

SECTION RECOMMENDATIONS AND REPORTS

American Bar Association Section of International Law and Practice Standing Committee on World Order Under Law Report to the House of Delegates

I. ANTITERRORISM

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports the enactment of domestic laws which address such terrorist activities as violent acts directed against civilian individuals and groups, the forcible detention or hijacking of vehicles and vessels, and the theft of nuclear material usable for explosive purposes;

BE IT FURTHER RESOLVED, that the American Bar Association supports United States ratification of two recently concluded antiterrorist agreements: the Protocol for Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

REPORT

1. There have been a number of recent encouraging developments with respect to efforts to suppress and punish terrorist activities. These include, for example, the passage of antiterrorism legislation, especially the Omnibus Diplomatic

Security and Antiterrorism Act of 1986; ratification of the U.S.-U.K. Supplementary Extradition Treaty; progress with respect to existing multilateral antiterrorism legal instruments; the drafting of new legal instruments under the auspices of international organizations; and the adoption of antiterrorist resolutions by organs of the United Nations. A brief description of these developments is set forth below.

(a) The United States Congress has recently adopted legislation designed to enhance U.S. capacity to suppress and punish international terrorism. In 1984, for example, Congress adopted legislation that, in accordance with U.S. treaty obligations, made hostage taking¹ and sabotage against aircraft,² committed anywhere in the world, punishable in U.S. federal courts. Similarly, the Omnibus Diplomatic Security and Antiterrorism Act of 1986³ provided U.S. federal courts with jurisdiction over terrorist crimes committed against Americans overseas. In addition, the Act provided several other tools for the U.S. Government to use in combatting terrorism. It established, for instance, a counterterrorism witness protection fund, in order that the United States might reimburse other governments for costs related to security for those who provide testimony or evidence in terrorist cases. The Act also increased funding for enhanced security for U.S. diplomats and embassies from terrorist attack. Lastly, the Act authorized increased funding for the Department of State's rewards program, first established in 1984, whereby the Department offers substantial cash awards to anyone who provides information leading to the arrest and prosecution of terrorists.

(b) The U.S.-U.K. Supplementary Extradition Treaty, which entered into force on December 23, 1986, severely limits the political offense exception to the obligation to extradite those accused of crimes covered by the treaty. Under the Supplementary Treaty, the exception will no longer be available to those accused of crimes covered by the multilateral antiterrorist conventions or of such violent crimes as murder, voluntary manslaughter, assault causing grievous bodily harm, kidnapping, or an offense involving the use of an explosive. At the same time the treaty authorizes judges to deny extradition if an accused demonstrates by a preponderance of the evidence that he is being sought "on account of his race, religion, nationality, or political opinions" or that he would be denied a fair trial because of any of these factors.

(c) To date, the world community has adopted five major global antiterrorist conventions: the Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), the Convention for Suppression of Unlawful Seizure of Aircraft (Hague Convention), the Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), the

1. 18 U.S.C. § 1203.

2. 18 U.S.C. § 32.

3. 18 U.S.C. §§ 1201, 2331.

Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (Convention on Protected Persons), and the International Convention Against the Taking of Hostages (Hostages Convention). On February 8, 1987, the Convention on the Physical Protection of Nuclear Material (Convention on Nuclear Material) also came into force. The Convention prevents parties from exporting or importing nuclear material used for peaceful purposes unless they give assurances that such material will be protected at prescribed levels during international transport. It also provides a framework for international cooperation in the recovery and protection of stolen nuclear material, and requires that states parties make certain serious offenses involving nuclear material punishable, and that they extradite or prosecute offenders. The primary purpose behind the Convention is to prevent nuclear materials from falling into the hands of terrorists.

(d) Efforts to date to conclude a convention that would require states parties to apply sanctions against states that support terrorism have been unsuccessful. On July 17, 1978, however, the heads of state and government participating in the Bonn Economic Summit agreed upon a non-binding declaration that has come to be known as the Bonn Declaration on Hijacking. The Declaration provides for the cutting off of all flights of the Summit Countries to a country that refuses to extradite or prosecute persons who have hijacked an airplane or to return the plane. The Bonn Declaration has been applied once against Afghanistan, and its application was threatened against South Africa.

