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Political and Legal Instruments in Supporting and Combatting Terrorism: Current Developments

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In the 1970s terrorism, whether backed directly or indirectly by the Soviet Union or independently initiated, appeared to have become an indispensable tactical and strategic tool in the Soviet struggles for power and influence within and among nations. In relying on this instrument, Moscow seems to aim, in the 1980s, at achieving strategic ends in circumstances where the use of conventional armed forces is deemed inappropriate, ineffective, too risky, or too difficult.

Ray S. Cline, Yonah Alexander[1]

Abstract. *A historian is a prophet of the past, not of the future, and a question about the future is not a historian's favorite one. With all these reservations, a historian is often compelled to trace past and present patterns in order to foresee the most likely arrangements of future events. The reflections presented below (in Part I) do not stem from the intention of the author to speculate about the prospects of Communism or discuss the alternative scenarios for the future of the Soviet bloc. They are limited to a few conclusions which can be drawn from the logical progression of recent events. The reflections in Part II address some current legal aspects of fighting international terrorism.*

Growth of Soviet-Sponsored Low-Intensity Operations Around the World

Even the most enthusiastic commentators on Gorbachev's attempts at restructuring of the Soviet economy admit that the system does not show many symptoms of a quick economic recovery. Gorbachev's "glasnost" and "perestroika" are tested in an atmosphere which resemble more the Sisyphean Labors[2] than the noisy hurrah-enthusiasm of the Krushchev era.

The success of the reforms is a function of a variable that is the sum total of many elements—social, ideological, economic, political. The conclusions drawn from the examination of these factors are not optimistic for the prospects of the socialist economy.

1. It must be admitted that the system has forever destroyed the so-called collective mentality, which was supposed to be a basic component of Communist political culture.
2. The crisis of Communist ideology is irreversible. The belief of the masses in Marxism-Leninism cannot be reconstructed, yet socialist leaders will not give up obsolete dogmas because they do not know how to function without them.

3. The ideological crisis has undermined the rudiments of Communist morality and corroded all Marxist-Leninist values, including the key dogma of common ownership.
4. The moral and ideological crisis has killed all healthy incentives among workers and managers.
5. Without the rudiments of democracy, people can be forced to work, but not to work efficiently. On the other, democratic transformations are too dangerous for the ruling elite. They are simply incompatible with the totalitarian framework of the system. Watchful commentators often warned that full-fledged "glasnost" may open the Pandora's box of social distress and may result in a more serious social turbulence than the Hungarian events of 1956, the "Prague Spring" of 1968, or the Polish Solidarity crisis of the 1980s. The 1987 Polish referendum, the 1988 strikes, the current attempts at limitation of Communist Party power in Hungary, the reports on the social dissatisfaction with the Communist leadership in Czechoslovakia, or on the development of the nationalist and ethnic movements in the Soviet Republics, confirm the seriousness of this danger.[3]
6. The double standard of morality, together with massive economic dislocations, has created a black market and corruption, which have been tolerated for so long that they are now irrevocably integrated in the way of life of Communist countries.
7. The need for creating a relatively open party elite forced the party to build a system of "negative selection" that promotes compliant, comformable "yes" men, who care far more about their careers than about the system of Communist values.
8. Lack of competence, widespread corruption, and unaccountability of decision-makers are incompatible with the basic principles of economic efficiency.
9. Lack of information, coordination, and proper control over the implementation of productive decisions, coupled with a form of decentralization that is more apparent than real, cripple the socialist system of central planning and decision-making. These factors also work against the attempts at introducing market mechanisms into the socialist system. The combination of central planning and market economy, totalitarian power of the party and the socialist democracy resembles a person who is "half pregnant, half not." This kind of reform may result in the creation (using Kolakowski's expression) of a sort of "boiling ice."
10. The sytem created its own "vicious circle." Without the party bureaucracy and *nomenklatura* people, the party cannot function; but with them, no reform is possible. Both are key ingredients of a system which can be crushed but not reformed. They are an inseparable part of the system.[4]

Analysis

The analysis of this domestic context of Soviet foreign policy brings us to several conclusions:

1. We cannot expect a quick recovery of the socialist economy, and this in turn will affect the key mechanisms of totalitarian power. In fact, the total subordination of Communist countries' societies to the dictatorship of the party elites has always been based on a few techniques that have been interchangeably employed: the

strategy of terror used most effectively by Stalin, the appealing promise of Communist economic success used by Stalin's successors, and the ideological or nationalist euphoria which was exploited effectively during the post-revolutionary time and the period of war. None of these strategies can be used as successfully as before. Ideological or nationalist cliches do not appeal to people who want to live on the level of civilized societies. Terror is still effective, but its excessively blatant application does not fit the liberal disguise of the Soviet leadership during the "glasnost" period, and "glasnost" is a prerequisite to Soviet relations with the West. For the Soviet leaders, it has become quite obvious that, without cooperation and technology from the West, the economies of the bloc countries will deteriorate further, just at a time when Western economies are on the mend. Continuation of detente and cooperation seems to be viewed by the Soviet leaders as condition *sine qua non* of "perestroika," and "glasnost" is to be the price paid for the successful restructuring of the socialist economy.

