

SEPTEMBER 11 AND TERRORISM  
INTERNATIONAL LAW IMPLICATIONS

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I. INTRODUCTION

The September 11 tragedy<sup>1</sup> has again revived debate on the need to combat international terrorism. For those who have written on this subject over the decades<sup>2</sup> there is a sense of weariness. My interest began with the development of the law of armed conflict from the late 1960s onwards,<sup>3</sup> which included attending the Geneva Diplomatic Conference on the Reaffirmation and Development of the International Law of Armed Conflicts 1974-1977 where various discussions on the subject occurred. To the veterans of these discussions, September 11 has brought about a sense of *deja vu* with yet another fresh bout of enthusiasm and determination to oppose terrorism. In each flurry of activity, there were moves to create declarations and treaties, but they did not amount to much by way of practical action. Thus, it would be no surprise if the current activity was no more successful than the previous attempts.

The late Professor Richard Baxter of Harvard Law School, who later became a Member of the International Court of Justice, also attended the

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<sup>1</sup> For more information, see generally the US Department of State's website on September 11 and subsequent events at <<http://usinfo.state.gov/topical/rights/law/warlaw.htm>> (visited November 2001); see also "Insights", the email information service of the American Society of International Law at <[www.asil.org/insights](http://www.asil.org/insights)> (visited November 2001).

<sup>2</sup> There are several books on this topic: for example, Malik O, *Enough of the Definition of Terrorism* (2001, International Affairs/Security Royal Institute of International Affairs, Brookings Institute Press, USA); Bassiouni CM (editor), *International Criminal Law* (1999, Translation Publishers, Ardsley, New York); Higgins R and anor (editors), *Terrorism and International Law* (1997, KY Routledge; London); Chadwick E, *Self-determination, Terrorism, and the International Humanitarian Law of Armed Conflict* (1996, Martinus Nijhoff, The Hague); Han HH (editor), *Terrorism and Political Violence: Limits and Possibilities of Legal Control* (1993, Oceana, New York).

<sup>3</sup> Suter K, *An International Law of Guerrilla Warfare: A Study of the Politics of Law-Making* (thesis, 1976, University of Sydney, Sydney); Suter K, *International Law of Guerrilla Warfare: The Global Politics of Law-Making* (London: Pinter, 1984, London).

Geneva Diplomatic Conference. In 1974, he wrote of his own frustration with the then discussion of terrorism:<sup>4</sup>

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.

Half a century ago, Professor Hersch Lauterpacht of the University of Cambridge reviewed the progress accomplished by an earlier round of development of international humanitarian law, the creation of the four Geneva Conventions of 1949 relating to the protection of armed conflict victims.<sup>5</sup> He listed at length the "parts of the law of war which [we]re not covered or which [we]re not wholly covered by the Geneva Conventions" and added the following well-known observation:<sup>6</sup>

In all these matters the lawyer must do his duty regardless of intellectual doubts - though with a feeling of humility springing from the knowledge that if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps, then, even more conspicuously, at the vanishing point of international law.

An attempt to make worthwhile progress in combating international terrorism is beyond even that vanishing point. No doubt treaties can be created but they will not amount to much if there is no change in political will. The problem then is essentially political, not legal. Once the political dimensions have been resolved – and they have not been so far – then progress could be made in developing effective international law.

The object of this article is to put the current flurry of activity into context and provide a sense of history to the attempts to curb international terrorism. Ironically, given one's definition of terrorism, it may well be that international law may be of great assistance in combating international terrorism – though not quite in the way intended by much of the current nationalistic rhetoric.

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<sup>4</sup> Baxter, "A sceptical look at the concept of terrorism", (1974) 7(2) *Akron Law Review* 380.

<sup>5</sup> Lauterpacht, "The problem of the revision of the law of war", (1953) XXIX *British Yearbook of International Law* 360, 381.

<sup>6</sup> *Ibid* 381-382.

## II. TERRORIST OR FREEDOM FIGHTER?

At the outset, it should be pointed out that there is no agreed definition or application of the term "terrorist". Depending on which side of the fence one sits, a terrorist may be considered a freedom fighter. This presents a basic and practical problem when trying to create an international regime against terrorism.<sup>7</sup> For example, the International Law Association (ILA) had this issue on its agenda for many years. At its 1984 Paris Conference, the ILA defined "acts of terrorism" as including but not limited to:<sup>8</sup>

atrocities, wanton killing, hostage-taking, hijacking, extortion or torture, committed or threatened to be committed whether in peacetime or in wartime for political purposes.

The practical problem is that one party's terrorist may be another party's freedom fighter, as stated above.<sup>9</sup> Indeed, it is possible for a person to move from terrorist to freedom fighter and even become a head of government. For example, Nelson Mandela recalls in his memoirs how his liberation movement decided not to use the term "terrorism" but opted for "sabotage" instead.<sup>10</sup> However, he does not define either phrase. The South African government had regarded him as a terrorist and so throughout the 1960s to the late 1980s it refused to negotiate with him.<sup>11</sup> Later, following a change in the political circumstances he was released from prison and went on to become South Africa's president, co-winning the Nobel Peace Prize in 1993.<sup>12</sup> Similarly, in 1947 the Jewish Irgun, considered by the British to be a terrorist group, fought against the British

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<sup>7</sup> Suter, "What is terrorism?" (December 1977) 55 *British Army Review* 66; see also Bassiouni, "International Terrorism" in Bassiouni CM (editor), *International Criminal Law* (1999, Translation Publishers, Ardsley, New York) 766 especially.

<sup>8</sup> ILA, Report of the 61<sup>st</sup> Conference, Paris, 1984 at 320.

<sup>9</sup> For a study of legal developments, particularly in the 1980s and 1990s, see Obote-Odora, "Defining international terrorism", (March 1999) 6:1 *Elaw – Murdoch University Electronic Journal of Law* at <[www.murdoch.edu.au/elaw/issues/v6n1/obote-odora61nf.html](http://www.murdoch.edu.au/elaw/issues/v6n1/obote-odora61nf.html)> (visited November 2001).