The United States has recently taken the initiative in the International Civil Aviation Organization (ICAO) to work toward the establishment of a model clause to be inserted in bilateral aviation agreements that would give either party to the bilateral agreement the right to apply sanctions against the other in the event of a violation of the Hague Convention or the Montreal Convention or a failure to conform with the aviation security provisions and regulations established by the ICAO. On February 24, 1988, an ICAO Conference held in Montreal adopted a protocol to the Montreal Convention—the Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation—that extends the provisions of the Montreal Convention to cover sabotage and other unlawful acts that take place in airports. Under this protocol attacks such as those that occurred at the Rome and Vienna Airports in 1985 would be covered.

The United States has also been involved in the International Maritime Organization's (IMO) efforts to draft a convention that would make the hijacking of ships an international crime. On March 10, 1988, the Organization adopted a Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation as well as a Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

(e) On December 9, 1985, the General Assembly adopted Resolution 40/61, which Vernon A. Walters, U.S. Ambassador to the United Nations, described as

“a symbol of new times.” The resolution unequivocally condemns all acts of terrorism and calls upon states to take a variety of steps towards its suppression and control. Similarly, on December 18, 1985, the UN Security Council adopted a resolution that condemns all acts of hostage-taking; calls for the immediate safe release of all hostages; affirms the obligation of states in whose territory hostage taking occurs to take steps to secure the safe release of the hostages and to prevent hostage-taking in the future; appeals to all states that have not yet done so to become parties to the antiterrorist conventions; and urges further international cooperation in order “to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of international terrorism.”

2. Despite these many accomplishments there are still serious gaps in the law and legal process that need to be filled. For example, deliberate attacks against the civilian population, a favorite tactic of terrorists, is not covered by the antiterrorist conventions (although such attacks are a war crime under the 1949 Geneva Conventions on the Law of Armed Conflict). Although the theft of nuclear material used for peaceful purposes is covered by the Convention on the Protection of Nuclear Material, the same may not be said of the theft of nuclear material used for military purposes.

3. A primary obstacle to further progress in combatting terrorism is the problem of definition. Walter Laqueur recently pointed out that between 1936 and 1981 there have been 109 different definitions of terrorism advanced, and more since then, including a half dozen provided by the United States Government, each one different from the other.⁴ The late Richard Baxter, Professor of Law at Harvard University and Judge on the International Court of Justice, once remarked, “We have cause to regret that a legal concept of ‘terrorism’ was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.”⁵

4. Not surprisingly, efforts to reach agreement on a definition of terrorism have proven especially unavailing in the United Nations. To be sure, Resolution 40/61, adopted by the General Assembly on December 9, 1985, loosely defines terrorism as acts “which endanger or take innocent lives, jeopardize fundamental freedoms, and seriously impair the dignity of human beings.” However, this definition is so imprecise and ambiguous that it “serves no operative legal purpose.” The International Law Commission also is working on a definition of terrorism in connection with its drafting of a Draft Code of Offenses Against the Peace and Security of Mankind, but at this writing it is unclear what will be the final outcome of this effort.

4. Laqueur, “Reflections on Terrorism,” 64 FOREIGN AFFAIRS 86, 88 (Fall 1986).

5. Baxter, “A Skeptical Look at the Concept of Terrorism,” 7 AKRON L. REV. 380 (1974).

5. One of the more elaborate definitions of international terrorism is to be found in the U.S. Foreign Intelligence Surveillance Act (FISA), which provides in pertinent part:

International terrorism means activities that—

- (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
- (2) appear to be intended—
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by assassination or kidnapping; and
- (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.⁶

Also relevant is the section of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, 18 U.S.C. § 2331, which provides U.S. criminal jurisdiction over the killing of, or an act of physical violence with intent to cause serious bodily injury to or that results in such injury to, a U.S. national outside the United States. Although the relevant chapter of the act is entitled “Extra-territorial Jurisdiction Over Terrorist Acts Abroad Against United States Nationals,” there is no requirement that the killing or violent act include the traditional elements of a terrorist act. Instead, the legislation incorporates the element of terrorism as a limitation on prosecutorial discretion:

(e) LIMITATION ON PROSECUTION.—No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.⁷

The broad definition of terrorism included in FISA for purposes of electronic surveillance was rejected by the drafters of 18 U.S.C. § 2331. The Department of Justice argued successfully that the elements of the crime under a criminal statute should not include a “terrorism” definition, since these definitions always are broader than the underlying criminal acts. The Department argued, for example, that although a prosecutor could prove the terrorists shot the Americans in the Rome airport in December 1985, it would be much more difficult and perhaps impossible to prove they did it “to intimidate or coerce a civilian population. . . .”

