

A SURVEY OF POSSIBLE LEGAL RESPONSES TO INTERNATIONAL TERRORISM: PREVENTION, PUNISHMENT, AND COOPERATIVE ACTION

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I. INTRODUCTION

The increasing complexity . . . and interdependence among nations require international solutions to problems which once could be dealt with at the national level.

The related problems of international terrorism and aircraft hijacking provide good examples These problems can only be solved by international cooperation.¹

With this recognition, the United States has actively sought to strengthen and promote measures for an international solution to the increased use of terrorism as a strategy of violent coercion. Several international legal efforts have begun. However, it is evident that the first elements in promoting widespread cooperative action to prevent and punish acts of impermissible terrorism will necessarily involve the articulation of a consensus on the boundaries of the "meaning" of terrorism and the articulation of a definitional framework for cooperative response. This need to identify the boundaries of consensus arises from the fact that states must generally agree upon what should be solved before they can act in unity to solve it.²

As a consequence, this paper identifies the problems inherent in an

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¹ U.S. DEP'T OF STATE, PUB. NO. 8699, UNITED STATES FOREIGN POLICY 1972: A REPORT OF THE SECRETARY OF STATE 129 (1973) [hereinafter cited as U.S. FOREIGN POLICY 1972]. The report adds that "efforts involve complex legal issues relating to international extradition and the process of bringing the traditional rules of law and concepts of sovereignty into line with the new needs of the international community. The task is long and slow." *Id.*

² This basic need arises from the fact that words alone do not have a "meaning," and the "meaning" of a word or group of words should be derived from the connotation given it by participants in the contemporary social process. See M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 56-57, 62-63, 103, 119, 148-58 (1961) [hereinafter cited as M. McDOUGAL & F. FELICIANO]. If experts fail to recognize this point, they might just as well send words off to do battle by themselves, resulting in an unprotected exchange of rhetoric in international debate such as that described by Ambassador Bennett. See Statement by W. Tapley Bennett, Jr., United States Ambassador to the U.N., before the Legal Committee of the U.N. General Assembly, December 8, 1972, in 68 DEP'T STATE BULL. 81 (1973) [hereinafter cited as Ambassador Bennett].

attempt to define "terrorism" in the context of global ideological confrontation, where "terrorism" is often used as an epithet to describe the despised conduct of an enemy, whether domestic or international. This paper surveys the types of general responses and general preventive measures which may have contemporary utility in dealing with terrorism. Each of the responses surveyed varies in efficacy depending on the actual features of a particular context. Efficacy will be conditioned by actual patterns of predisposition, social interaction (operations), and environmental features. No attempt is made to describe completely the past trends in decision and conditioning factors that relate to each type of possible legal response. Rather, this paper offers a survey of the broad responsive approaches that seem useful in containing impermissible terrorism. Future decision makers will have to address intertwined policies and contextual features in each particular situation in order to arrive at a rational, policy-serving decision as to permissibility and utility.

II. A DEFINITIONAL FOCUS

Efforts to obtain acceptance of the 1972 U.S. Draft Convention on Terrorism³ were linked to an intentional avoidance of definitional questions.⁴ It appears that the failure to obtain approval of the instrument at the United Nations was due in part to an unnecessary confusion among states as to what the 1972 U.S. Draft Convention sought to control and, more importantly, what it did not prohibit.⁵ Previous

³ United States Draft Convention for the Prevention of Certain Acts of International Terrorism, U.N. Doc. A/C.6/L.850 (1972) (distribution limited), *reprinted in* 67 DEP'T STATE BULL. 431 (1972) [hereinafter cited as 1972 U.S. Draft Convention].

⁴ Rosenstock, *At the United Nations: Extending the Boundaries of International Law*, 59 A.B.A.J. 412, 413 (1973) [hereinafter cited as Rosenstock]; see U.S. DEP'T OF STATE, PUB. NO. 8689, THE ROLE OF INTERNATIONAL LAW IN COMBATING TERRORISM 5 (1973) [hereinafter cited as ROLE OF INT'L LAW]. Ambassador Bennett stated that the 1972 U.S. Draft Convention did not seek to define terrorism or to deal with all acts which might be called terrorism, but focused on a narrow common interest of nations. Ambassador Bennett, *supra* note 2, at 83, 85. John R. Stevenson stated that because of disagreement on political goals and interests, commercial interests, asylum, and other matters, the United States thought that an attempt to define terrorism would be "counterproductive" and that efforts should be focused on the "most serious international threats." Address by John R. Stevenson, Association of the Bar of New York City and the American Society of International Law, Nov. 9, 1972, in 67 DEP'T STATE BULL. 645 (1972) [hereinafter cited as Stevenson].

