.* art. 12, para. 2.

476. *Id.* art. 18. These include the establishment of measures to identify depositors, monitor large and complex and unusual patterns of transactions and to maintain records. *Id.* art. 19, para. 1(b)(iii). States Parties shall further cooperate in the prevention of offenses by the licensing of money-transmission agencies, and shall undertake measures to detect or to monitor the physical cross-border transportation of cash and negotiable instruments. *Id.* art. 18, para. 2(b).

477. *See supra* notes 465-67 and accompanying text.

478. *See supra* notes 382-89 and accompanying text.

479. *See supra* notes 393-403 and accompanying text.

480. *See supra* notes 390-91 and accompanying text.

481. *See supra* notes 430-40 and accompanying text.

482. *See supra* notes 464-77 and accompanying text.

made significant progress on prohibiting nuclear terrorism.<sup>483</sup> These instruments incorporated progress on the extension of jurisdiction, extradition and State cooperation.<sup>484</sup>

## VI. TOWARDS A COMPREHENSIVE CONVENTION

The momentum mounted for a comprehensive convention on terrorism.<sup>485</sup> In 1996, India transmitted to the Secretary-General for consideration by Member States a draft international convention on the suppression of terrorism.<sup>486</sup> The Ad Hoc Committee on Terrorism appointed by the General Assembly, in 1999, has regularly condemned terrorism as a threat to international peace and security which constituted a violation of basic human rights.<sup>487</sup> States nevertheless have been unable to agree on the precise parameters of terrorism; various delegates to the Ad Hoc Committee, for instance, have insisted on differentiating between terrorism and the legitimate right of peoples to resist foreign occupation.<sup>488</sup> These State delegations, in essence, argued that any consideration and condemnation of terrorism must be tempered by an appreciation of the underlying motives and causes of this conduct.<sup>489</sup> Others cautioned against devolving into a debate which might detract from the accomplishments of the General Assembly.<sup>490</sup> Another set of States stressed the dangers posed by State terrorism.<sup>491</sup> Others emphasized that any definition must note the particular threat of terrorists aligning themselves with drug traffickers and arms smugglers.<sup>492</sup>

Delegates compromised by endorsing the pragmatic and prudent approach of addressing particular types of terrorist activity in an

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483. *See supra* notes 452-60 and accompanying text.

484. *See supra* notes 447-48, 456-57, 468-69 and accompanying text.

485. *See infra* notes 486-500 and accompanying text.

486. Letter From The Permanent Representative Of India To The United Nations Addressed To The Secretary-General (Nov. 1, 1996) U.N. Doc. A/C.6/51/6, *compiled in* I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 526 [hereinafter Indian Draft I].

487. *Report Of The Ad Hoc Committee Established By General Assembly Resolution 51/210 Of 17 December 1996*, 4th Sess., para. 16, U.N. Doc. A/55/37 (2000), *compiled in* I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS *supra* note 249, at 806 [hereinafter *Report of the Ad Hoc Committee*].

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.*

incremental fashion.<sup>493</sup> States stressed the importance of international cooperation in combating terrorism and the ratification of existing conventions.<sup>494</sup> A significant number advocated drafting a comprehensive convention on international terrorism<sup>495</sup> which integrated existing conventions, addressed terrorist threats which heretofore had not been the subject of international action and established a common legal framework for the processing and prosecution of terrorism.<sup>496</sup>

The General Assembly, in 2000, formally voted to appoint a working group within the Sixth Committee to draft a "comprehensive convention on international terrorism within a comprehensive legal framework of conventions dealing with international terrorism."<sup>497</sup> The Working Group agreed that a comprehensive convention should address all aspects of terrorism, including those not yet encompassed in existing documents.<sup>498</sup> In addition, the comprehensive convention should extend the progressive procedural provisions of more recent documents to offenses not encompassed within earlier instruments.<sup>499</sup>

India distributed a revised draft comprehensive convention at the first meeting of the Working Group in 2000.<sup>500</sup> The preamble to the Indian draft enumerated existing international conventions, recalled General Assembly resolutions which adopted measures to eliminate international terrorism and resolved to take effective measures to prevent terrorism and to ensure that the perpetrators were subjected to prosecution and

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493. Report of the Ad Hoc Committee, *supra* note 487, para. 17.

494. *Id.*

495. *Id.* "The suggestion was made that the Secretariat could offer assistance to States by serving as a depository of implementing legislation regarding terrorism." *Id.* para. 19.

496. *Id.* para. 26. There was lengthy debate on convening a comprehensive conference on terrorism. Some contended that this would draw attention to the problem of terrorism and permit discussion of methods of combating terrorism. *Id.* para. 22. Others warned that this would invite rhetorical exercise on issues and absorb valuable time and resources. *Id.* para. 23.

497. *Measures To Eliminate International Terrorism*, U.N. Doc. A/Res/54/110 (2000), compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS *supra* note 249, at 800.

498. *Measures To Eliminate International Terrorism: Report of the Working Group*, Annex IV, para. 18, U.N.Doc. A/C.6/L.2 (2000), compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 827 [hereinafter *Report of the Working Group*].

499. *Id.*

500. *Measures To Eliminate International Terrorism: Draft Comprehensive Convention On International Terrorism, Working Document Submitted By India*, U.N. Doc. A/C.6/55/1 (2000), compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS *supra* note 249, at 814 [hereinafter *Indian Draft II*].

punishment.<sup>501</sup> The preamble also implicitly recognized the suppression of terrorism, including that sponsored or supported by States, was essential to the safeguarding of international peace and security.<sup>502</sup> Some States undoubtedly would object that while the preamble condemned terrorism as endangering innocent lives and human dignity and impinging fundamental freedoms, that insufficient attention was devoted to addressing the underlying causes of terrorism and to the aspirations of peoples fighting for self-determination against colonial and racist regimes.<sup>503</sup>

Article Two defined terrorism as an unlawful and intentional act which causes death or serious bodily injury to any person.<sup>504</sup> There is some logic to a provision which is sufficiently broad to encompass a full range of criminal conduct, but this language is too elastic. The murder of a common citizen typically is not sufficiently significant to impact upon the societal psyche unless the act endangered or threatened the public or was directed against an individual of status, stature or notoriety.<sup>505</sup> This also seems to preclude hostage-taking, kidnappings and symbolic acts of violence intended to promote terror.<sup>506</sup> The second act of terror set forth in the Convention involved an act intended to cause serious damage or major economic loss to a government facility, public transportation system communication network or infrastructure where the purpose of such act was to "intimidate a population, or to compel a Government or an

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501. *Id.* pmb1.