2. The Socialist leaders still do not see as dramatic the restructuring of the system. Despite this view, however, it must be admitted realistically that even successful perestroika requires time, funds, patience, and social support, and yet the Soviet leadership has run short of these goods. In fact, it can already be expected that, in spite of the attempts at reforming the system, Soviet politics at the turn of the 1980s and 1990s will be shaped by economic crisis, and the Soviet bloc will face unprecedented shortages of energy, capital, and food. With the efforts of the Soviet leadership, the technological gap between the socialist economies and the other countries of the industrialized world will increase.
3. The reforms have already endangered the position of the middle ranks of party bureaucrats and has resulted in the considerable conservative opposition within the Communist Party. The economic distresses will contribute to a further stagnation of the standard of living and even the decline of the growth rate of mass consumption. "Glasnost" will shatter the chances of hindering the economic slowdown and the growing gap between the rulers and the ruled. Combined with ethnic and nationalist movements, these factors may contribute to a serious internal turbulence.[5]
4. The Soviet leadership now seems to realize that if these circumstances continue, Soviet participation in the arms race will place an unbearable strain on the economy. Mikhail Gorbachev's repeated calls for a renewal of the spirit of detente, the signing of the INF treaty, and the readiness to discuss the reduction of strategic arms combined with his continuing sharp criticism of President Reagan's Strategic Defense Initiative program are the clearest indicators of the importance Kremlin leaders attach to armament freezing. The economic background of these initiatives is clear. Mikhail Gorbachev is confronted with a crucial question that is provoking internal debate within the Soviet hierarchy: whether to continue arming at the expense of the faltering economy, or to restructure a less restrictive social and economic system at the cost of nuclear and missile supremacy. Detente seems to offer a well tested alternative strategy. Detente, combined with the armament freeze and the inflow of Western technology and capital to the socialist bloc, can enable the Soviet Union to maintain strategic parity with the United States without suffering a further decline in the growth rate of consumption and productivity.[6]

The real reasons behind the Soviet interest in detente should be emphasized so that they are better recognized in the United States and Western Europe.[7] The true

Soviet motive has always been derived from a declining growth rate in consumption and productivity.[8] Yet, because of the shrewd manipulation of slogans, the issue of peace was offered as the real reason for the policy of detente.

5. Internal turbulence and a decline of Russian nationalism combined with an increase of anti-Russian nationalism in the non-Russian regions[9] may force the regime to follow Poland's example and seek some military leaders who could deal with the situation. The isolated Party elite may experiment with military coups, and the regime may relapse into a modified Stalinist form of dictatorship, which proved suitable in a state of emergency but useless in the face of serious and permanent social and economic problems. The West can expect the destabilization of the socialist system and a sort of *zigzag policy* with typical strategies based on both rational calculated motives and some irrational factors. The failures of Reykjavik-type meetings might be followed by successful summits, and the friendly relationships may be intertwined with dangerous incidents such as the shooting down of the Korean airliner or the recent hitting of American ships on the Black Sea by Soviet warships.
6. The deteriorating economies of satellite countries will make the bonds from the Soviet Union to Eastern Europe less and less profitable. It is obvious that Moscow's recent relations with its satellites are highly political in nature. It is quite predictable that these military and political determinants of the Soviet interest in Eastern Europe buffer zones will remain constant, but the future will show to what extent the Soviet Union will be able to afford costly commitments in this region. The possibility cannot be ruled out that economic decay may erode Moscow's dominance in the Soviet bloc as well as Soviet involvement in risky and expensive international ventures.[10] The recent Soviet troop-pullout plan from Afghanistan confirms these prognoses.[11]

The major question for commentators on Soviet foreign policy is: To what extent will the economic, social, ideological and political distresses of the socialist countries encourage the Soviet trend toward neutralism and pacifism? The question is crucial and gives rationale for the above lengthy comments on the domestic context of Soviet foreign policy.

An historical examination of Soviet strategies since the Great Revolution is not optimistic. Pacifistic slogans have always been a part of communist ideology, and despite various economic and social troubles which accompanied the development of Communist power, they always were offered to disguise a genuine aggressiveness of Soviet policy. The aggressiveness of Communism was, from the very beginning, implicit in Bolshevism. Promises of "permanent struggle" and "permanent revolution" successfully covered all the political fallacies of Soviet leaders. Aggressiveness, called "the policy of self-defense" in Communist jargon, is an ideological principle and plays an ideological role, justifying and legitimizing the pragmatic policy of the regime. In accordance with the concept of social dynamism and class war, the Soviets view the world as a battlefield, and the Soviet leaders have attempted and will continue to strive for the creation of a worldwide Communist state centrally directed from Moscow.

It is inaccurate to suppose that a gigantic and aggressive superpower, which exists only through force and coercion, will be satisfied with its present domain. One invasion breeds further aggressive policy. Each new territory needs a buffer zone to be fully protected. The bigger the empire, the bigger the risk of its dispersion, and the more dan-

gerous the opponents of the empire seem to be. The leaders of the empire become increasingly insecure and more inclined to destroy or subordinate their opponents to gain some guarantee of security. It would be a major mistake to believe that a frustrated and distressed Soviet leadership will be less aggressive than a successful regime. The economic, social, and ideological problems will, however, affect the strategies of the Communist struggle. The economic shortages will necessarily limit costly direct involvements of the Afghanistan type and will favor low-intensity operations around the world. Many experts anticipate that the 1990s will bring about the intensification of psychological warfare, guerilla warfare and various terrorist activities which are viewed by the Soviets as a "suitable substitute for traditional warfare."[12] For the West to be prepared to respond to this threat is a matter of highest priority.