<sup>10</sup> Mandela N, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (1994, Little Brown, Boston) 246.

<sup>11</sup> *Ibid* 458.

<sup>12</sup> The other co-winner was Frederick Willem de Klerk: see The Nobel Foundation, "Nelson Mandela – Biography", Nobel e-museum, 29 June 2001 at <[www.nobel.se/peace/laureates/1993/mandela-bio.html](http://www.nobel.se/peace/laureates/1993/mandela-bio.html)>.

for the creation of the independent State of Israel. Irgun's leader was Menachem Begin who subsequently became Prime Minister of Israel.<sup>13</sup>

Indeed, many of the first generation of leaders of the new States created out of the former British and French colonies had served time in prison or had been on the run for offences that their colonial masters had regarded as one form of terrorism or another. Presumably, the first examples of such persons included George Washington between 1776-1783.<sup>14</sup> Thus, the term "terrorism" is a pejorative and politically coloured phrase devoid of legal meaning.

There is also the implication that the victims are innocent and unarmed as distinct from being combatants taking part in an armed conflict. However, about 90% of victims of modern conflict come into that category.<sup>15</sup> Indeed, in percentage terms, even more journalists than civilians are killed in conflict.<sup>16</sup> Thus, in the current era of warfare, combatants have – in percentage terms – a low rate of casualties. On this approach, some people may feel that the Afghani civilians who have been killed as "collateral damage" in the United States-led campaign against Osama bin Laden would come into the category of innocent and unarmed victims of terrorism. This is especially so since few, if any, Afghans were involved in the September 11 attacks in the United States and the training camps of the September 11 personnel were mainly established educational institutions in western countries and not in Afghanistan.

### III. INCONSISTENT STATE PRACTICE

The lack of a generally accepted definition helps explain the inconsistent pattern of state practice. The following are four sets of examples.

First, the first major use of aerial hijacking was made by east Europeans fleeing communism in the early years of the Cold War. They stole aircraft

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<sup>13</sup> Anon, "Menachem Begin (1913-1992)", Jewish Virtual Library, 2002 at <[www.us-israel.org/jsource/biography/begin.html](http://www.us-israel.org/jsource/biography/begin.html)> (visited November 2001).

<sup>14</sup> WPI Worcester Polytechnic Institute, "Gen George Washington's Campaigns of 1766", 1 February 2002 at <[www.wpi.edu/Academics/Depts/MilSci?BTSL/abs\\_wash.html](http://www.wpi.edu/Academics/Depts/MilSci?BTSL/abs_wash.html)>.

<sup>15</sup> Suter, "The new era of warfare", *The Contemporary Review* (London), September 1994 at 128-133.

<sup>16</sup> Suter, "Our window on the world", *The World Today* (London), March 1999 at 23-24.

to land in Western Europe (usually West Germany) and were seen as heroes in western countries. They were not returned to their communist rulers as demanded by their communist governments. Western countries only began to regard aerial hijacking as a crime when their own aircraft were being hijacked.<sup>17</sup>

The 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft signed in Tokyo (Tokyo Convention) deals with the safety of aircraft and maintenance of order on board. However, the problem of unlawful seizure is considered in Articles 11 and 13 only and States parties to the Convention are not obliged to prosecute or extradite the alleged offender.<sup>18</sup> Their obligations concern only the release and safe return of the crew, passengers, aircraft and cargo.<sup>19</sup>

Then in the late 1960s, the hijacking of aircraft for political motives (as distinct from asylum seekers fleeing from governments) became more widespread, especially against western governments.<sup>20</sup> The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague (The Hague Convention) goes considerably further than the Tokyo Convention and deals explicitly with aerial hijacking. This was followed by the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal (Montreal Convention). There is also the 1988 Protocol on the Suppression of Unlawful Acts at Airports Serving International Civil Aviation, which adds to the definition of "offence" given in the Montreal Convention.<sup>21</sup> Together, these treaties represent a very different attitude towards aerial

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<sup>17</sup> Encyclopaedia Britannica, "Hijacking" at <[www.britannica.com/original?content\\_id=1448](http://www.britannica.com/original?content_id=1448)> (visited December 2001).

<sup>18</sup> Article 16(2) provides that subject to Article 16(1) "nothing in this Convention shall be deemed to create an obligation to grant extradition."

<sup>19</sup> The obligations of the Contracting States are found in Articles 12-15: see Diederiks-Verschoor IHPH, *An Introduction to Air Law* (2001, 7<sup>th</sup> revised edition, Kluwer Law International, The Hague) 222.

<sup>20</sup> A spate of hijackings occurred in Europe (and the Middle East) from 1968 onwards. Between 1968-1970, there were almost 200 hijackings, mainly for political purposes: "Hijackings" at <[www.britannica.com/original?content\\_id=1448](http://www.britannica.com/original?content_id=1448)> (visited December 2001). Contrast this with the reference to "the unlawful seizure of aircraft" as a "phenomenon" that became increasingly frequent since the 1940s: Diederiks-Verschoor IHPH, *An Introduction to Air Law* (2001, 7<sup>th</sup> revised edition, Kluwer Law International, The Hague) 221.

<sup>21</sup> For further discussion on the international penal legislation see generally *ibid* 215-233.

hijacking than the cavalier approach in western countries in the early Cold War years.

Thus, some progress has been made in devising ways to deal with aerial hijacking. However, the September 11 tragedy has shown that aerial hijacking is still possible irrespective of the considerably increased range of treaties and airport security, which is a problem for all legal systems.