502. *Id.* Article 18 somewhat obscurely provides that "[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law." *Id.* art. 18, para 1.

503. *See* Hostage Convention, *supra* note 353, art. 12.

504. *Indian Draft II*, *supra* note 500, art. 2, para. 1(a). The Convention also penalizes an attempt or acting as an accessory; organizing, directing or instigating others to commit an offense; aiding, abetting, facilitating or counseling the commission of such an offense, or contributing to the commission to an offense within the convention by a group of persons acting with a common purpose. *Id.* art. 2. This contribution must be "intentional and either made with the aim of furthering the general criminal activity or purpose of the group or be made with the knowledge of the intention of the group to commit the offense or offenses concerned." *Id.* art. 2, para. (3)(c).

505. *See* The Convention for the Prevention and Punishment of Terrorism, *supra* note 258, at 71, art. 2, paras. (1)-(2).

506. *See* United States Draft Convention For The Prevention And Punishment of Certain Acts of International Terrorism, U.N. Doc. A/C.6/L.850 (1972), *compiled in* I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 557.

international organization to do or abstain from doing any act.”<sup>507</sup> The concern with property appears to be a remnant of the Cold War conflict in which Socialist States placed a primacy on social and economic rights rather than civil liberties.<sup>508</sup> The “intimidate or compel” standard nicely captures the requisite intent which distinguishes terrorism from common crimes.<sup>509</sup> The text should be clarified to make plain that an attack on ordinary office buildings, public and private monuments or automobiles and private transport systems are encompassed within the language of this section.<sup>510</sup> An international convention also should be directed at acts which cause or which are intended to cause serious damage or major economic loss.<sup>511</sup> The text stipulates that these offenses shall be established as criminal offenses under domestic law and are to be punished by appropriate penalties.<sup>512</sup> The draft, in Appendix I, enumerated the international offenses established by existing terrorist conventions which, together with the offenses in Article Two, were not to be considered as political crimes which were exempt from extradition.<sup>513</sup>

Article Two illustrates the dilemmas inherent in a comprehensive convention. The Indian Draft appears to be designed to maximize ratifications by including a broadly phrased text and stipulating that the offenses enumerated in existing international instruments shall not be considered political crimes which are exempt from extradition.<sup>514</sup> There is no requirement in the draft that States ratify these treaties and recognize these offenses.<sup>515</sup> States, under the comprehensive convention, still possess the discretion to abrogate political offender status while retaining the authority to refuse to extradite an offender to a requesting State and to decline to prosecute the offender.<sup>516</sup> In any event, the requirement that

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507. Indian Draft II, *supra* note 500, art. 2, para. 1(b). Purpose may be determined by the “nature or context” of the act. *Id.*

508. See generally International Covenant On Economic, Social and Cultural Rights, G.A. Res. 2200, U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1967).

509. See *id.*

510. See *id.*

511. See *id.*

512. Indian Draft II, *supra* note 500, art. 4. See *Report of the Working Group, supra* note 498, at 827, 831. It was suggested that Article Two should be modified to provide for a section on death or seriously bodily harm and a second section addressing serious damage to property. The third section then would address damage to property resulting or likely to result in major economic loss. *Id.* art. 11(B).

513. Indian Draft II, *supra* note 500, art. 14.

514. See *id.*

515. See *supra* note 513 and accompanying text.

516. See Indian Draft II, *supra* note 500, art. 17. A State, for instance, may not have an extradition agreement with the requesting State. See *id.* art. 17(2).



States abrogate political offender status still may impede ratification since States which have not yet entered into existing particular counter-terrorism conventions may object to this provision on the grounds that it improperly interferes with their domestic jurisdiction or denies political recognition to justified acts of resistance.<sup>517</sup> There also is the concern that so-called State terrorism, which some consider to be of paramount concern, is not explicitly included in the Treaty.<sup>518</sup>

A more comprehensive text which either incorporates existing instruments by reference or which encompasses their substantive provisions, on the other hand, likely is to meet resistance from reticent States.<sup>519</sup> It nevertheless appears preferable to formulate a comprehensive convention which supercedes and refines existing documents and incorporates additional manifestations of modern terrorism in order to provide an international condemnation of terrorist acts, however symbolic.<sup>520</sup>

The Convention primarily is concerned with the international dimension of terrorism and contains the familiar provision that the draft shall not apply where the offense is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis to exercise jurisdiction under the Convention.<sup>521</sup> This provision implicitly encourages and recognizes the interest of third-party States in extending their jurisdiction to encompass acts committed against and by their nationals abroad as well as acts undertaken abroad which are directed against their regime.<sup>522</sup> The result is that acts of pure domestic terrorism are excluded from the scope of the convention and are considered beyond the scope of the influence and control of the international community.<sup>523</sup>

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517. See *supra* notes 347-62 and accompanying text.

518. See generally Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197 (Annex), U.N. Doc. A/9/51 (1985), reprinted in 23 I.L.M. 1027 (1984). The conduct of States, of course, already is addressed in existing documents. See Convention on The Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

519. See *Unofficial Draft Comprehensive Convention on the International Suppression of Terrorism*, compiled in II INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS, *supra* 258, at 263 (this draft was formulated by Professor Bassiouni and others and incorporated the offenses contained in existing international treaties).

520. See *id.*

521. Indian Draft II, *supra* note 500, art. 3. This was modified to require that the alleged offender and the victims were nationals of a single State. See Report of the Working Group, *supra* note 498, at 827, 829.