Growth of International Terrorist Incidents in the 1980s

The record of international terrorist incidents during 1968-1986 confirms the above analysis. The Report of the Ambassador at Large for Counter-Terrorism in the U.S. Department of State[13] indicates that the number of incidents between 1968 and 1976 grew from 125 to 484 and stayed at this level until 1984, when it increased rapidly to 598 incidents, with another rapid growth to 785 incidents in 1985 and 774 major incidents in 1986.[14] There are no doubts that the number of terrorist incidents is still growing. Counting all terrorist incidents (both domestic and international) involving bombing, facility attack, assassination, kidnapping, hijacking, and maiming, the record solely for the third quarter of 1987 indicates 832 incidents, an increase from 761 during the second quarter and from 618 incidents during the first quarter of 1987.[15] As Yonah Alexander wrote: "Despite all efforts at control, the level of terrorist violence remains high. There are many reasons for this, but there is one universal key factor: the toleration, encouragement, and even support of terrorism by the Soviet Union".[16]

It is very difficult to assess precisely the scope of Soviet involvement in terrorist activity. I would rather reluctantly use the most popular "geographical" argument pointing out the low frequency of international terrorist acts in Eastern Europe.[17] Pro-Soviet critics of this approach can easily claim that, for example, North America has the second lowest number of terrorist incidents, and therefore U.S. and Canadian support for terrorism is evident. In fact, the low frequency of terrorist incidents in Eastern Europe is a result of a combination of factors: the closed nature of Communist societies, close surveillance of the foreigners' activities in Soviet bloc countries, strict bans on the possession of weapons, limitation of visits abroad, some features of the political culture of Poles, Czechs, or Hungarians, and many others. Without all of these factors, the Soviet support for international terrorism alone would not protect the Soviet bloc against terrorist incidents.

A more solid indicator of Soviet involvement in low-intensity violence is the growing Soviet support for countries which are intermediaries between the Kremlin and terrorist organizations (such as Cuba, Angola, Nicaragua, Bulgaria, Czechoslovakia, and North Korea), as well as the increase of terrorist incidents in the spheres of active Soviet penetration (including Latin America, the Middle East, and Africa). For the watchful observer of the changing pattern of international warfare, the risk assessment of violence in these areas may be very informative. "What once may have seemed the random, senseless acts of a few crazed individuals," stated John C. Whitehead, U.S. Deputy Secretary of State,

"has come into clearer forms as a new pattern of low-technology and inexpensive warfare against the West and its friends."[18]

The conclusion from these observations is quite clear: There will be a higher level of low-intensity violence in the world at the turn of the 1980s; the question is only whether the Western World is prepared to handle this problem.

Development of International Legal Instruments in Fighting Terrorism

The attempts at recognizing terrorism as an international crime have so far been unsuccessful.[19] Experts agree that the difficulties in defining international terrorism are the main obstacles for the development of effective international cooperation in fighting terrorism.[20] In the concurring statement to the dismissal of plaintiff's action against certain alleged terrorists in *Tel-Oren v. Libyan Arab Republic,* Judge Harry Edwards pointed out,

> While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus. Unlike the issue of individual responsibility, which much of the world has never even reached, terrorism has evoked strident reactions and sparked strong alliances among numerous nations. Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations.[21]

The lack of consensus regarding terrorism as an international crime has important implications:

1. Acts of terrorism can be prosecuted only if they are recognized as criminal under municipal laws.
2. Acts of terrorism can be prosecuted only by the state that claims jurisdiction under the generally recognized basis of jurisdiction under international law.
3. Acts of terrorism cannot be prosecuted by any state which simply has the terrorist in its custody.
4. The state which does not claim any extraterritorial basis for its criminal jurisdiction over the terrorist acts has either to extradite the terrorists or give up the prosecution.[22]

Although terrorism as such has not been included among international crimes, there are a number of actions related to terrorism which either emerged from customary international law or were designated as international crimes in multilateral conventions with a significant number of states as parties to them.[23]

Large efforts to penalize piracy were crowned by the 1958 Geneva Convention on the High Seas and the 1982 U.N. Convention on the Law of the Sea.[24] The criminal character of hijacking was recognized by three conventions dealing with the safety of aviation: the 1963 Tokyo Convention on Offences and Certain Acts Committed on Board Aircraft, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against

the Safety of Civil Aviation.[25] The crime of kidnapping and hostage taking, as defined in the International Convention against the Taking of Hostages, gives the state party in the territory where the alleged offender was found the choice either to extradite or to prosecute.[26] The 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents made "threat and use of force against internationally protected persons" an international crime.[27] The universally recognized criminal character of these acts gives any state in custody of the perpetrators the right to prosecute the alleged offenders without respect to the general principles of extraterritorial jurisdiction (territorial, nationality, or protective principles). Although the above-mentioned list of international crimes does not cover all forms of terrorism, the recognition of their international character by the family of nations is a major achievement in the struggle against terrorism.

Development of U.S. Anti-Terrorist Legislation

The above mentioned crimes committed by *hostis humani generis*—the enemies of all the people—have been incorporated into U.S. law.