⁵ Much of the confusion seemed unnecessary in view of the Secretary of State's early explanation of the coverage of the Convention. See Statement by Secretary of State Rogers, 27th session of the U.N. General Assembly, Sept. 25, 1972, in 67 DEP'T STATE BULL. 425 (1972) [hereinafter cited as Rogers]. See also Ambassador Bennett, *supra* note 2, at 82, 87. Articles 13 and 15 of the Convention concern its compatibility with the law of armed conflict and U.N. Charter obligations. The articles do not mention self-determination or anti-colonialism, but specifically mention prisoner-of-war status. 1972 U.S. Draft Convention, *supra* note 3, arts. 13 & 15.

United States spokesmen had condemned the attempt of the 1937 League of Nations Convention on Terrorism (hereinafter referred to as the 1937 Convention on Terrorism)⁶ to formulate a useful definitional framework as unnecessary and overly broad,⁷ but statements made at a meeting of scholars in Washington in 1973 seem to reflect a change in attitude.⁸ Any new draft should contain a definition of terrorism and clauses emphasizing the fact that the prohibition of a particular strategy of international terrorism does not preclude certain activities compatible with the U.N. Charter, such as permissible revolution, self-determination, anti-colonial struggles, and quests for independence or other macro-political purposes. This would serve to eliminate much of the rhetorical confusion.

The recommendation that a definition of international terrorism be included in the instrument is not founded on the misconceptions that groups of words will dictate decisions⁹ or that rules can protect us from ourselves; nor is it based on a deference to a "mechanical arrogance of abstractions."¹⁰ It lies rather in the view that "the impossibility of absolute precision does not necessarily render complete confusion desirable,"¹¹ and that a definition can be extremely useful to guide decision

For a review of the main points of debate and confusion see INTERNATIONAL LEAGUE FOR THE RIGHTS OF MAN, REPORTS ON THE U.N. CONSIDERATION OF ITEM ON TERRORISM (H. Shapiro ed. 1972); U.S. FOREIGN POLICY 1972, *supra* note 1, at 95; Ambassador Bennett, *supra* note 2, at 87-89; Rosenstock, *supra* note 4, at 87-89.

⁶ Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, 19 LEAGUE OF NATIONS OFF. J. 23 (1938) [hereinafter cited as 1937 Convention on Terrorism], *reprinted in* 27 U.N. GAOR, Annex I, Agenda Item No. 92, U.N. Doc. A/C.6/418 (1972) [hereinafter cited as 1972 U.N. Doc. A/C.6/418]. Although the Convention was signed by 24 countries, only India ratified it. For a useful bibliography see 7 M. HUDSON, INTERNATIONAL LEGISLATION 862 (1941); for a history of the instrument and trends in expectation see 1972 U.N. Doc. A/C.6/418, *supra*.

⁷ See Ambassador Bennett, *supra* note 2, at 85; Stevenson, *supra* note 4, at 652. It was also explained that the 1972 U.S. Draft Convention, by specifying the acts covered by the Convention, was sufficiently precise so as to obviate the need for an abstract definition. See Rosenstock, *supra* note 4.

⁸ At the annual meeting of the American Society of International Law (ASIL) held in Washington, D.C. from 12 to 14 April 1973, Professor John Norton Moore, counselor on international law for the United States Department of State, declared during a panel session on "Terrorism and Political Crimes in International Law" that "the whole trick is to define." He also agreed with the comments from the floor that a definition would be most useful. This recognition is most significant, since it was announced at the panel session that Professor Moore had been a principal author of the 1972 U.S. Draft Convention. The disagreement among certain panelists also seemed to emphasize the need for a common definitional framework to begin implementary efforts. See Kearney, *The Twenty-Fourth Session of the International Law Commission*, 67 AM. J. INT'L L. 84, 87-89 (1973).

⁹ See M. McDUGAL & F. FELICIANO, *supra* note 2.

¹⁰ *Id.* at 57 n.136.