522. Indian Draft II, *supra* note 500, art. 3.

523. *Id.*

Each State Party shall adopt those measures which may be necessary in order to establish as criminal offenses the offenses set forth in Article Two which, as noted, are to be punishable by appropriate penalties.<sup>524</sup> The Convention also might set forth parameters of the range of punishments as well as the correctional conditions and status to which those incarcerated may be subjected.<sup>525</sup> In addition, Article Four should address the availability of the statute of limitations as well as various common law defenses such as duress and necessity and double jeopardy.<sup>526</sup> Criminal acts under the Convention may not be justified on the basis of a philosophical, ideological, racial, ethnic or religious claim.<sup>527</sup> The issue arises whether these factors may be considered in mitigation of punishment.<sup>528</sup> It also would be desirable to specify the character and conduct of the relevant domestic tribunals which may be employed and minimal due process protections and procedures.<sup>529</sup>

Article Six requires States to assert an expansive jurisdictional basis over offenses within the Convention based on the territorial, nationality and protective principles<sup>530</sup> and also provides broad provisions for permissive jurisdiction.<sup>531</sup> States Parties also shall take such measures as may be necessary to assert jurisdiction over offenses in those instances in which the alleged offender is present in its territory and where it does not extradite the individual with a State which possesses jurisdiction under the Convention.<sup>532</sup> This ensures that there is a State with a legal interest in bringing alleged terrorists to trial.<sup>533</sup> The difficulty of competing jurisdictional claims, of course, arises and the Convention merely

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524. *Id.*

525. *Standard Minimum Rules for the Treatment of Prisoners*, E.S.C. Res. 663, 24 U.N. ESCOR, Supp. No. 1, at 11, Doc. A/CONF./6/1, U.N. Doc. E/3048 (1957).

526. *See* Indian Draft II, *supra* note 500, art. 3.

527. *Id.* art. 5.

528. *See id.*

529. *See id.*

530. *Id.* art. 6, para. 1. Protective jurisdiction provides legal authority and competence when the effect of extra-territorial conduct or the intended effect of such occur within a State's territory. *Id.* art. 6, para. 1(c).

531. *Id.* art. 6, para. 2. A State may establish its jurisdiction over any such offense when it is committed by a stateless person whose habitual residence is in that state; it is committed by a national of that State; it is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; it is committed in an attempt to compel that State to do or to abstain from doing any act, it is committed on board a ship or aircraft which is operated by the Government of that State. *Id.* art. 6, para. 2.

532. *Id.* art. 6, para. 3.

533. *See Id.* art. 6.

admonishes States to coordinate their "actions appropriately."<sup>534</sup> It may be more expedient to provide for universal jurisdiction, or the recognition of the claims of any and all countries, rather than engage in this catalogue of complex and competing jurisdictional provisions and claims.<sup>535</sup> At the same time, there are obvious difficulties with States asserting jurisdiction in cases in which witnesses, documents and evidence is located abroad.<sup>536</sup> The most logical solution to many of these potential complex and competing jurisdictional claims is to vest jurisdiction in the newly-established international criminal court.<sup>537</sup>

The provision for broadly-based jurisdiction is particularly important given the reluctance of States who fear retaliation to prosecute foreign terrorist groups operating within their territory and, in such instances, negotiation may be a much more attractive alternative.<sup>538</sup> Weak central States often lack mechanisms to apprehend or to prosecute terrorists while so-called rogue States often provide safe havens for terrorists and are likely to refuse extradition or to deny the presence of terrorists.<sup>539</sup> Terrorist organizations are fluid, flexible and global and effective cooperation between States is particularly important.<sup>540</sup> The large number of individuals who are involved in supporting and organizing terrorist activity also makes the provision of accessory liability an important component of any treaty on terrorism.<sup>541</sup>

The Convention provides that States Parties shall take the necessary measures to hold legal entities located in their territory or organized under their laws liable in those instances in which an individual responsible for the organization's management or control has committed an offense within the Convention.<sup>542</sup> These remedies may be effective, proportionate and dissuasive criminal, civil or administrative sanctions and may include

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534. *Id.* art. 6, para. 4.

535. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

536. *Id.*

537. See Rome Statute, *supra* note 446.

538. See generally SIMON REEVE, ONE DAY IN SEPTEMBER (2000). An example is Germany's implicit arrangement to release those Palestinians who participated in the hostage-taking and killing of Israeli athletes at the 1972 Munich Olympics. *Id.* 155-59.

539. See RAYMOND TANTER, ROUGE REGIMES: TERRORISM AND PROLIFERATION (St. Martin's Griffin 1999).

540. See *supra* notes 54-56 and accompanying text.

541. See *supra* note 290 and accompanying text.

542. Indian Draft II, *supra* note 500, art. 9. This "liability is incurred without prejudice to the criminal liability of individuals having committed the offense." *Id.* art. 9, para. 2.

monetary sanctions.<sup>543</sup> There also might be provision for civil remedies against individuals associated with terrorist groups as well as actionable claims against State sponsors.<sup>544</sup> The specific measures for the freezing and forfeiture of funds contained in the Convention on the Financing of Terrorism also should be explicitly set forth.<sup>545</sup> These concerns should be explicitly linked to the creation of domestic and international funds for the compensation of victims of terrorism as well as to measures which insure the fair and equitable treatment of victims and their families.<sup>546</sup>

Article Seven, which provides that States Parties shall take appropriate measures before granting asylum to ensure that asylum is not granted to an individual reasonably believed to be involved in terrorism, might be extended to encompass the immigration and the movements of peoples across borders.<sup>547</sup> States Parties also shall take all "practicable measures" to prevent and to counter preparations in their territories for the commission of acts of terrorism, both within and outside their territories.<sup>548</sup> This includes a prohibition on terrorist installations and training camps;<sup>549</sup> prevention of illegal activities to encourage, instigate, organize or finance or engage in terrorism;<sup>550</sup> and efforts to exchange accurate and verified information.<sup>551</sup> This, of course, may impinge upon protected activities and might be combined with an admonition that the countering of terrorism does not justify the impingement of human rights.<sup>552</sup> States also might be required to engage in programs of education concerning the benefits of social diversity and tolerance as well as the consequences of terrorism and Signatory States also should be expected to take affirmative steps to eradicate the socio-economic conditions which foster terrorism.<sup>553</sup>

States Parties also are required to investigate allegations that individuals present within their territory have engaged in acts of

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543. *Id.* art. 9, para. 3.