The U.S. Code provides for imprisonment for life for the crime of piracy. The Code referral to international law for the definition of this crime was recognized as constitutional in United States v. Smith.[28]

The Federal Aviation Act of 1958 made aircraft hijacking a criminal act. In 1962, the anti-aircraft piracy law introduced penalties of not less than twenty years to death by execution for hijackers.[29]

The United States also introduced into the U.S. Code a crime against internationally protected persons and against selected United States Officials. The amendment to Title 18 of the U.S. Code imposed the penalty of life imprisonment for the murder of protected persons and a sentence of up to twenty years for attempted murder.[30]

The Comprehensive Crime Control Act of 1984 implemented the International Convention Against the Taking of Hostages provides that the penalty for this crime imprisonment for life.[31] If the offender is found in the United States, these crimes can be prosecuted in the United States without regard to national or territorial links.

Without the international criminalization of terrorism, a state has few options to expand the extraterritorial basis for its criminal jurisdiction over the acts of international terrorism. The state can itself define terrorism as such and incorporate the crime of terrorism into its criminal code.[32] However, this approach has its shortcomings. While prosecutions have occurred without the formal incorporation of the international crime into domestic law,[33] the application of the universal principle of jurisdiction to crimes which were criminalized under domestic law but did not reach the status of an international crime would violate international law.[34] In practical terms, this means that the state which criminalizes terrorism has to limit its jurisdiction to the territorial, national, or protective bases recognized by international law. Without international criminalization of terrorism, the state cannot punish all terrorists who are in its custody. Without links of the act to the state's sovereign power, the state must decline its jurisdiction or extradite the offenders.

The state can extend the list of crimes related to terrorism without the criminalization of terrorism as such. The above-mentioned shortcomings apply, however, to this approach as well. Legislators may in this way avoid the controversial attempt to define

terrorism, but they still must recognize the jurisdiction of local courts only within the generally recognized territorial, national, or protective bases.

To extend federal jurisdiction over the extraterritorial acts of terrorism, the U.S. Congress invoked the second approach. The 1986 Omnibus Diplomatic Security and Anti-terrorism Act[35] added a new Chapter to Title 18 of the United States Code, entitled "Extraterritorial Jurisdiction over Terrorist Acts Abroad Against United States Nationals." The Act refers to terrorism in the title but, in fact, does not criminalize international terrorism *in toto*. The jurisdiction of U.S. courts is established only if

1. The crime has a character of murder, manslaughter, or serious injury;
2. The act was committed abroad;
3. The victim was a U.S. national;
4. The act bears some features of a terrorist act, which means that it "was intended to coerce, intimidate, or retaliate against *a government or a civilian population;*"[36]
5. The terrorist character of the act is certified in writing by the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions.

The jurisdiction of the U.S. courts extends to some offenses related to terrorism which are covered by the universal principle of jurisdiction and some others which are prosecutable under U.S. law but which are not recognized as criminal under international law. With the absence of universal jurisdiction over terrorism *in toto,* U.S. jurisdiction must be linked to one of the generally recognized bases of extraterritorial jurisdiction. With regard to the 1986 Omnibus Antiterrorism Act, if the murder, manslaughter, or injury of a U.S. national occurs beyond U.S. borders and the accused is not of U.S. nationality, the U.S. court has unquestionable jurisdiction only if "a coerced government" is the U.S. government and the act involves threats to the U.S. national security, territorial integrity, or political independence.[37] This conclusion is quite perplexing. We cannot claim jurisdiction because of coercive manipulation of a government other than the U.S. government, and if coercive manipulation is directed against the U.S. government, we do not have to invoke the 1986 Omnibus Antiterrorism Act because this jurisdiction was already available based on the "protective" principle recognized by international law.

This brings us to one of two possible conclusions, which must be spelled out quite distinctly. (1) The 1986 Omnibus Diplomatic Security and Antiterrorism Act either did not extend the jurisdiction of U.S. courts at all, because the courts already had jurisdiction on the basis of the "protective" principle; or (2) this jurisdiction was expended on the ground of the passive personality principle, which means that the U.S. claims jurisdiction whenever and wherever its nationals are attacked in a terrorist manner (with coercion intended to affect a government or a civilian population). Let us say it quite clearly: The U.S. claims jurisdiction not because "a government" or "a civilian population" is coerced, intimidated, or retaliated against, but rather because its nationals are killed or injured. I do not want to argue that jurisdiction based on the passive personality principle is not questionable on the ground of international law. I do claim, however, that the jurisdiction of one state to prosecute the acts of coercive manipulation of another state committed abroad is without any basis in international law. Without invoking the passive personality principle, the 1986 Omnibus Antiterrorism Act is just a confirmation of jurisdiction based on the old protective basis.[38]

Major Gaps in the Legal Coverage of Terrorism

As Robert A. Friedlander pointed out:

> According to statements made before the Senate Foreign Relations Committee at the end of January 1985, the United States had suffered the loss of more diplomats, as a result of terror-violence, during the prior 17 years than during the previous 150 years. In the mid-1980s the United States is losing more diplomatic personnel as casualties of terror-violence than it has lost generals in the performance of their duties. Hardly a month goes by where there is not some manifestation of terrorism directed against diplomats and embassies throughout the world.[39]

In fact, attacks on diplomats peaked in 1980-81, with a steady decrease of incidents during the 1980s. The Report of U.S. State Department for 1968-1986 shows 40 incidents in 1968, 222 in 1981, and 96 in 1986.[40] Among the many factors which contributed to this decline, the universal criminalization of attacks on internationally protected persons plays a foremost role.