Secondly, the current round of conflict in Northern Ireland began in the late 1960s. British politicians and Northern Ireland Protestant groups have complained about the way in which elements in the United States (such as the legal system and non-governmental fund-raising) have assisted the Irish Republican Army (IRA). This issue arose at the 1985 annual conference of the American Society of International Law and the following passage from the proceedings illustrates how Professor Rubin of the Fletcher School of Law and Diplomacy, Tufts University, explained the situation:<sup>22</sup>

Professor Rubin answered that according to the British, who defended their constitutional structure in Northern Ireland, the IRA was a criminal conspiracy. According to the IRA, they were an army of national liberation. According to the United States, the question arose only in an extradition context. In all four cases that had arisen thus far (Mackin, McMullin, Quinn, and Doherty), the United States had refused extradition on the grounds that, as long as the offence would have been legitimate for a soldier in armed struggle, then the political offence exception applied. Thus, US courts had applied the political offence exception under the *Castioni* rule,<sup>23</sup> which meant that the United States could be concerned with an asylum for honourable soldiers when the latter opted out of struggle. In this context, Professor Rubin stressed that many US citizens had descended from refugees who had been on the losing side in struggles in their home countries. He stressed that nothing in international law required all states to use the same labels to a situation.

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<sup>22</sup> American Society of International Law, "Should the laws of war apply to terrorists?" [1985] Proceedings of the American Society of International Law 125.

<sup>23</sup> Refer *Re Castioni* [1891] 1 Queen's Bench 149.

In 1996, the United States began designating certain organisations as Foreign Terrorist Organisations (FTOs)<sup>24</sup> pursuant to the Immigration and Nationality Act as amended by the Antiterrorism and Effective Death Penalty Act. This Act makes it illegal for persons in the United States or subject to United States jurisdiction to provide material support to FTOs and requires United States financial institutions to block assets held by them. The Act also enables the United States government to deny visas to representatives of FTOs. The October 2001 list<sup>25</sup> identified 28 FTOs (with the breakaway faction "Real IRA" listed, instead of the "real" IRA). A further list was issued on 5 December 2001 with the number increasing to 39.<sup>26</sup> The accompanying statement foreshadowed that this was not the last version and so presumably other groups will be added in due course. It could be argued that given the amount of assistance from persons and organisations based in the United States (as distinct from official government sources) that this process is too little too late.

Thirdly, Russia has its own inconsistencies. In late September 2001, it was reported on how a former KGB officer reminisced about playing football with "Carlos" (Ilyich Sanchez, a terrorist trained in the USSR) who operated against western interests and who is now in a French prison. The report continued:<sup>27</sup>

In the 1990s Russia flirted with terrorism as a way of unsettling uppity bits of the former empire. Igor Giorgadze, an ex-KGB man wanted in connection with the attempted assassination in 1995 of Georgia's president, Edward Shevardnadze, escaped on a Russian military aircraft to Moscow. Russia brushes off Georgian extradition requests, pleading ignorance of his whereabouts – although journalists have no trouble finding him.

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<sup>24</sup> In 1997, the first 30 groups of FTOs were designated and in 2001, 26 groups were re-certificated: "Countering the changing threat of international terrorism, 8 October 1999", Report of the National Commission on Terrorism Pursuant to Public Law 277, 105<sup>th</sup> United States Congress at <[www.usembassy.org.uk/terror.html](http://www.usembassy.org.uk/terror.html)> (visited December 2001).

<sup>25</sup> US Department of State, "State Department identifies 28 foreign terrorist groups", Fact Sheet, 5 October 2001 at <[www.usinfo.state.gov/topical/pol/terror/01100513/h.htm](http://www.usinfo.state.gov/topical/pol/terror/01100513/h.htm)>.

<sup>26</sup> US Department of State, "United States places 39 groups on terrorist exclusion list", International Information Programs, 6 December 2001 at <[www.usinfo.state.gov/topical/pol/terror/01120613/h.htm](http://www.usinfo.state.gov/topical/pol/terror/01120613/h.htm)>.

<sup>27</sup> "Poacher turned gamekeeper", *The Economist* (London), 22 September 2001 at 50.

Finally, there is the role of 'rogue states'. The United States first used the term during the Clinton administration to describe States that, among other things, facilitate terrorism overseas (always against the United States).<sup>28</sup> The 1998 list published by the United States State Department was made up of Cuba, Iran, Iraq, Libya, Syria, North Korea and Sudan.<sup>29</sup> However, there is little consistent state practice regarding which States are deemed rogue states. For example, not all States agree with this list and some States move on and off the list.<sup>30</sup> Further, almost all the other States in the United Nations (including Australia but excluding Israel) do not agree that Cuba is a rogue state.<sup>31</sup> Each year, the General Assembly adopts by a very large majority a non-binding resolution calling on the United States to end its unilateral sanctions against Cuba.<sup>32</sup> In response, Australian companies have ignored the United States-led sanctions and continue to trade with Cuba to a degree.<sup>33</sup>

Meanwhile, Libya has stopped being a rogue state. On 21 December 1988, a bomb exploded in the cargo hold of Pan Am Flight 103, killing all 259 passengers and crew including 11 residents in Lockerbie, Scotland where the Boeing 747 crashed. Western intelligence agencies

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<sup>28</sup> US Department of State, "Overview of State-sponsored terrorism – Patterns of global terrorism", 30 April 2001 at <[www.state.gov/s/ct/rls/pgtrpt/2000/2441.htm](http://www.state.gov/s/ct/rls/pgtrpt/2000/2441.htm)>; Childs, "Analysis: The new bogeymen", BBC News, 12 December 2001 at <[http://news.bbc.co.uk/1/hi/english/world/newsid\\_1376000/1376425.stm](http://news.bbc.co.uk/1/hi/english/world/newsid_1376000/1376425.stm)>.

<sup>29</sup> Tanter R, *Rogue Regimes: Terrorism and Proliferation* (1998, Macmillan, London) 12; US Department of State, "Overview of State-sponsored terrorism – Patterns of global terrorism", 30 April 2001 at <[www.state.gov/s/ct/rls/pgtrpt/2000/2441.htm](http://www.state.gov/s/ct/rls/pgtrpt/2000/2441.htm)>.