544. See ALLAN GERSON & JERRY ADLER, *THE PRICE OF TERROR* 103 (Harper Collins 2001).

545. See *supra* notes 465-76 and accompanying text.

546. See generally *ORIGINS OF TERRORISM*, *supra* note 8. The literature primarily has been devoted to the psychology of victimizers rather than victims. See *id.*

547. See Indian Draft II, *supra* note 500, art. 7.

548. *Id.* art. 8(a).

549. *Id.* art. 8(a)(i).

550. *Id.* art. 8(a)(ii).

551. *Id.* art. 8(b).

552. See *supra* notes 379-80 and accompanying texts.

553. See *Colonial Countries and Peoples*, *supra* note 337.

terrorism.<sup>554</sup> In the event that the requisite evidentiary basis is satisfied, States Parties shall take appropriate measures under their domestic law to detain the individuals for the purpose of prosecution or extradition.<sup>555</sup> Detainee shall be entitled to meet with a representative of their State of nationality.<sup>556</sup> The detaining State shall notify other countries with jurisdictional claims over the alleged perpetrator.<sup>557</sup> States Parties are expected to afford one another the "greatest measure of assistance" in conducting investigations or criminal or extradition proceedings.<sup>558</sup>

A State Party in whose territory an alleged offender is detained, shall either extradite the offender or submit the case to its competent authorities for the purpose of prosecution.<sup>559</sup> The decision whether to prosecute shall be made in accordance with the procedures utilized in the case of any "ordinary offence of a grave nature under the law of that State."<sup>560</sup> This provision makes extradition discretionary which raises the concern that offenders who are not extradited either will avoid prosecution or will be prosecuted for relatively modest offenses or receive a lenient sentence.<sup>561</sup>

Article Fourteen provides that the offenses enumerated in the Convention as well as in other terrorist instruments shall not be considered political offenses for purposes of extradition or mutual legal assistance.<sup>562</sup> This appears to be based on view that a political motive or exigency, under no circumstances, may justify the commission of terrorist offenses.<sup>563</sup> The narrowing of State discretion over extradition is counter-balanced by Article Fifteen which provides that there shall be no obligation to extradite individuals in those instances in which the request has been motivated by a

554. Indian Draft II, *supra* note 500, art 10(1).

555. *Id.* art. 10(2).

556. *Id.* art. 10(3).

557. *Id.* art. 10(6). Persons taken into custody or subjected to any other measures or proceedings under the Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in which the individual is detained and in conformity with the laws of the United States. *Id.* art. 12.

558. *Id.* art. 13(1).

559. *Id.* art. 11(1).

560. Indian Draft II, *supra* note 500.

561. *Id.* A State Party which only is authorized to extradite a national on the condition that the detainee will be returned to the State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender was sought, may extradite the offender under the Convention on the grounds that the individual will be returned to serve his or her sentence. *Id.* art. 11(2).

562. *Id.* art. 14.

563. *See id.* In addition to the two offenses set forth in Article Two; the offenses set forth in twelve terrorism treaties are not considered political offenses. *See* Annex 1.

desire to prosecute individuals based on their background or views.<sup>564</sup> There are a number of standard provisions which seek to overcome technical and procedural barriers which might impede or prevent the extradition of offenders.<sup>565</sup>

Article Sixteen establishes procedures for transferring detainees to third party State for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the prosecution of offenses under the Convention.<sup>566</sup> There also should be a prohibition on a State transferring detainees to a third-party State whose judicial and police procedures contravene due process principles pertaining to interrogation or to the treatment of detainees.<sup>567</sup> Disputes concerning the interpretation or application of the instrument which cannot be settled through negotiation may be referred, at the request of one of the parties, to arbitration with an appeal to the International Court of Justice.<sup>568</sup> It also would appear advisable to establish a permanent committee on terrorism under the Convention to receive State reports and to monitor compliance with the terms of the treaty.<sup>569</sup>

The Indian proposal provides a foundation for a comprehensive convention on international terrorism.<sup>570</sup> The draft treaty's most glaring weakness appears to be the limited definition of terrorism.<sup>571</sup> The instrument, however, is a significant step towards the creation of a system

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564. *Id.* art. 15.

565. *See id.* art. 15, para. 17. The offenses under the Convention shall be deemed to be included as an extraditable offense in any extradition treaty between any of the States Parties before the entry into force of the Convention. *Id.* art. 17(1). A State may consider the Convention as a legal basis for extradition in the event that there is no extradition treaty between the requesting and receiving States. *Id.* art. 17(2). States which do not make extradition conditional on the existence of a treaty shall recognize the offenses set forth in the Treaty as extraditable offenses between themselves. *Id.* art. 17(3). The provisions of extradition treaties shall be deemed to be modified as between States Parties to the extent that they are incompatible with the Convention. *Id.* art. 17(5). *See id.* Annex III (Extradition Procedure).

566. Indian Draft II, *supra* note 500, art. 16. *See* Annex II (Procedure for mutual legal assistance). Mutual legal assistance may be requested for taking evidence or statements; effecting service of judicial documents; executing searches and seizures; examining objects and sites; providing information and evidentiary items; providing original or certified copies of relevant documents and records; and identifying or tracing proceeds, property, instrumentalities or other items for evidentiary purposes. *Id.* art. 2 (Annex II).

567. *See id.* art. 16.

568. *See id.* art. 23(1).

569. *See generally* International Covenant On Civil And Political Rights, arts. 28, 40-43, 993 U.N.T.S. 171, 6 I.L.M. 368 (1967).

570. *See supra* notes 500-69 and accompanying text.