The most frequent terrorist attacks recently have been directed against business facilities and personnel—targets which are not universally protected. The record shows a steady growth of attacks on business in the last twenty years.[41] The Statistical Overview of terrorist incidents in the third quarter of 1987 shows that business was a major target hit by terrorist groups (278 incidents), with military and police installations attacked 231 times, government facilities hit 195 times, and diplomats and diplomatic establishments only 10 times.

It must be admitted that with all the current, significant development of legal instruments in fighting terrorism, the "non-protected" group[42] remains extremely vulnerable to terrorist attacks. The examination of the recent legal coverage of terrorism shows gaps in both domestic and international law. Attempts at creation of an International Criminal Court have been unsuccessful so far, and the near success of these attempts is most unlikely. The prosecution of international crimes related to terrorism has been left to national jurisdictions. The number of crimes covered by the universal principle of jurisdiction is limited, and terrorism is not as such criminalized under international law. Furthermore, if a state wants to extend its extraterritorial jurisdiction to offences which are not recognized as criminal under international law, it has to link its jurisdiction to one of the general bases recognized by international law. The passive personality principle, which extends the jurisdiction of a country to all offenses in which the victims are the country's nationals, is not widely accepted. As discussed above, the U.S. has only limited jurisdiction over crimes against nationals abroad. In fact, the effectiveness of federal prosecution under the 1986 Omnibus Diplomatic Security and Antiterrorism Act is restrained not just by the vague basis of jurisdiction. The Act is adequate for the purposes of prosecution only if a political motive (coercion, intimidation, or retaliation against a government or a civil population) can be proved. As Victoria Toensing, Deputy Assistant Attorny General for the Criminal Division, testified, prosecutors are placed in a very difficult position. On the one hand, "the criminal law may not punish the political motive; it must reach the act or conduct," while on the other hand, the political motive must be found to make the act prosecutable under the 1986 Omnibus Antiterrorism Act.[43] Toensing concluded that the requirements of the Act either makes "prosecution impossible" or renders the trial "a showcase for terrorist propaganda."[44] Even if the "terrorist

propaganda'' is accepted in U.S. courts as ''the price of justice in a democracy,''[45] it must be admitted that the ''political motive'' (in the form of coercive manipulation) quite often cannot be proved. This leaves the most frequent bomb attacks on business facilities and personnel which are not directly accompanied by any demands directed against a government or a civilian population without any prosecution. If unconditional jurisdiction based on the nationality of the victims does not exist, the U.S. courts must extradite or decline jurisdiction.

Conclusions

The above observations bring us to several conclusions:

1. We have to be prepared to face the growth of low-intensity violence in the oncoming decade.
2. It is fairly obvious that international anti-terrorist cooperation must be strengthened, and reexamination of the legal gaps and uneffective political and military strategies should be made to develop new responses to terrorism.
3. It must be made widely known that the struggle with terrorism is not futile and that in the last decade we can note an important development of legal instruments in the fight against terrorism.
4. One of the major reasons for the law's poor record in dealing with terrorism is the quite erroneous public consciousness that says the struggle is lost from the very beginning because we face a vicious circle: ''One man's terrorist is another's freedom fighter.'' As argued in one of the previous articles, this slogan is a total misunderstanding, and this fact should be brought to the public's attention as soon as possible.[46]
5. The public should realize as clearly as possible that a ''political motive,'' which is necessary for the distinction of a terrorist-related act from a common crime, cannot be confused with ''the political offense exception.'' It is widely recognized that the acts related to terrorism are not regarded as ''political offenses'' for the purposes of extradition.[47]
6. To make the struggle with terrorism more successful, we should at least attempt to distinguish between ''terrorists'' and ''revolutionaries.'' Although there is no unanimity among writers on international law concerning the right to fight against the constituted government, one argument should be spelled out more clearly. The very essence of democracy provides for the power of the majority, the protection of the rights of the minority, and legally recognized, nonviolent methods for the exchange of ruling teams. To recognize a right to the violent change of the legally constituted government as inherent in democracy would undermine the sense of democracy itself. As Victoria Toensing correctly pointed out, ''we must make our position unmistakable to terrorists: in a democratic society dissidents cannot use bullets when they have both freedom of expression and the ballot box.''[48]
7. It is an illusion to believe that the international criminalization of terrorism is a sort of legal panacea for our distresses linked to this phenomenon. As Guy B. Roberts wrote: ''Although more laws are needed to close loopholes, law itself will never be sufficient to stop terrorism.''[49] With the absence of an international criminal court, the prosecution of terrorist acts would be left to national courts. Even if these courts receive universal jurisdiction they would not be exempted from dis-

covering the political motives of the terrorists, which has already proved to be a fairly difficult task for prosecutors. It must be also admitted that "the further we extend our criminal jurisdiction extraterritorially, the faster it threatens to outpace our enforcement resources. Once we get outside the United States, effective enforcement is obviously heavily dependent upon the cooperation of foreign governments."[50]