¹¹ *Id.* at 62.

makers to relevant policy, or at least to a comprehensive consideration of varying claims to authority in varying contexts of terroristic process with greater insight into context, greater rationality in choice, greater overall policy realization, and greater efficacy during the process of authoritative response.¹² The Secretary-General's report on international terrorism reflects the need for a definitional approach by attempting to articulate certain basic definitional components.¹³ The 1937 Convention on Terrorism and subsequent scholars have identified other components of the process of terrorism.¹⁴ The need for a more comprehensive framework is apparent when it is recognized that the process of terrorism is a form of violent strategy and that such strategy is a form of coercion utilized to alter the freedom of choice of others. Terrorism involves the intentional use of violence or the threat of violence by the precipitator(s) against an instrumental target in order to communicate to a primary target a threat of future violence. The object is to use intense fear or anxiety to coerce the primary target into behavior or to mold its attitudes in connection with a demanded power (political) outcome. It should be noted that in a specific context the instrumental and

¹² *Id.* at 57, 62-63, 102, 119, 148-58. Increased complexity and interdependence have antiquated the reliance on multifarious national interpretations of what policies and other factors are involved in the process of international terrorism. They have also made irrelevant the confusion now evident in the international community, which seems to have resulted from a lack of a definitional framework in recent proposals.

¹³ See 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 6-7. These definitional components include: (1) terror outcome, (2) instrumental or "immediate" victims, (3) primary targets ("population" or "broad groups" and others), (4) violence, and (5) political purpose.

¹⁴ The 1937 Convention on Terrorism, *supra* note 6, identified components such as: (1) willful or intentional act; (2) terror purpose ("calculated to create a state of terror in the minds of" the primary target); (3) outcome of death, grievous bodily harm or loss of liberty to a set of instrumental targets (e.g., heads of state, their families, public servants); (4) outcome of damage to or destruction of public property as an instrumental target; and (5) acts "calculated to endanger the lives of the members of the public." Another factor which seemed to apply to all acts of terrorism was a requirement that acts be "directed against a State" (which most likely was designed to exclude terrorization by governments of their own people and other incidents involving non-state targets). See also 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 6-7, 10-16, 39 n.1. A survey of several definitional components can be found in Hutchinson, *The Concept of Revolutionary Terrorism*, 16 J. CONFLICT RES. 383 (1972) [hereinafter cited as Hutchinson]. Factors identified by Hutchinson include: (1) intentional conduct, (2) terror purpose, (3) "political" purpose, (4) violent conduct (act or threat), and (5) terror outcome (production of intense fear or anxiety). Other factors identified by Hutchinson which the present author finds marginally useful include: (1) "systematic" use or "consistent pattern," (2) atrocious or shocking conduct, (3) arbitrariness, (4) selectivity of targets, (5) indiscriminate affectation of targets, (6) irrationality, and (7) immoral or "unjust" activity. In a study on political violence, Eugene Walter describes the process of terrorism as involving three main elements: (1) an act or threat of violence, (2) an emotional outcome, and (3) production of "social effects." He also identifies three types of participants: source, victim, and target. See E. WALTER, *TERROR AND RESISTANCE* 5, 7-11 (1969).

primary targets could well be the same person or group. Also, terror can be caused by an unintended act, but the community does not seek to perceive such activity as "terrorism"; nor does it seek to regulate terror caused by conduct which does not include intense coercion or acts and threats of violence. It is often difficult to draw the parameters of the subjectivities and intensities of coercion.¹⁵ The crucial factor is that the task of deciding between the permissible and impermissible labels of a particular coercive process should be guided by community expectations and all relevant policies and features of context.¹⁶

III. NORMS AND EXPECTATIONS THAT PROSCRIBE TERRORISM

A related approach to the problem of terrorism lies in a recognition that not all strategies for violent coercion are permissible,¹⁷ and that the "justness" of one's political cause does not categorically "justify the means" utilized.¹⁸ Indeed, the Secretary-General has addressed this idea directly in his report on international terrorism:

¹⁵ See B. MURTY, *PROPAGANDA AND WORLD PUBLIC ORDER: THE LEGAL REGULATION OF THE IDEOLOGICAL INSTRUMENT OF COERCION* (1968) [hereinafter cited as B. MURTY].

¹⁶ See Lasswell & McDougal, *Criteria For A Theory About Law*, 44 S. CAL. L. REV. 362 (1971) [hereinafter cited as Lasswell & McDougal].