571. *See supra* notes 504-11 and accompanying text.

of international cooperation and mutual assistance for combating multinational terrorist violence.<sup>572</sup> There no doubt will be States which resist signing or ratifying a comprehensive treaty.<sup>573</sup> An instrument of this nature nevertheless may highlight the international community's condemnation of terrorism, place States which sponsor terrorism on the defensive and assist in the creation of an international customary denunciation of terrorism.<sup>574</sup>

## VII. THE UNITED NATIONS SECURITY COUNCIL

The United Nations Security Council convened on September 12, 2001 following the attack on the United States and proclaimed that terrorism was crime against the international community.<sup>575</sup> Secretary-General Kofi Anan expressed solidarity with the American government and denounced terrorism as an international scourge which has been condemned by the United States and which constituted an attack on "humanity as a whole."<sup>576</sup> Sir Jeremy Greenstock noted that "terrorism is the new evil in our world today, perpetrated by fanatics who are utterly indifferent to the sanctity of human life."<sup>577</sup> He noted that September 11th constituted an attack on the "whole of modern civilization" and that the international community must "respond globally and show the strength of . . . spirit."<sup>578</sup> Mr. Ryan of Ireland affirmed that "no cause that is based on mass murder and carnage can ever succeed . . . those who perpetrate such deeds are the enemies of all peoples everywhere."<sup>579</sup> Those responsible for this "barbarism" were the "enemies of peace and justice" and must be "brought to justice and the entire international community must work together towards this end."<sup>580</sup> Mr. Lavrov of Russia proclaimed that the attack on the United States "transcends national borders. It is a brazen challenge to all of humankind."<sup>581</sup> Mr. Kolby of Norway

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572. See *supra* notes 548-53 and accompanying text.

573. Indian Draft II, *supra* note 500, art. 25(1). The Convention shall enter force thirty days after twenty-two instruments of ratification, acceptance, approval or accession have been deposited with the Secretary-General of the United Nations. *Id.*

574. See *id.* pmbl.

575. U.N. SCOR, 56th Sess., 4370th mtg., at 1, U.N. Doc. S/PV.4370 (2001), compiled in I INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS, *supra* note 249, at 61.

576. *Id.* at 2.

577. *Id.*

578. *Id.*

579. *Id.* at 5.

580. *Id.*

581. U.N. SCOR, *supra* note 575.

proclaimed that this “shameless terror was an effort to undermine the values that constitute the very foundations of the civilized world. The attacks were therefore directed against all of us.”<sup>582</sup> The President of the Security Council, Mr. Levitte of France, called for “unity and resolve” in the “face of what constitutes an attack upon all of humanity.”<sup>583</sup>

The Security Council proceeded to adopt Resolution 1368 and condemned in the “strongest terms the horrifying attacks” which took place on September 11, 2001<sup>584</sup> and expressed its “deepest sympathy” and “condolences.”<sup>585</sup> The resolution called upon States to work together to bring the perpetrators and organizers and sponsors of these terrorist acts to justice and to hold the offenders accountable.<sup>586</sup> The international community was called upon to increase its efforts to prevent and to suppress terrorist acts, including implementation of the relevant international anti-terrorist conventions and Security Council resolutions.<sup>587</sup> Most importantly, the Council expressed a willingness to take the necessary steps to combat all forms of terrorism, in accordance with “its responsibilities under the Charter of the United Nations.”<sup>588</sup>

On September 28, 2002, the United Nations Security Council adopted Resolution 1373 which reaffirmed the need to combat, by all means, the threat to international peace and security caused by terrorism.<sup>589</sup> This textual language significantly shifted the discussion of terrorism from human rights and self-determination to threats to international peace and security under the jurisdiction of the United Nations Security Council.<sup>590</sup> States also were called upon to prevent and to suppress the financing of terrorist acts<sup>591</sup> and to freeze the financial assets related to terrorist causes.<sup>592</sup> Criminal penalties were to be imposed on individuals involved in the solicitation and collection of funds for terrorist activities<sup>593</sup> and for

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582. *Id.* at 6.

583. *Id.* at 7.

584. U.N. SCOR, Res. 1368, 56th Sess., 4370th mtg., para. 1, U.N. Doc. S/RES/1368 (2001).

585. *Id.* para. 2.

586. *Id.* para. 3.

587. *Id.* para. 4.

588. *Id.* para. 5.

589. U.N. SCOR, Res. 1373, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001), available at <http://www.un.org/terrorism> (last visited Feb. 11, 2003).

590. *Id.* The resolution stated that the Security Council was acting under Chapter VII of the Charter of the United Nations. *Id.* See U.N. CHARTER art. 39.

591. S.C. Res. 1373, *supra* note 589, para. 1(a).

592. *Id.* para. 1(c).

593. *Id.* para. 1(b).



making finances or services available to terrorists or entities owned or under the control of terrorists.<sup>594</sup>

States also were to take the necessary steps to prevent the commission of terrorist acts, including information sharing and alerting other States.<sup>595</sup> In addition, States were to deny safe haven to individuals involved in terrorist activity<sup>596</sup> and were to insure that terrorist acts were established as criminal offenses, that the punishment reflected the seriousness of such acts and that individuals who committed these terrorist offenses were brought to justice.<sup>597</sup> States also were to afford one another the "greatest measure" of assistance in criminal investigations and proceedings relating to terrorist acts.<sup>598</sup> In addition, terrorists and terrorist groups should be prevented from moving across boundaries through effective controls on borders, the issuance of identity papers and travel documents and through measures for the prevention of document fraud counterfeiting and forgery.<sup>599</sup>

States also were called upon to intensify and to accelerate the exchange of information regarding terrorism, forged documents, illicit traffic in weapons and explosives and the methods of conspiratorial communication and weapons of mass destruction.<sup>600</sup> They also were to enter into bilateral and multilateral agreements to prevent and to suppress terrorist acts<sup>601</sup> and to sign and to ratify the relevant international conventions and protocols.<sup>602</sup> In addition, regimes were to ensure that asylum and refugee status were not extended to individuals involved in terrorism.<sup>603</sup>

The resolution also noted the close connection between terrorism and transnational organized crime, illicit drugs, money laundering, illegal arms trafficking and the illicit movement of nuclear, chemical, biological and other potentially deadly materials.<sup>604</sup> The Security Council stressed the necessity of coordinating efforts on the national, sub-regional, regional and

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594. *Id.* para. 1(d).

595. *Id.* para. 2(a).

596. *Id.* para. 2(c).

597. S.C. Res. 1373, *supra* note 589, para. 2(e).

598. *Id.* para. 2(f).

599. *Id.* para. 2(g).

600. *Id.* para. 3(a).

601. *Id.* para. 3(c).