<sup>30</sup> Prior to the September 11 terror attacks, Yugoslavia, Afghanistan, Syria and Sudan may have been added to the list: Childs, "Analysis: The new bogeymen", BBC News, 12 December 2001 at <[http://news.bbc.co.uk/1/hi/english/world/newsid\\_1376000/1376425.stm](http://news.bbc.co.uk/1/hi/english/world/newsid_1376000/1376425.stm)>. Recently China was removed from the list, pledging to join the United States in the fight against terrorism: Halliday, "Rogue nations work with the US against terrorism", Scholastic, 2002 at <[http://teacher.scholastic.com/newszone/specialreports/under\\_attack/rogue\\_nations.htm](http://teacher.scholastic.com/newszone/specialreports/under_attack/rogue_nations.htm)>.

<sup>31</sup> For example, Cuba trades with Canada, Spain, Japan, the United Kingdom and the Americas and there are almost 400 foreign companies involved in agriculture, construction, telecommunications, tourism, transport etc in Cuba: see Australia, Department of Foreign Affairs and Trade, "Cuba: Economic and trade information" at <[www.dfat.gov.au/geo/cuba](http://www.dfat.gov.au/geo/cuba)> (visited December 2001).

<sup>32</sup> The most recent legislation in the United States is the 1996 Cuban Liberty and Democratic Solidarity Act (known commonly as "the Helms Burton legislation"). Australia strongly opposes the extraterritorial measures contained in this Act: *ibid*.

<sup>33</sup> Cuba's main export to Australia is tobacco products and the two-way trade amounted to A\$5.7 million in fiscal year 1999-2000: *ibid*.



suspected two Libyan agents of planting the bomb. Throughout the 1990s, when Libya refused to hand them over for a trial, it was subjected to international sanctions and isolated from most of the rest of the world.<sup>34</sup> Finally, in 2000, the United Nations negotiated a deal whereby the suspects were tried in The Netherlands under Scottish law.<sup>35</sup> In February 2001, one suspect was found guilty and the other released. The sanctions against Libya have since been lifted and Western companies are back trading with the oil rich country. There remains, of course, the mystery of how one or two agents were able to mount such an operation and the extent to which the Libyan government was involved.<sup>36</sup>

#### IV. STATE TERRORISM

A second problem is posed by the word 'terrorism', which is usually applied to non-State actors only and so ignores the role of governments in terrorism. Theoretically, terrorism is what is done to a government and not by it. However, depending on one's approach to terrorism, it could be argued that the worst terrorists in the previous century have all been

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<sup>34</sup> On 21 January 1992, the United Nations Security Council passed Resolution 731 deploring Libya for not cooperating with the United Kingdom and United States (both were permanent Members of the Security Council). Security Council Resolution 748 of 31 March 1992 required Libya to comply with the requests within the stipulated timeframe. If not, the sanctions expressed in the resolution (including trade and air transport sanctions) would be activated. This occurred in April 1992 when Libya did not comply. Another resolution on 11 November 1993 extended the range and application of the sanctions. These two sanction resolutions were passed pursuant to Chapter 7 of the United Nations Charter because Libya's failure to extradite the two accused amounted to a threat to international peace and security: see generally the University of Glasgow website at <[www.ltb.org.uk/](http://www.ltb.org.uk/)> (visited December 2001).

<sup>35</sup> In the United Kingdom, the High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order of 1988 provided for the trial to be held in the Netherlands ('neutral venue') resulting in an agreement on the diplomatic arrangements between these two States on 18 September 1998. The Order in Council was made pursuant to the (UK) United Nations Act 1946 to give effect to Security Council Resolution 1192 of 27 August 1998 that called on all States, particularly the United Kingdom, the Netherlands and Libya, to ensure that the trial would be held in the Netherlands. Libyan nationals, Al Megrahi and Fhimah, were to be tried for murder, conspiracy to murder and contravention of the (UK) Air Safety Act 1982 in relation to the Lockerbie disaster. Although the trial was to be heard in the Netherlands, it was to be conducted according to Scottish law before three Scottish judges appointed by the Lord Justice-Clerk: *ibid.* See also Scharf, "A preview of the Lockerbie case", May 2000 at <[www.asil.org/insights/insight44.htm](http://www.asil.org/insights/insight44.htm)>.

<sup>36</sup> *Ibid.*

recognised leaders of government: Stalin, Hitler, Mao Zedong and Pol Pot. The 1984 ILA definition of 'acts of terrorism' would apply to the activities of these leaders since they killed many of their own people through 'purges' and the like. Those killed were mainly innocent victims and not armed opponents of the regime and in most cases were killed in appalling circumstances without adequate trial. They were simply in the wrong place at the wrong time or had the wrong economic, social, ethnic or religious background.

Similarly, a number of regimes in the post-Second World War era used 'terrorism' on their own people and were supported by the United States. For example, Chile was one of the few States, if not the only one, in Latin America with an established tradition of democracy. In 1970, President Salvador Allende was elected and he instituted a programme of socialist reforms. It has been alleged that following this, the Nixon administration in the United States began a destabilisation program in Chile.<sup>37</sup>

On 11 September 1973, General Augusto Pinochet led a military coup to stop the reforms. President Allende was killed in the process and the military cracked down on its opponents.<sup>38</sup> Pinochet, in retirement, was arrested in the United Kingdom in October 1998 on a Spanish warrant for offences committed against Spanish citizens during his time in power and he eventually returned to Chile.<sup>39</sup> The most well-known United States citizen implicated in the Chile tragedy is Henry Kissinger who was then United States Secretary of State and some have claimed that he is also vulnerable to a similar indictment as one of the chief architects of the destabilisation program.<sup>40</sup>

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<sup>37</sup> When it was revealed that President Nixon had ordered the Central Intelligence Agency "to make the economy scream" in Chile to unseat Allende or prevent him from assuming power, a major scandal erupted followed by a Senate investigation: Kornbluh, "Chile and the United States – Declassified documents relating to the military coup, September 11, 1973", Electronic Briefing Book No 8, National Security Archive at <[www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB8/nsaebb8i.htm](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB8/nsaebb8i.htm)> (visited December 2001).