8. To make the national prosecution more effective, the international community has to reconsider the passive personality principle as an applicable basis of international jurisdiction. This principle is already recognized by several nations[51] and can be applicable as a supplemental basis of jurisdiction in cases related to terrorism when extradition is offered and the state in which the offence was committed refuses to receive the offender.[52] The argument that the state does not want to have its nationals punished by other states is not convincing, as they already can be tried in foreign courts on the basis of other principles of extraterritorial jurisdiction.[53] Although it is not directly admitted, this principle gives the only logical rationale to the 1986 Omnibus Diplomatic Security and Antiterrorism Act. Despite all traditional Anglo-American reservations against the passive personality principle,[54] it is often argued that the protection of nationals can justify not only legal action against the offenders but also the limited use of force to rescue nationals from a country which does not offer adequate protection. The protection of nationals was recently recognized as an adequate basis for state intervention in a number of "peace-keeping and humanitarian" actions.[55] As Gerald P. McGinley wrote:

> The primary objection to the [passive personality] principle is that jurisdiction should not depend on the fortuity of the victim's nationality. Over the last two decades, however, governments have been held ransom by threats of violence against their nationals. The frequent movement from one country to another by the perpetrators of these offenses makes it unlikely that jurisdiction based on the territoriality or nationality of the defendent be exercised. Nor is the passive personality principle an illogical basis of jurisdiction when the victim himself is singled out because of his nationality. This change of circumstances has strengthened the passive personality principle as a basis of jurisdiction in international law.[56]

Jurisdiction over the offenses against the nationals of the country would give a state the full coverage of the acts related to terrorism in which the political motive would have been unprovable and the offer of extradition was refused by the state which has territorial jurisdiction. With all the problems of universal definition of terrorism and doubts as to the eventual effectiveness of prosecutions that are conditioned by the scrutinizing of the political motive, the possibility of seeking a supplementary basis for extraterritorial jurisdiction should be strongly encouraged.[57]

Notes

1. Ray S. Cline and Yonah Alexander. *Terrorism: The Soviet Connection* (New York: 1984), Crane Russack, 6.

2. See Rett R. Ludwikowski. "Gorbachev and His Reforms," *Modern Age* (Spring 1986), 120–130.

3. See *Washington Post,* 30 November, 1987, 1 December, 1987, 24, 25, 26 February, 1988; see also, "Multiple Ethnic Conflicts Challenging Gorbachev," *Washington Post,* 29 February, 1988, at A1 and A12.

4. The factors mentioned above were more extensively examined in Rett R. Ludwikowski. *The Crisis of Communism, Its Meaning, Origins, and Phases,* Washington, D.C.: Pergamon-Brassey's, 1986.

5. See Seweryn Bialer and Tjane Gustafson, eds. *Russia at the Crossroads. 26th Congress of the CPSU* (London, Boston: George Allen & Urwin, 1982), 38.

6. See "Dreams of a Postnuclear Era Hinge on East-West Parity," *Insight* (22 February, 1988): 14–17.

7. See *Insight* (29 February, 1988): 41.

8. See comments of Seweryn Bialer on the growing consumerism in the Soviet bloc, *Stalin's Successors: Leadership, Stability, and Change in the Soviet Union* (Cambridge, London, Cambridge University Press, 1980), 293.

9. See "Reports on growth of ethnic nationalism in Lithuania, Latvia and Estonia," *Newsweek* (29 February, 1988): 39.

10. See Marshall I. Goldman, *USSR in Crisis. The Failure of an Economic System* (New York, London: W.W. Norton & Co., 1983), XI.

11. See *Newsweek* (February 22, 1988): 35.

12. See also Cline and Alexander, *op.cit., at 5.*

13. *Patterns of Global Terrorism: 1986* (U.S. Department of State, January 1988) [hereinafter quoted as Report of U.S. State Department.]

14. These statistics cover only international terrorist incidents. The Report did not include a data base on domestic terrorism which was recognized as not comprehensive enough to provide data with the same degree of confidence as those referred to international terrorism.

15. *Quarterly Risk Assessment-Executive Summary* (July-September 1987).

16. Walter Laqueur and Yonah Alexander, *The Terrorism: Reader* (New York: Penguin Inc., 1987), 364.

17. In 1968 and 1986 no incidents were noted in this area, with insignificant amounts (5–7) in 1977–78 and 1981–82. Report of U.S. Department of State.

18. John C. Whitehead, *Terrorism: The Challenge and the Response,* Address at Brookings Institute; Dec. 10, 1986, 87 Department of State Bulletin, 2119 (Feb. 1987): 70. The increase of the Soviet aid for Cuba, the training camp for the terrorist groups from all over the world and the center of the Soviet espionage network, is the best evidence of this strategy. The Soviet Union supplies all Cuban oil and pays six times the world price for Cuban sugar. "In 1985 the Soviets signed (with Cuba) trade and economy cooperation agreements worth a total of $3 billion for 1986–1990, representing a 50 percent increase in Soviet credit to Cuba over the preceding five-year period. Moscow also agreed to suspend repayment of Cuba's debt, estimated at $9 billion." See David Brock, "Making Rights a Right in Cuba," *Insight* (February 29, 1988): 12. Soviet aid is offered to the Mozambique National Resistance (RNM), led by Alfonso Dhlakama, and to the government of Angola which is paying for some 30,000 Cuban troops stationed in the country. There are few doubts as to the Soviet support to Khad (the Afghan secret service), which orchestrated a series of bomb attacks in Pakistan. *Political Violence in 1988,* Control Risks Information Services Limited Study (October 1987), 40, 45.

The Report of the U.S. Department of State indicates that the number of major international terrorist incidents in 1968–1986 in Latin America grew from 45 to 159; in the Middle East from 18 to 360; in Africa from 0 to 45–43 in 1984–1985, with a decline to 20 in 1986.