602. *Id.* para 3(d).

603. S.C. Res. 1373, *supra* note 589, para. 3(f)-(g).

604. *Id.* para. 4.

international levels in order to strengthen the global response to terrorist threats.<sup>605</sup>

The Security Council created a Counter-Terrorism Committee, consisting of all members of the Council, charged with monitoring the implementation of the resolution.<sup>606</sup> Member States were to report to the Committee within ninety days on the measures which they had taken to implement the resolution.<sup>607</sup> The Security Council concluded by expressing the determination to “take all necessary steps in order to ensure the full implementation” of the resolution ‘in accordance with its responsibilities under the Charter.’<sup>608</sup>

The Security Council, convened at the ministerial level, proceeded to adopt Resolution 1377.<sup>609</sup> This affirmed Resolution 1373 and declared that international terrorism represented a serious threat to international peace and to individual as well as to collective security and was contrary to the principles of the United Nations Charter.<sup>610</sup> The main body of the resolution invited the Counter-Terrorism Committee to promote sophisticated approaches to addressing the areas encompassed by Resolution 1373, including the preparation of model laws;<sup>611</sup> and the availability and “possible synergies” between technical assistance programs.<sup>612</sup> The Resolution concluded by calling on States to intensify their efforts to eliminate the “scourge of international terrorism.”<sup>613</sup>

At the 4453 meeting of the Security Council, Sir Jeremy Greenstock, Head of the Counter-Terrorism Committee, proclaimed that Resolution 1373 imposed a binding obligation on all States to suppress and to prevent terrorism and that the function of the Counter-Terrorism Committee was to monitor the implementation of the measures required under this resolution and under existing anti-terrorist instruments.<sup>614</sup> He stressed that the mandate of the Committee was to enhance government performance in the struggle against terrorism and to insure that the executive and legislative branches of all countries were equipped to effectively

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605. *Id.*

606. *Id.* para. 6.

607. *Id.*

608. *Id.* para. 8.

609. *Id.* See U.N. SCOR, Res. 1377, 56th Sess., 4413th mtg., U.N. Doc S/RES/1377 (2001), available at <http://www.un.org/terrorism>.

610. *Id.*

611. *Id.*

612. *Id.*

613. *Id.*

614. U.N. SCOR, Res. 1373, 57th Sess., 4453d mtg., at 4, U.N. Doc. S/PV.4453 (2002), available at <http://un.org/terrorism>.

implement the program of action.<sup>615</sup> A critical part of this effort, as noted by some delegates, was to advocate increased domestic and regional efforts to combat terrorism and to encourage cooperation at the regional level among States with common cultural and historical traditions.<sup>616</sup> Sir Jeremy reported that the Committee already had invited States and regional organizations to contribute to a directory of available technical assistance; selected independent experts to advise the Committee; and requested the Secretary-General to establish a trust fund to support anti-terrorist activities.<sup>617</sup> Sir Jeremy further reported that guidelines had been issued to direct States in drafting reports and that an impressive 125 State reports had thus far been received.<sup>618</sup> He also assured the Security Council that the Counter-Terrorism Committee would work in an open and cooperative capacity and that he would continue to brief delegates on developments.<sup>619</sup>

Sir Jeremy explained that the Counter-Terrorism Committee would review the reports and write in confidence to the governments concerned, offering constructive comments.<sup>620</sup> This might entail a request for additional information, clarification or suggestions as to areas in which legislation or further executive measures were required.<sup>621</sup> Sir Jeremy stressed that this was a long-term and evolving process of adaptation and adjustment and that it was unlikely that any State would be declared in full compliance.<sup>622</sup> He stressed that the Counter-Terrorism Committee planned to function through consensus and to evaluate States' overall performance and had no intention of formulating a definition of terrorism, compiling lists of terrorists organizations or condemning specific acts of alleged terrorism.<sup>623</sup> Sir Jeremy pointed out that the authority to address specific acts which posed a threat to the peace was vested in the Security Council.<sup>624</sup> He also observed that the Committee was guided by Resolution 1373 and by twelve existing international conventions and that none of these texts referred to State terrorism which already was adequately addressed under the rubric of war crimes, crimes against humanity and human rights.<sup>625</sup>

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615. *Id.*

616. *Id.*

617. *Id.*

618. *Id.*

619. *Id.*

620. Res. 1373, *supra* note 614, at 5.

621. *Id.*

622. *Id.*

623. *Id.*

624. *Id.* at 24.

625. *Id.* at 24-25.

Sir Jeremy reviewed the performance of the Counter-Terrorism Committee at the 4512th meeting of the Security Council, on April 15, 2002.<sup>626</sup> He noted that the Committee had received 143 reports and almost one-half of the States had received a response.<sup>627</sup> The Committee was contacting the roughly fifty States which had yet to submit materials.<sup>628</sup> States were expected to submit a second-round of reports and Sir Jeremy stated that the Committee intended to be direct and forthcoming in inquiring into the plans of States for addressing issues of concern and that the Committee would recommend sources of assistance.<sup>629</sup> He also announced that the Counter-Terrorism Committee had established contact with the High Commissioner for Human Rights in order to remain aware of civil liberties and humanitarian concerns in the campaign to curtail terrorism.<sup>630</sup> In addition, Sir Jeremy expressed his intention to contact relevant agencies, such as the International Civil Aviation Organization, which might assist in identifying required initiatives and reforms.<sup>631</sup>

Sir Jeremy further noted that the failure of fifty States to submit reports likely was explained by these regimes' lack of resources and expertise, a deficiency which could be cured through the assistance of third party States and experts.<sup>632</sup> He pointed to and praised Norway which announced that it would lend assistance to the Organization of African States.<sup>633</sup> At the 4561st meeting of the Security Council, on June 27, 2002, Sir Jeremy noted that the Counter-Terrorism Committee was developing "benchmarks" to evaluate the performance of States.<sup>634</sup>

The Counter-Terrorism Committee's activities were the subject of debate and discussion by the Security Council.<sup>635</sup> At the November 12, 2002 meeting of the Council, the President, Mr. Knight of Jamaica,

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626. U.N. SCOR, 57th Sess., 4512th mtg., at 2, U.N. Doc. S/PV. 4512 (2002), available at <http://www.un.org/terrorism> (last visited Feb. 7, 2003).