<sup>38</sup> *Ibid.*

<sup>39</sup> Refer *R v Bow Street Magistrate; Ex parte Pinochet* [1998] 4 All England Reports 897; *R v Bow Street Magistrate; Ex parte Pinochet (No 3)* [1999] 2 All England Reports 97.

<sup>40</sup> The so-called 'poor Henry' argument is one explanation for the United States' refusal to support the 1998 Rome Statute for an International Criminal Court (ICC). In fact, an eventual ICC could not deal retrospectively with the Chilean tragedy from the 1970s. But the argument has been widely (if wrongly) used in the United States:

The destruction of the Greenpeace vessel, *Rainbow Warrior*, is a good example of both state terrorism and inconsistent state practice.<sup>41</sup> The vessel had been monitoring the impact of United States nuclear tests three decades earlier in Micronesia. Members of the French secret service, *Direction Generale De Securite Exterieur*, destroyed the vessel in Auckland harbour on 10 July 1985. Forty kilograms of explosive were used to sink the ship thereby killing a member of the crew. The ship had been campaigning against nuclear testing in the South Pacific. All but two of the French agents escaped back to France.

The two who were caught on 12 July pleaded guilty on 4 November 1985 to the lesser charge of manslaughter (instead of murder) and each was sentenced to ten years in a New Zealand prison. France subjected New Zealand to considerable pressure to release the agents immediately. Eventually, the United Nations Secretary-General mediated the dispute in which the two agents were transferred to a French prison to serve the rest of their terms. In return, the United States apologised to New Zealand and paid NZ\$13 million in compensation. However, the agents were released from prison prematurely and in July 1991 one of them even received a French decoration.<sup>42</sup> Although France could not deny its agents had destroyed the *Rainbow Warrior*, what remains a mystery is the lack of clarity on its motive and who in Paris authorised the attack. Owing to the amount of resources involved in the attack on the ship, this appears to be more than just a case of a few agents operating on their own initiative.

Meanwhile, France's allies (supposedly New Zealand's allies as well) never applied the word 'terrorist' to this attack. New Zealand was angered by this lack of support, not least from the United Kingdom where the vessel was formerly registered as *Sir William Hardy* and used as a fisheries research vessel.<sup>43</sup> David Lange, New Zealand's then prime minister and an outspoken critic of the nuclear arms race, had alienated New Zealand from the United States and Australia leading to the

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see Guyatt N, *Another American Century? The United States and the World After 2000* (2000, Zed, London) 101-2. See also Hitchens C, *The Trial of Henry Kissinger* (2001, Macmillan, London).

<sup>41</sup> See Suter, "French nuclear testing in the South Pacific", *The Contemporary Review* (London), September 1992 at 126-129.

<sup>42</sup> *Ibid.*

<sup>43</sup> He had called this incident "a sordid act of international state-backed terrorism": Szabo, "The bombing of the Warrior" at <[www.kauai.net/centralscrutinizer/pardon/myanalysis/rainbow\\_bomb.html](http://www.kauai.net/centralscrutinizer/pardon/myanalysis/rainbow_bomb.html)> (visited December 2001).

suspension of ANZUS, the Australia/New Zealand/United States defence alliance. As a result, the United Kingdom, the United States and Australia decided not to assist New Zealand over the *Rainbow Warrior* tragedy and neither did they regard France as a rogue state.<sup>44</sup>

To sum up so far, terrorism is far more a political than legal term and its use varies according to the political expediency of each government at the time. This helps to explain the lack of real progress in international legal action against terrorism.

## V. CURBING TERRORISM – HISTORICAL PERSPECTIVE

The word 'terrorism' has often been applied to assassinations, a staple item of political life since at least Brutus stabbed Julius Caesar on the Ides of March in 44 BC.<sup>45</sup> In the European Middle Ages, kings, queens and heirs to the throne were often killed. In the late 19<sup>th</sup> century, victims of this form of terrorism included Tsar Alexander II of Russia,<sup>46</sup> President Sadi Carnot of France<sup>47</sup> and President William McKinley of the United States.<sup>48</sup> In June 1914, Archduke Francis Ferdinand's assassination in Sarajevo provided a trigger for World War I.<sup>49</sup>

The first international treaty on terrorism arose out of the assassination of King Alexander of Yugoslavia in October 1934. Hitler came to power in Germany in 1933, and France, then a great power, was positioning itself *vis-a-vis* Hitler in Germany and Mussolini in Italy. The French Foreign Minister Louis Barthou invited the King to France as part of France's plan to improve its strategic situation in the Balkans. Instead, a Macedonian

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<sup>44</sup> Ibid.

<sup>45</sup> Bardsley, "Caesar, Julius", Collier's Encyclopaedia (1976, PF Collier Inc, New York) Volume 5 at 104-110.

<sup>46</sup> In spite of his liberal reforms, his reign saw growing revolutionary and terrorist movements. Many attempts were made on his life and he was finally assassinated on 13 March 1881 when a bomb was thrown at him: Strakhovsky, "Alexander", Collier's Encyclopedia (1976, PF Collier Inc, New York) Volume 1 at 518.

<sup>47</sup> School of Mathematics and Statistics, University of St Andrews, Scotland, "Sadi Nicolas Leonard Carnot", JOC/EFR, October 1998 at <[www-history.mcs.st-andrews.ac.uk/history/Mathematician/Carnot\\_Sadi.html](http://www-history.mcs.st-andrews.ac.uk/history/Mathematician/Carnot_Sadi.html)>.

<sup>48</sup> White House, "William McKinley" at <[www.whitehouse.gov/history/presidents/wm25.html](http://www.whitehouse.gov/history/presidents/wm25.html)> (visited December 2001).