19. See Hans-Heinrich Jescheck, "Development and Future Prospects," in *International Criminal Law-Crimes,* ed. M. Cherif Bassiouni, 92–93 (New York: Transnational Publishers, 1986).

20. See Levitt, "Is Terrorism Worth Defining?", 13 *Ohio Northern University Law Review* 97 (1986); see also Daniel G. Partan, "Terrorism: An International Law Offense," 19 *Connecticut Law Review* 4 (1987).

21. 726 F. 2d 795 (decided Feb 3, 1984); see also concurring statement of Judge Bork, at 807; see comments on Bork's statement by Jordan J. Paust, 19 *Connecticut Law Review* 4, 700.

22. See Partan, *op. cit.*, at 751.

23. M. Cherif Bassiouni, "The Theory of International Criminal Law" in Bassiouni, op. cit., at 2–3.

24. See Jacob W.F. Sunberg, "The Crime of Piracy", in Bassiouni, *op. cit.*, at 442.

25. Tokyo Convention entered into force on Dec. 14, 1969, 20 U.S.T. 2941, T.I.A.S. No. 6788; Hague Convention entered into force Oct. 16, 1971, 22 U.S.T. 1641, T.I.A.S. No. 7992; Montreal Convention entered into force Jan. 26, 1973, 24 U.S.T. 564, T.I.A.S. No. 7570. See Robert A. Friedlander, "The Crime of Hijacking," in Bassiouni, *op. cit.*, at 455–63.

26. Art. 8, International Convention against the Taking of Hostages, opened for signature at New York, 18 Dec. 1979. Thirty-six states ratified the Convention through June 1, 1987. 34 U.N. G.A.O.R. Supp. (No. 46); see M. Cherif Bassiouni, "The Crime of Kidnapping and Hostage Taking," in Bassiouni, *op. cit.*, at 475–480.

27. Entered into force Feb. 20, 1977, 28 U.N. G.A.O.R. Supp. (No. 30), U.N. Doc. Doc A/9030, 28 U.S.T. 1975, T.I.A.S. No. 8532.

28. 5 Wheat. 153 (U.S. 1820); see also *In re* Piracy Jure Gentium, (a934) A.C. 586, 2 Moore, International Law 951 (1906). For more extensive comments, see also D.F. Martell, "F.B.I.'s Expanding Role in International Terrorism Investigations," in *F.B.I. Law Enforcement Bulletin, Terrorism Issue* (October 1987): 29; Gerald P. McGinley, "The Achille Lauro Affair: Implications for International Law," 52 *Tennesee Law Review,* (Summer 1985):691–738.

29. 49 U.S.C. § 1472(1).

30. See Martell, *op. cit.*, at 29.

31. 18 U.S.C. § 1203; *ibid.* at 30.

32. This form of legislation was advocated by Jordan J. Paust and by Daniel G. Partan. See Jordan J. Paust, "Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine," 23 *Virginia Journal of International Law* 216 f 1983; Partan, *op. cit.*, at 780.

33. See Paust, *op. Cit.*, at 212, note 82.

34. This opinion seems to be supported by Paust who writes: "To proceed when no authority exists under international law could subject the United States to claims that it has violated international law." Ibid. at 199, note 31. Partan seems to hold a different opinion. Criticizing the 1986 Omnibus Antiterrorism Act as contrary to the "traditions and interests of the United States," he recommends its replacement by "new legislation punishing all terrorists coming into the United States custody." Partan, *op. cit.*, at 780. See also Congressional Research Service, The Library of Congress, *Constitutional Appraisal of Two Anti-Terrorist Proposals, Hearing Before the Subcommittee on Security and Terrorism of the Committee on the Judiciary,* U.S. Senate, Ser. No. J. 99–45 (Washington 1986), at 25, 28, 29 (quoted hereinafter as *Hearing on Terrorism*).

35. Hereinafter called 1986 Omnibus Antiterrorism Act, Public Law 99–399, August 27, 1986.

36. Author's emphasis.

37. See Harvard Research in International Law, "Jurisdiction with Respect to Crime," 29 A.J. Int'l. L. Supp. (1935), art. 7. See also comments of Judge Medina on the protective principle of jurisdiction, *U.S. v. Jean Philomena Pizzarusso,* 388 F. 2d 8 (1968); *U.S. v. Alfred Zahe,* 601 F. Supp. 196 (1985).

38. See Statement of Senator Spector, *Hearing on Terrorism, op. cit.*, at 41, 42. See also Statement of Honorable Abraham D. Sofaer, concerning the intention to extend the U.S. jurisdiction through introducing the Bill on Terrorism, at 63.

The U.S. law defines both terrorism and international terrorism. The 1984 Act to Combat International Terrorism provides that an "act of terrorism" means an activity that (A) involves a violent act or an act dangerous to human life that is 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 of any State; and (B) appears to be intended—(i) to intimidate or coerce a civilian

population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping. (Pub. Law No. 98-533, 98th Congress, Oct. 19, 1984, § 3077.)

The Foreign Intelligence Surveillance Act of 1978 used the same definition to describe "international terrorism," adding that the acts should "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." (Pub. Law No. 95-511, 95th Congress, Oct. 25, 1978, § 101(c)(3.)