¹⁷ See 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 7, 41. Even in time of war, when power struggle marks its greatest intensity, it has long been a basic expectation of Man that there are limits to allowable death and suffering and that certain normative protections are peremptory. See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1909), T.S. No. 539 [hereinafter cited as Hague Convention]. See also G.A. Res. 2675, 25 U.N. GAOR, Supp. 28, at 76, U.N. Doc. A/8028 (1970), *reprinted in* 119 INT'L REV. RED CROSS 104, 108-09 (1971); U.N. Secretary-General Report, *Respect for Human Rights in Armed Conflicts*, 25 U.N. GAOR, U.N. Doc. A/8052 (1970) [hereinafter cited as S.G. Report A/8052]; U.N. Secretary-General Report, *Respect for Human Rights in Armed Conflicts*, 24 U.N. GAOR, U.N. Doc. A/7720 (1969) [hereinafter cited as S.G. Report A/7720]; Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 139-43 (1972) [hereinafter cited as Paust]; Rosenstock, *supra* note 4, at 413. The authorities also condemn indiscriminate warfare, attacks on the civilian population as such, and refusals to distinguish between "those taking part" in the hostilities and those who are not. G.A. Res. 2444, 23 U.N. GAOR, Supp. 18, at 50, U.N. Doc. A/7218 (1969); see U.S. DEP'T OF ARMY, *FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE* (1956) [hereinafter cited as *FIELD MANUAL*]. Hersh Lauterpacht discusses the peremptory norm against intentional terrorization of the civilian population not incidental to lawful military operations. Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BR. Y.B. INT'L L. 360, 369 (1951) [hereinafter cited as Lauterpacht].

¹⁸ Here, the theory that "the ends justify the means" is refuted. See 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 41; B. MURTY, *supra* note 15. See also Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, arts. 7 & 8, [1971] 2 U.S.T. 1641, T.I.A.S. No. 7192 (effective Oct. 14, 1971) [hereinafter cited as 1971 Montreal Convention]; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, art. 2, O.A.S./Ser. A/17, O.A.S. Doc. AG/88 Rev. 1, *reprinted in* 10 INT'L LEGAL MAT'LS 255 (1971) (not yet in effect) [hereinafter cited as 1971 O.A.S. Convention on Terrorism]; Convention for the

At all times in history, mankind has recognized the unavoidable necessity of repressing some forms of violence, which otherwise would threaten the very existence of society as well as that of man himself. There are some means of using force, as in every form of human conflict, which must not be used, even when the use of force is legally and morally justified, and regardless of the status of the perpetrator.¹⁹

Another recent trend requires extradition for the offense of terrorism; whereas, for most "political" crimes, extradition is not normally required.²⁰ Relevant human rights instruments allow no exception to human rights protections (on the basis of a postulated political purpose) in cases of conduct which would amount to acts or threats of terrorism.²¹

Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, arts. 7 & 8, [1973] 1 U.S.T. 565, T.I.A.S. No. 7570 (effective Jan. 26, 1973) (ratified by 46 states) [hereinafter cited as 1970 Hague Convention]. An O.A.S. resolution states that the "political and ideological pretexts utilized as justification for the crimes in no way mitigate their cruelty and irrationality or the ignoble nature of the means employed, and in no way remove their character as acts in violation of essential human rights." O.A.S. Res. 4, O.A.S. Doc. AG/Res. 4 (I-E/70) (1970), reprinted in 9 INT'L LEGAL MAT'LS 1084 (1970) [hereinafter cited as 1970 O.A.S. Res. 4]. See also Convention on Offences and Certain Other Acts Committed on Board Aircrafts, Sept. 14, 1963, art. 2, [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768 (effective Dec. 4, 1969) [hereinafter cited as 1963 Tokyo Convention]. The 1963 Tokyo Convention implies an exclusion of any exceptions to prosecution on the basis of purpose or "political" offense. For other relevant references which refute the simplistic myth that "ends justify the means," see, e.g., United States v. List, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 66 (1949); United States v. Von Leeb, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93-94, 123 (1949); IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 15-16, 34, 37-40, 225-26 (J. Pictet ed. 1958) [hereinafter cited as COMMENTARY]; H. HALLECK, INTERNATIONAL LAW 426 (1861); M. MCDUGAL & F. FELICIANO, *supra* note 2, at 72, 80 nn.194 & 195, 134-35, 186-88, 521-24, 529; 2 L. OPPENHEIM, INTERNATIONAL LAW 218 (7th ed. H. Lauterpacht 1952) [hereinafter cited as 2 L. OPPENHEIM]; FIELD MANUAL, *supra* note 17, para. 3(a). See also Dinstein, *Terrorism and Wars of Liberation Applied to the Arab-Israeli Conflict: An Israeli Perspective*, 3 ISRAEL Y.B. HUMAN RIGHTS 78 (1973); Paust, *Law in a Guerrilla Conflict: Myths, Norms and Human Rights*, 3 ISRAEL Y.B. HUMAN RIGHTS 39 (1973); Rovine, *The Contemporary International Legal Attack on Terrorism*, 3 ISRAEL Y.B. HUMAN RIGHTS 9 (1973) [hereinafter cited as Rovine].