<sup>49</sup> Iavarone, "Thumbnail bio – Archduke Franz Ferdinand", Trenches on the Web, 15 January 2000 at <[www.worldwar1.com/biohff.htm](http://www.worldwar1.com/biohff.htm)>.

revolutionary incited by a fanatical group of Croatians assassinated the King in Marseilles, striking Barthou at the same time.<sup>50</sup> Elizabeth Wiskemann, who later became Professor of International Relations at the University of Sussex, noted:<sup>51</sup>

The murder at Marseilles was one of the most appalling events of the inter-war period and it was most injurious to France which had been unable to protect its royal visitor; Barthou's death was said to have been due only to delay in supplying medical care.

She also noted that the British politician Lord Avon (previously Sir Anthony Eden, the Foreign Secretary during the 1930s and 1940s) had said that "[t]hese were the first shots of the Second World War".<sup>52</sup> The murder was also caught on news film and hence well publicised by the media standards of the day.

Concerned by the King's assassination and in pursuance of a French proposal, the League of Nations Council (forerunner of the United Nations Security Council) took steps in 1934 to draft an international convention for the prevention and punishment of acts of political terrorism. The Council adopted the view that States had a duty to suppress terrorist activity and comply with any request for help in suppressing adventurers foraging within their jurisdiction. A treaty was adopted at Geneva in November 1937. This was the League of Nations Convention for the Prevention and Punishment of Terrorism.<sup>53</sup> Under this treaty the Contracting States undertook to treat as criminal offences acts of terrorism, including conspiracy, incitement and participation in such acts, and in some cases grant extradition for such crimes. However, the treaty never entered into force because only one country – India – ratified it.<sup>54</sup>

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<sup>50</sup> Refer "Part I: Terrorism in Yugoslavia" in Montgomery JF, Hungary, the Unwilling Satellite (1947, Devin-Adair Co, New York), digitised as Don Mabry's Historical Text Archive, 1996 at <<http://historicaltextarchive.com/montgomery/>>.

<sup>51</sup> Wiskemann E, *Europe of the Dictators 1919-1945* (1971, Fontana, London) 106.

<sup>52</sup> *Ibid.*

<sup>53</sup> See Laos, "Fighting terrorism: What can international law do?" (March-May 2000) V:1 *Journal of International Affairs* at <[www.mfa.gov.tr/grupa/percept/V-1/laos.htm](http://www.mfa.gov.tr/grupa/percept/V-1/laos.htm)>.

<sup>54</sup> *Ibid.*

The new United Nations did not revive the issue of terrorism in its early years of operation. In 1985, Andrew Selth of the Australian National University noted the revival of interest in terrorism since.<sup>55</sup>

In 1968 *The New York Times Index* did not even include a subject heading for terrorism, yet by the end of 1976 the Central Intelligence Agency (CIA) could compile a bibliography which cited 1,277 books and articles on the subject. Four years later, Edward Mickolus published another bibliography on *The Literature of Terrorism* which listed nearly 4,000 entries. As Geoffrey Fairbairn once wrote, the number of written works on international terrorism seems to be in danger of outstripping the number of its victims.

The 1937 Convention had set the pattern for the subsequent flurries of activities. This is usually characterised by a tragedy that is extensively reported in the media, a demand from the public for something to be done, an agreement on an international text (declaration or treaty) condemning terrorism, and then little, if any, action to follow it up. The issue then lies dormant until there is another tragedy.

## VI. THE UNITED NATIONS AND TERRORISM

While, for political reasons, it has not been possible to obtain international agreement on a definition of terrorism, this has not prevented States from co-operating extensively in adopting measures against specific acts. The United Nations has a list of 12 treaties adopted under its aegis.<sup>56</sup> The list is probably longer than is commonly thought. Besides the four treaties mentioned earlier dealing with aerial hijacking and airport offences, the following are the other eight:

1. *1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*<sup>57</sup>

This Convention was adopted pursuant to United Nations General Assembly Resolution 3166 (XXVIII) on 14 December 1973. It

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<sup>55</sup> Selth A, *Terrorist Studies and the Threat to Diplomacy* (1985, Strategic and Defence Studies Centre, Canberra) 1.

<sup>56</sup> See United Nations Treaty Collection, "Treaty event – Multilateral treaties on terrorism" at <<http://untreaty.un.org/English/tersumen.htm>> (visited January 2002).

<sup>57</sup> The Convention entered into force in 1977 and Australia is a party to it.

applies to the crimes of direct involvement or complicity in the murder, kidnapping or attack, whether actual, attempted or threatened on the person, official premises, private accommodation or means of transport of diplomatic agents and other "internationally protected persons" (such as heads of government).

2. *1979 International Convention against the Taking of Hostages*<sup>58</sup>  
Signed in New York on 18 December 1979, this Convention deals with the offence of direct involvement or complicity in the seizure or detention of, and threat to kill, injure, or continue to detain a hostage. The act could be actual or attempted in order to compel a State, an international inter-governmental organisation, a person or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the hostage's release.
3. *1980 Convention on the Physical Protection of Nuclear Materials*<sup>59</sup>  
Signed in New York and Vienna on 3 March 1980, this Convention deals with the protection of nuclear materials used for peaceful purposes. More specifically, the Preamble states that the Convention provides "an appropriate framework for international co-operation in protection, recovery and return of stolen nuclear material and in the application of criminal sanctions against persons who commit criminal acts involving nuclear material."
4. *1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*<sup>60</sup>  
This Convention was signed in Rome on 10 March 1988. It applies to offences of direct involvement or complicity in the intentional and unlawful threatened, attempted or actual endangerment of the safe navigation of a ship by the commission of specified acts enumerated in Article 3:

- (a) the seizure of or exercise of control over a ship by any form of intimidation;

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<sup>58</sup> The Convention entered into force in 1983 and Australia is a party to it.

<sup>59</sup> The Convention entered into force in 1989 and Australia is a party to it.

<sup>60</sup> The Convention entered into force in 1992 and Australia is a party to it.