The description of the crime provided for in the 1986 Omnibus Antiterrorism Act may be confusing. The title refers to terrorist acts, and "limitation on prosecution" invokes "terror outcome"—one of the primary factors which distinguish terrorism from ordinary crimes. In fact, however, the Omnibus Act does not refer to "violent acts or acts dangerous to human life" (as provided in the definition of terrorism in the 1984 Act to Combat International Terrorism) but limits these acts to "murder, manslaughter and serious injury."

39. Bassiouni, *op. cit.*, at 485.

40. See Frank H. Perez, *Terrorist Target: The Diplomat* (address before the conference on terrorism sponsored by the Instituto de Cuestiones Internacionales, Madrid, Spain, June 10, 1982, Department of State Bulletin, August 1982).

41. Ibid.

42. As Jordan J. Paust explained, the term " 'nonprotected persons or things' refers to those without some special status or protection under international law. All persons are protected by international human rights law and also, in time of armed conflict, by the law of war; but here the term is used in contrast to 'internationally protected persons,' i.e., diplomats and other specially protected persons." Paust, "Nonprotected Persons or Things," in *Legal Aspects of International Terrorism*, ed. Alona E. Evans and John F. Murphy, 341 (Toronto: Lexington Books, 1978).

43. International Terrorism Conference, April 1986, sponsored by the Center for Law and National Security, University of Virginia.

44. *Ibid.*, at 20–21.

45. See Partan, *op. cit.*, at 767, note 57.

46. See Rett R. Ludwikowski, "Aspects of Terrorism: Personal Reflections," *Terrorism: An International Journal* 10:175–184.

47. See European Convention on the Suppression of Terrorism, entered into force, Aug. 4, 1978, art 1. See also Miriam E. Sapiro, "Extradition in an Era of Terrorism, The Need to Abolish the Political Offense Exception," 61 *New York University Law Review* 654–702 (1986).

48. Conference on International Terrorism, *op.cit.*, at 19.

49. Guy B. Roberts, "Self-Help in Combatting Terrorism: Self-Defence and Peacetime Reprisals," 19 *Case Western Reserve Journal of International Law* 290 (No. 2, 1987).

50. Geoffrey M. Levitt, "Combatting Terrorism under International Law," 18 The University of Toledo Law Review 138 (No. 1, 1986). See also Geoffrey M. Levitt, "International Law and the U.S. Government's Response to Terrorism" and Michael J. Bazyler, "Capturing Terrorists in the "Wild Blue Yonder": International Law and the Achille Lauro and Libyan Aircraft Incidents," both published in 8 *Whitter Law Review* 755–763, and 685–709 (1986).

51. While The Harvard Research in International Law, Jurisdiction with Respect to Crime did not mention this principle, the commentary noted that the principle was asserted by some twenty or so countries (Albania, Brazil, China, Estonia, Finland, Greece, Guatemala, Italy, Japan, Latvia, Lithuania, Mexico, Monaco, Peru, Poland, San Marino, Sweden, Turkey, Urugguay, Venezuela, and Yugoslavia). See 29 *American Journal of International Law Supplement* 435 (1935); comments by Professor Dickinson, quoted after William W. Bishop Jr., *International Law. Cases and Materials* (Boston: Little Brown, 1971, 554–555; see also Gerald P. McGinley, *op. cit.*, at 712. The principle of passive personality was invoked by Israel in the Eichmann case. The District Court in Jerusalem found that "from the point of view of international law, the power of the State of Israel to enact the Law in question or Israel's 'right to punish' is based, with respect to the offences in question, on a dual foundation: the universal character of the crimes in question and their specific

character as intended to exterminate the Jewish people." 56 *American Journal of International Law* 805 (1962). As a result of French reservations, the passive personality principle was not accepted by the Permanent Court of International Justice in the *Lotus Case*. See *The S.S. "Lotus" (France V. Turkey)*, P.C.I.J., Ser. No. 10 (1927), 2 Hudson, World Court Reports 20 (1935). In fact, however, France in 1975 incorporated this principle itself into the Code de Procedure Penale. The amended art. 689 reads: "Any foreigner who, beyond the territory of the Republic, is guilty of a crime, either as author or accomplice, may be prosecuted and convicted in accordance with the disposition of French law, when the victim of the crime is a French national." (I quote after Christopher L. Blakesley, "Extraterritorial Jurisdiction," in Bassiouni, *International Criminal Law Procedure* (1986), 28, note 91.)

52. As in the Austrian Penal Code of 1852, this principle can be asserted with a qualification that if more lenient treatment is prescribed by the criminal law of the place where the act was committed, the offender will be treated according to this more lenient law. (Art. 39, 40.)

53. See The Cutting's Case, 2A *Digest of International Law* 237 (1966).

54. *Ibid.*

55. "Protection of nationals is a well-established, narrowly drawn ground for the use of force which has not been considered to conflict with the U.N. Charter. While the U.S. has not asserted that protection of nationals standing alone constitutes a sufficient basis for all of the actions taken by collective force, it is important to note that it did clearly justify the landing of U.S. military forces." Letter from Davis R. Robinson, Legal Advisor, U.S. Department of State, to Professor Edward Gordon reiterating U.S. legal position concerning Granada. Feb. 10, 1984; copy on file in the Center for Law and National Security, University of Virginia School of Law.

56. "The Achille Lauro Affair," *op. cit.*, at 712–713.

57. For arguments against the applicability of the passive personality principle, see Partan, *op. cit.*, at 779–780.