627. *Id.*

628. *Id.*

629. *Id.* at 3.

630. *Id.*

631. *Id.*

632. U.N. SCOR, 4512th mtg., *supra* note 626, at 25.

633. *Id.*

634. U.N. SCOR, 57th Sess., 4561st mtg., at 20, U.N. Doc. S/PV. 4561 (2002), available at <http://www.un.org/terrorism> (last visited Feb. 7, 2003). See also *Guidance for the Submission of Reports Pursuant to Paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001*, para. 1.2, available at <http://www.un.org/terrorism> (last visited Feb. 7, 2003). See also *Reports By Member States*, available at <http://www.un.org/Doc/sc/committees/1373/1373reportsEng.htm>.

635. U.N. SCOR, 57th Sess., 4370th-4688th mtgs., available at <http://www.org/terrorism> (last visited Feb. 7, 2003).

reported that although Resolution 1373 provided a framework for action that there remained a need to define terrorism<sup>636</sup> and to formulate a comprehensive convention.<sup>637</sup> There also was a continuing need to address the issues which gave rise to terrorism, including poverty, regional conflict, the denial of human rights, a lack of access to justice and equal protection of the law, and a failure to provide for sustainable development and environmental protection.<sup>638</sup> Mr. Knight also stressed, in his capacity as Foreign Minister of Jamaica, the responsibility of regional and sub-regional organizations to implement Resolution 1373 and to strengthen the coordinated international response against terrorism, transnational crime, and illicit drugs, money-laundering and illegal arms trafficking.<sup>639</sup>

In summary the Counter-Terrorism Committee established as its goal the mobilization of State action against terrorism and the creation of a multinational anti-terrorist culture and infrastructure.<sup>640</sup> The provision of experts and assistance to States was a significant step in strengthening the capacity of the global community to combat terrorism.<sup>641</sup> The concern with the financing of terrorism, the movement across borders, the illicit shipment of arms, judicial cooperation and agreements to share information and resources also wisely focused on the institutional and legal architecture which must be strengthened in order to repress terrorist activity.<sup>642</sup> The Counter-Terrorism Committee also would be well-advised to continue to encourage the employment of regional expertise and resources<sup>643</sup> and should serve the valuable function of coordinating the efforts of various international, regional and national agencies and groups.<sup>644</sup> Of course, a great deal of terrorist activity is facilitated by rogue or weak States which are unlikely to be willing or able to cooperate and

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636. U.N. SCOR, 57th Sess., 4413th mtg., at 3, U.N. S/PV./4413 (2001) (statement of Security Council President Knight, Jamaica), available at <http://www.un.org/terrorism> (last visited Feb. 7, 2003).

637. *Id.*

638. *Id.* at 4.

639. *Id.* The Minister for Foreign Affairs of the Russian Federation, Mr. Igor Invanov, stressed the need to complete work on an international convention on nuclear terrorism. *Id.* at 11.

640. See *supra* notes 606-34 and accompanying text.

641. U.N. SCOR, 4453d mtg., *supra* note 614, at 5 (remarks of Mr. Ling, Belarus).

642. *Id.* at 11-13 (remarks of Mr. Arias, Spain).

643. *Id.*

644. U.N. SCOR, 4453d mtg., *supra* note 614, at 3 (remarks of the Security Council President, Mr. Loonjul of Mauritius).

which may be available as sponsors and safe havens for terrorist groups.<sup>645</sup> These are the States which should be the focus of international agitation and attention.<sup>646</sup>

Ironically, States which are engaged in the systematic violation of human rights are likely to have the most effective, if not totalitarian, mechanisms for controlling terrorism.<sup>647</sup> The failure to provide even a loose definition of terrorism invites these countries to repress democratic elements under the guise of combating terrorism.<sup>648</sup> This danger is compounded by the Counter-Terrorism Committee's decision to center on terrorism in isolation from the political context of such activity and a concern with human rights.<sup>649</sup>

At the same time, a focus on terrorism, while overlooking the fundamental socio-economic causes of violence and neglecting to address regional tensions and the threat to the peace presented by weapons of mass destruction, is a self-defeating strategy.<sup>650</sup> The Counter-Terrorism Committee has decided to view the struggle against terrorism as a technical task in order to limit the pernicious perils of political posturing and ideology.<sup>651</sup> This is a rational and pragmatic approach whose success will rest upon the willingness of States to set aside ideological and territorial aspirations and tensions.<sup>652</sup>

The Committee's success in encouraging formal action against terrorism, in the end, must be evaluated in light of the ability and willingness of individual States to act against terrorism and to refrain from the sponsorship of terrorist attacks.<sup>653</sup> There also must be an effort to educate the global community on the impact of terrorism and to challenge

645. *Id.* at 9 (statement of Mr. Enkhsaikhan, Mongolia).

646. *See id.*

647. *See* Letter from the Chairman of the Security Council Committee Established Pursuant to Resoultion 1373 (2001) Concerning Counter-terrorism Addressed to the President of the Security Council (Dec. 28, 2001), U.N. Doc. S/2001/1323 (2001), *available at* <http://www.un.org/terrorism>.

648. U.N. SCOR, 4453d mtg., *supra* note 614, at 4 (statement of Mr. Chowdhury, Bangladesh).

649. U.N. SCOR, 4512th mtg., *supra* note 626, at 2 (statement of Mr. Niehaus, Costa Rica).

650. U.N. SCOR, 4453d mtg., *supra* note 614, at 3 (statement of Mr. Loonjul, Mauritius).

651. *See supra* notes 623-25 and accompanying text.

652. *Cf.* U.N. SCOR, 4453d mtg., *supra* note 614, at 8-9 (statement of Mr. Mekdad, Syria). Of course, some may contend that the exclusion of political considerations from evaluating the justifiability of terrorism, is, itself, a political partisan stance. *Cf.* U.N. SCOR, 4512th mtg., *supra* note 626, at 4 (statement of Mr. Cengizer, Turkey).