- (b) violence against a person on board a ship; destruction of a ship or the causing of damage to a ship or to its cargo;
- (c) placement on a ship of a device or substance that is likely to destroy or cause damage to that ship or its cargo;
- (d) destruction of, serious damaging of, or interference with maritime navigational facilities;
- (e) knowing communication of false information; or
- (f) injury or murder of any person in connection with any of the preceding acts.

5. *1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf*<sup>61</sup>

Signed in Rome on 10 March 1988, this Protocol applies to the offences in the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation when committed in relation to a "fixed platform". Article 1(3) of the Convention defines this term as an artificial island, installation or structure permanently attached to the seabed for the purpose of exploration or exploitation of resources or for other economic purposes.

6. *1991 Convention on the Marking of Plastic Explosive for the Purpose of Detection*<sup>62</sup>

Signed on 1 March 1991 at Montreal, this Convention was adopted pursuant to Resolution A27-8 adopted unanimously by the 27<sup>th</sup> Session of the Assembly of the International Civil Aviation Organisation. This Convention requires each State party to prohibit and prevent the manufacture in its territory of unmarked plastic and sheet explosives.<sup>63</sup> If the explosives are marked, this enables their easier detection. For example, semtex (which was probably used in the Lockerbie bombing) is almost impossible to detect by odour and it is translucent. Hence, its popularity in some circles.

7. *1991 Convention on the Marking of Plastic Explosive for the Purpose of Identification*<sup>64</sup>

This Convention was signed at the same time and in similar

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<sup>61</sup> The Convention entered into force in 1992 and Australia is a party to it.

<sup>62</sup> The Convention entered into force in 1998 but Australia is not a party to it yet.

<sup>63</sup> See generally the Preamble to this Convention.

<sup>64</sup> The Convention entered into force in 1998 but Australia is not a party to it yet.



circumstances as the above Convention because of concern regarding terrorist acts aimed at the destruction of aircraft, other means of transportation and other targets. It was felt that if plastic and sheet explosives were identified, this would facilitate the prevention of unlawful terrorist acts. As a result, this Convention obliged States party to adopt appropriate measures to ensure that plastic explosives are marked.<sup>65</sup>

8. *1997 International Convention for the Suppression of Terrorist Bombing*<sup>66</sup>

Adopted by the United Nations General on 9 December 1999, this Convention applies to the offence of the intentional and unlawful delivery, placement, discharge or detonation of an explosive or other lethal device. This is irrespective of whether the act is attempted or actual, in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility. The act should be with the intent to cause death or serious bodily injury, or extensive destruction likely to or actually resulting in major economic loss.

9. *1999 International Convention for the Suppression of the Financing of Terrorism*<sup>67</sup>

Adopted by United Nations General Assembly Resolution 54/109 on 9 December 1999, this Convention applies to the offence of direct involvement or complicity in the intentional and unlawful provision or collection of funds, whether attempted or actual. The act should be with the intention or knowledge that any part of the funds may be used to carry out any of the offences described in the treaty's annex. Or it should be intended to cause death or serious bodily injury to any person not actively involved in armed conflict in order to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act.

The above shows that there has been some progress in the United Nations' efforts in devising treaties against terrorism. The international

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<sup>65</sup> See generally the Preamble to this Convention.

<sup>66</sup> The Convention entered into force in May 2001 but Australia is not a party to it yet.

<sup>67</sup> The Convention has not yet entered into force and Australia is still considering it.

work continues, especially in the Sixth (Legal) Committee of the United Nations General Assembly where more treaties are being considered.<sup>68</sup> There are also regional inter-governmental treaties such as those devised under the aegis of the Council of Europe, and an example is the 1977 European Convention on the Suppression of Terrorism.

However, going back to the concerns raised at the beginning of this article, there is the irony that so many United Nations members condemn terrorism unequivocally and yet there is no universal agreement on what act or acts they condemn as terrorism. All governments have criticised the September 11 attacks as terrorism and most have, to varying extents, supported the United States-led campaign against Osama bin Laden and his al Qa'ida network.<sup>69</sup> But it would not be surprising if this international consensus will erode as time goes by, as it always has.

## VII. AN ALTERNATIVE GRAND STRATEGY

The first conflict of the 21<sup>st</sup> century has been fought with techniques similar to those of previous centuries. It remains to be seen how successful the United States' grand strategy will be against the al Qa'ida network. It would be reasonable to assume that anyone smart enough to plan the September 11 attacks would have also factored in a United States military retaliation. Indeed, an over-reaction may have been part of the calculations.

Terrorism is partly designed to provoke a harsh response by a government so that (in theory) the resulting oppression will lead to a public backlash in favour of the terrorist organisation's political aims. Although this theory may be tainted by scepticism, nonetheless it may be

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<sup>68</sup> United Nations General Assembly, "Measures to Eliminate International Terrorism: Report of the Working Group", United Nations General Assembly Doc A/C.6/56/L.9, 29 October 2001.

<sup>69</sup> For example, see open letter from Human Rights Watch to the President of the Council of the European Union dated 12 October 2001 supporting the European Union's condemnation of the terror attacks: at <[www.hrw.org/press/2001/10/coe-1012-ltr.htm](http://www.hrw.org/press/2001/10/coe-1012-ltr.htm)>; see also Jendrejczyk, "America and China can go further", International Herald Tribune, 12 October 2001 <[www.hrw.org/editorials/2001/us-china1012.htm](http://www.hrw.org/editorials/2001/us-china1012.htm)>. Further, NATO considered the September 11 attacks to be strikes against its 18 Members and it supported the United States' response against Osama bin Laden's al Qa'ida terrorist network and the Taliban: CNN, "NATO: US evidence compelling", CNN.com./WORLD, 2 October 2001 at <[www.cnn.com](http://www.cnn.com)>.

a justification for terrorism. Therefore, a standard military campaign that includes fighting, such as that conducted by the United States, could have been included in Osama bin Laden's plans. As such, it could result in an ambush of some sort and the military response could isolate the United States rather than bin Laden's network.