6. In the United Nations or other international organizations there is little prospect that a FISA type of definition of international terrorism would prove acceptable. The FISA definition includes a political purpose or motivation behind

6. 50 U.S.C. § 1801(c).

7. 18 U.S.C. § 2331(e).

the violent act and a government as the primary target. These factors serve to distinguish terrorism from violent acts that are classified as common crimes. The political purpose of the violent act is to influence the policy of a government by intimidation or coercion. These same factors, however, may lead some governments to be not only unwilling to criminalize such behavior but prone actively to support it. As Levitt has pointed out, “[p]ut simply, governments that have a strong political stake in the promotion of ‘national liberation movements’ are loath to subscribe to a definition of terrorism that would criminalize broad areas of conduct habitually resorted to by such groups; and on the other end of the spectrum, governments against which these groups’ violent activities are directed are obviously reluctant to subscribe to a definition that would criminalize their own use of force in response to such activities or otherwise.”⁸

7. The United States Government has been a leader in the United Nations of an effort to resolve the problem of defining international terrorism by avoiding it and focusing instead on acts that should be regarded as impermissible under any circumstances and therefore subject to vigorous international cooperation toward their suppression and punishment. To this end it has strongly supported the adoption of multilateral conventions and other legal measures directed against hijacking of or sabotage against civil aviation, attacks against internationally protected persons, hostage taking, and theft of nuclear material used for civilian purposes. This effort should be intensified. Equally important is the ideological battle over values that has long engaged the United Nations in its efforts to combat terrorism. The thesis supported by some member states that the end justifies the means violates humanitarian values developed over centuries. It must not go unchallenged. Its defeat is necessary to ensure the effectiveness of the conventions and other legal measures designed to suppress and punish international terrorism.

8. A precise focus on those acts the world community should condemn under any circumstances also would help member states of the United Nations to carry out the recommendations of Resolution 40/61. In that resolution the General Assembly, *inter alia*, “[u]nequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security”; invites states “to take all appropriate measures at the national level . . . such as the harmonization of domestic legislation with existing international conventions, the fulfillment of assumed international obligations, and the prevention of the preparation and organization in their respective territories of acts directed against other States”; calls upon states “to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts”; appeals to all states to become parties to the existing

8. Levitt, “Is ‘Terrorism’ Worth Defining?,” 13 OHIO N. U. L. REV. 97, 113–14 n. 72 (1986).

antiterrorist conventions and urges all states “to cooperate with one another more closely, especially through the exchange of relevant information concerning the prevention and combatting of terrorism, apprehension and prosecution or extradition of the perpetrators of such acts, the conclusion of special treaties and/or the incorporation into appropriate bilateral treaties of special clauses, in particular regarding the extradition or prosecution of terrorists.”

9. In a less fractious United Nations it might be possible to reach agreement on a wide-ranging, generic definition of international terrorism—although even under such circumstances one might be skeptical considering the difficulties of reaching agreement on such a definition in the United States. In any event, given the intractable conceptual and political differences among member states on this issue, a definition of international terrorism produced by the United Nations is likely to be so ambiguous as to provide a further basis for dispute and invective. This should be avoided and an attempt made instead to reach further agreement on those acts that are either intrinsically morally repugnant or so clearly interfere with the conduct of international commerce or relations as to pose a potential threat to all states.

10. Unlawful acts against the safety of civil aviation and unlawful acts against the safety of maritime navigation and of fixed platforms located on the continental shelf have long been regarded by an overwhelming majority of the world community as impermissible under any circumstances. However, neither attacks in airports serving civil aviation (as compared to attacks on civil airplanes) nor attacks against ships or other maritime facilities are covered by the antiterrorist conventions currently in force. The Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf would fill this gap in the law. Both conventions and the protocol were adopted with the active participation and support of the United States Government. The Senate should give its early advice and consent to ratification.

Conclusion

By adopting this recommendation the American Bar Association would be advising the United States Government of practical steps it might take toward overcoming some of the serious obstacles facing efforts to combat international terrorism.

Respectfully submitted,

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