653. *See* Reports By Member States, *available at* <http://ww.u.n.org/terrorism>.

ideological justifications for violence<sup>654</sup> while simultaneously working to lessen ethnic, racial and territorial tensions and taking significant steps to control weapons of mass destruction and to promote economic development.<sup>655</sup> Finally, terrorism cannot be combated in isolation from the traffic in illicit drugs, arms, metals and illegal immigration and sexual exploitation and international organized crime, all of which partially fund and are inter-related with terrorist activity.<sup>656</sup>

### VIII. CONCLUSION

Global society is witnessing a new world order based on the struggle against terrorism.<sup>657</sup> This "new terrorism" is characterized by religiously motivated apocalyptic movements committed to anomic violence and to the devastating destruction resulting from the deployment of weapons of mass destruction.<sup>658</sup> The touchstone of this "new terrorism" is the super-terrorist who is committed to leaving a malevolent murderous mark.<sup>659</sup> The most threatening variant of the global terrorist threat is the martyrdom of the suicide bomber.<sup>660</sup>

The draft of the Conference on the Unification of Penal Law<sup>661</sup> and the League of Nations Convention of 1937 for the Prevention and Punishment of Terrorism primarily provided protection to Heads of States.<sup>662</sup> The United Nations' early efforts in the field of terrorism were limited to admonishing countries to refrain from violating the sovereign integrity of third party States.<sup>663</sup> The advent of attacks on aircraft led the United Nations to draft a series of treaties protecting the safety and security of aerial transport.<sup>664</sup> An instrument also was adopted to protect diplomats from an escalating series of attacks.<sup>665</sup> The rise of anti-colonialism and the self-determination of peoples<sup>666</sup> was reflected in the

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654. U.N. SCOR, 4453d mtg., *supra* note 614, at 9 (statement of Mr. Enkhsaikhan, Mongolia).

655. *See id.* at 10-11 (statement of Mr. Niehaus, Costa Rica).

656. *See id.* at 10. *See also id.* at 11 (statement of Miss Durant, Jamaica).

657. *See supra* notes 1-40 and accompanying text.

658. *See supra* notes 44-52 and accompanying text.

659. *See supra* notes 58-98 accompanying text.

660. *See supra* notes 99-205 and accompanying text.

661. *See supra* notes 249-56 and accompanying text.

662. *See supra* notes 257-68 and accompanying text.

663. *See supra* notes 269-74 and accompanying text.

664. *See supra* notes 275-322 and accompanying text.

665. *See supra* notes 323-35 and accompanying text.

666. *See supra* notes 337-39 and accompanying text.

provision of the Hostage Convention which seemingly exempted groups engaged in political struggles from coverage.<sup>667</sup> These early documents created the basic architecture for international anti-terrorism treaties by addressing and highlighting issues such as extradition, jurisdiction and cooperation between Signatory Parties.<sup>668</sup>

In the contemporary era, major initiatives have been taken to combat terrorism, including treaties prohibiting terrorist bombing<sup>669</sup> and financial assistance to terrorists<sup>670</sup> as well as a draft on nuclear terrorism.<sup>671</sup> There also has been significant progress in the drafting of a comprehensive convention on terrorism which would coordinate national, regional and international efforts.<sup>672</sup> Steps also have been taken to create a system of standardized State reports under the auspices of the Counter-Terrorism Committee.<sup>673</sup> The latter recognizes that combating terrorism largely is a matter of domestic initiative and of homeland security.<sup>674</sup> The United Nations Policy Working Group on Terrorism, in September 2002, urged the organization to focus its efforts at those areas in which the organization's efforts would prove most effective in the struggle against terrorism.<sup>675</sup> This strategy included a stress on legal and non-legal anti-terrorist norm buildings through the drafting and ratification of international anti-terrorist instruments<sup>676</sup> and human rights initiatives;<sup>677</sup> the communication of anti-terrorist messages and values,<sup>678</sup> the building of domestic anti-terrorist regimes through the activities of the Counter-Terrorism Committee,<sup>679</sup> disarmament initiatives pertaining to weapons of mass destruction<sup>680</sup> and coordination with regional organizations<sup>681</sup> as well as within the United Nations.<sup>682</sup>

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667. *See supra* notes 353-56 and accompanying text.

668. *See supra* notes 288-89 and accompanying text.

669. *See supra* notes 429-40 and accompanying text.

670. *See supra* notes 464-76 and accompanying text.

671. *See supra* notes 452-60 and accompanying text.

672. *See supra* notes 500-69 and accompanying text.

673. *See supra* notes 614-25 and accompanying text.

674. *See supra* notes 620-23 and accompanying text.

675. *Report of the Policy Working Group on the United Nations and Terrorism, A/57273 (Annex), S/2002/875*, at 7, para. 9 (2002), available at <http://www.un.org/terrorism>.

676. *Id.* (recommendations 1-3).

677. *Id.* (recommendations 4-6).

678. *Id.* (recommendations 7-12).

679. *Id.* (recommendations 13-17).

680. *Id.* (recommendations 18-24).

681. *Id.* (recommendations 25-29).

682. *Id.* (recommendations 30-31).



The acceleration of counter-terrorist activity, while heartening, may not be sufficient to effectively address the looming threat. There are too many weak and rogue States which may undermine this effort. At the same time, it is clear that virtually every concern has become subordinated to the struggle to eliminate the threat of global terrorism and that political posturing gradually is being replaced by a clarity of conviction and moral purpose. The issue remains whether the war on terrorism may undermine the very values which the international community so nobly seeks to protect.<sup>683</sup>

A serious and sustained assault on terrorism would be assisted by a comprehensive convention which highlighted and amplified the commitment of the international community. States would be placed under pressure to ratify the treaty and to accept a uniform set of practices and procedures pertaining to the prosecution and punishment of terrorism. This would insure that terrorism was a matter of international priority whose discipline and disposition would no longer be considered a matter of State discretion and parochial partisanship. Protection from terrorism is an essential aspect of human rights and a comprehensive set of anti-terrorist accords is a prerequisite to the promotion of the dignity of humankind.<sup>684</sup>

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683. See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM & THE CONSTITUTION* (2000).

684. See generally *TERRORISM AND THE LAW* (Yonah Alexander & Edgar H. Brenner eds., 2001).