An alternative grand strategy could have been based on the building of the international legal order and denying the other side of an opportunity to win martyrdom status in the many developing States where the United States' economic and foreign policies are not liked. This strategy would have needed a great deal of advocacy, not least because many Americans, as has been reported, wanted Afghanistan destroyed.<sup>70</sup> However, it would have required President Bush to ask if there were another way to behave and so encourage creative thinking. Such is the leadership role of United States presidents if they want to assume it. Therefore, the United States could have followed four steps as alternative strategies:

1. It could have refrained from attacking Afghanistan because the Afghans had already suffered so much from the Soviet invasion and subsequent civil war and drought.
2. It could have provided extensive amounts of foreign aid to win the hearts and minds of Afghans and others in the Islamic world.
3. It could have offered a very big reward (such as US\$500 million) to entice groups such as Afghani warlords (or even the Taliban) to hand over Osama bin Laden dead or alive.<sup>71</sup>
4. It could have sought to follow the Lockerbie solution<sup>72</sup> by having an *ad hoc* international tribunal try Osama bin Laden if he were captured alive.

More broadly, the lessons learnt from September 11 suggest that the expansion of international law would lead to a better world. However, this does not recommend the creation of more treaties on terrorism. Instead, first of all, it is necessary to recognise that terrorism could take place no matter what arrangements are made. At a more personal level, it is important to remember that the object of terror is to terrorise. As such,

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<sup>70</sup> For example, see Coulter, "This is war – We should invade their countries", National Review Online, 13 September 2001 at <<http://www.nationalreview.com/coulter/coulter091301.shtml>>.

<sup>71</sup> Suter, "Our taskforce", The Age (Melbourne), 19 October 2001 at 7.

<sup>72</sup> Suter, "Assault on terror", The Age (Melbourne), 25 September 2001 at 6.

those who cancelled travel plans, for example, could be deemed to have given in to terrorism. As Winston Churchill said at the height of the German bombing blitz on London on July 14 1941: "You do your worst – and we will do our best".<sup>73</sup>

Secondly, by addressing the underlying causes of violence the potential for terrorism may be reduced. This will mean, among other things, a greater sense of the United States' multilateral engagement with the world instead of a withdrawal from multilateral involvement in global affairs. For example, President Bill Clinton was angered in 1999 by the refusal of the United States Congress to provide enough funds for the United States' foreign operations. The president claimed that it was "another sign of a new isolationism that would have America bury its head in the sand at the height of our power and prosperity."<sup>74</sup> The 2000 Foreign Operations Bill provided US\$12,600 million for that fiscal year, US\$1,900 million less than he had requested.<sup>75</sup> He warned:<sup>76</sup>

It is about half the amount available in real terms to President Reagan in 1985 and it is 14 per cent below the level that I requested...If we under-fund our diplomacy, we will end up over-using our military.

That turned out to be a good prediction.

Finally, this grand strategy would need the United States to re-involve itself in creating a better international legal order as it requires the international co-operation that it had thrown away. The "isolationism" identified by President Clinton has increased. Indeed, the United States did not sign the Rome Statute for the International Criminal Court (ICC) until the very last day it was open for signature.<sup>77</sup> Also, three weeks prior to the September 11 tragedy the United States Congress had debated a proposal to reduce its contributions to the United Nations, which act had

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<sup>73</sup> The International Churchill Society, "A tonic for today", Autumn 2001, Finest Hour 6.

<sup>74</sup> Washington DC: State Department Media Statement, "Clinton on veto of Foreign Operations Bill", 18 October 1999.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> Article 125(1) of the Rome Statute provides that 31 December 2000 is the last day for signature.

further "undercut" the ICC initiative.<sup>78</sup> In July 2001, *The Economist* queried rhetorically if "George Bush has ever met a treaty he liked" and listed the following decisions:<sup>79</sup>

*January 2* – The President announced that he would not send the Rome Statute to the Senate for ratification.

*March 28* – The United States abandoned the 1997 Kyoto Protocol on climate change.

*July 21* – The United States threatened to withdraw from a United Nations conference to impose limits on the illegal trafficking of small arms.

*July 25* – The United States rejected the proposed enforcement measures for the 1972 Biological Warfare Convention.

Further, on 13 December 2001, the United States announced that it would withdraw from the almost 30 year-old 1972 Anti Ballistic Treaty (effective in six months) in order to proceed with its controversial national missile defence system.<sup>80</sup> President Bush gave this formal notice to Russia because "the ABM treaty hinders our government's ability to develop ways to protect our people from future terrorist or rogue state missile attacks."<sup>81</sup> The United States had tried unsuccessfully to persuade Russia to set aside the treaty after several months of negotiations to be replaced by a new strategic treaty.<sup>82</sup>

Therefore, the United States should reaffirm its commitment to wanting to work with other States through international organisations to develop the international legal order. Non-governmental organisations have a role to play as well. For example, the ILA has provided many ideas for projects that could enhance the international legal order in the past. However, the problem is not so much a shortage of legal ideas but a shortage of political will to do so.

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<sup>78</sup> "United States foes of World Court to block fees for UN", *The International Herald Tribune* (Paris), 17 August 2001 at 3.

<sup>79</sup> "Stop the world, I want to get off", *The Economist*, 28 July 2001 at 39.

<sup>80</sup> Schweid, "ABM Withdrawal – Bush pulls out of 1972 ABM Treaty", *ABC News*, 13 December 2001 at <[http://abcnews.go.com/sections/politics/DailyNews/Bush\\_abm011213.html](http://abcnews.go.com/sections/politics/DailyNews/Bush_abm011213.html)>.

<sup>81</sup> Perez-Rivas, "US quits AMB treaty", *CNN.com/allpolitics.com*, 14 December 2001 at <[www.cnn.com/2001/ALLPOLITICS/12/13/rec.bush.abm](http://www.cnn.com/2001/ALLPOLITICS/12/13/rec.bush.abm)>.

<sup>82</sup> *Ibid.*