¹⁹ 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 41.

²⁰ Early work on terrorism prior to 1937 included drafts which specifically excluded terrorism or related acts from "political" offenses and created a criminal offense where the purpose was to "propound or put into practice political or social ideas" or to "commit an act with a political and terroristic" purpose. Thus, the offense of terrorism was excluded from the category of "political" crimes for extradition purposes. See 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 11, 13, 16, 22. Furthermore, many extradition treaties have excluded terrorism from "political" offenses. *Id.* at 16-21. The 1937 Convention on Terrorism, *supra* note 6, arts. 1, 9-10, 19, and the 1972 U.S. Draft Convention, *supra* note 3, arts. 2-4, 6-7, would seem to fit within this trend. The new United States-Cuba agreement on hijacking also seems to exclude the offense listed from the category of "political" crimes for purposes of extradition. See U.S. Dep't of State, Press Release No. 35, Feb. 15, 1973, arts. 1 & 4, reprinted in 12 INT'L LEGAL MAT'LS 370 (1973) (text of note signed by Secretary of State Rogers containing agreement with Cuba) [hereinafter cited as U.S.-Cuba Agreement].

²¹ For example, even though the European Convention on Human Rights allows certain deroga-

Patently, this recognition of legal restraints on violent coercion and of the unacceptability of "just" excuses per se is a key to the efficacy of norms proscribing terroristic strategies. Without a shared acceptance of these two basic premises, law can have little effect on the participants in the power process who will increasingly defer to raw, violent power to effect a "just" measure of social change.²² Numerous examples of claims to utilize any means of violence, to expand permissible target groups, or to excuse human rights deprivations on the basis of a "holy" or "just" macro-political purpose appear in recent writings, and misconceptions of legal norms and values are common in legal literature.²³

tions under specified conditions, it affirms that no derogation is permissible from articles 2 and 3 or from other international obligations, such as the 1907 Hague Convention or the 1949 Geneva Convention. The European Convention adds that nothing shall imply any right for any state, group, or person to derogate from the rights and freedoms of persons set forth in the Convention or to limit such rights to a greater extent than is provided in the Convention. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 15 & 17, 213 U.N.T.S. 221 [hereinafter cited as 1950 Eur. Convention]. Articles 2 and 3 prohibit the type of conduct most often connected with terrorism. Similar absolute prohibitions against conduct which includes terroristic acts appear in other human rights instruments. *See* American Convention on Human Rights, *opened for signature* Nov. 22, 1969, arts. 4-5, 8, 25, 27, 29, 32, *reprinted in* 65 AM. J. INT'L L. 679 (1971) [hereinafter cited as 1969 Am. Convention]; 1966 Covenant on Civil and Political Rights, arts. 4(1)-(2), 6-7, *adopted by* G.A. Res. 2200, 21 U.N. GAOR, Supp. 16, at 49-58, U.N. Doc. A/6316 (1966) [hereinafter cited as 1966 Covenant on Civil and Political Rights]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 3, 4, 13, 16, 27-33, 147, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (effective Feb. 2, 1956) [hereinafter cited as Geneva Convention]. These prescriptions do not depend on reciprocity between contending participants in a particular arena for their force and effect. They are obligations to mankind (or at least to all persons in a particular region), and they state that provisional characterizations of persons and protections are subject to community review. *See* 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 6-7, 40-41; S.G. Report A/7720, *supra* note 17, at 31; COMMENTARY, *supra* note 18, at 15-17, 21, 23, 34, 37-40, 225-29; M. McDUGAL & F. FELICIANO, *supra* note 2, at 218-19.

²² The concept of law adopted here recognizes the interplay between patterns of authority and patterns of control and recognizes that "authority" is ultimately based in the shared expectations of all members of the human community. Decisions which are controlling but which are not based at all on authority are not law but naked power. *See* Lasswell & McDougal, *supra* note 16, at 384. *See also* Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968). Terrorism motivated by blind fanaticism, or the adoption of an extremist ideology which subordinates morality and all other human values to a single aim, or the dominance of parochial political dogma by coercive violence is, of course, rejected. *See* 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 9, para. 18; Wash. Post, Nov. 2, 1972, at 7, col. 3. The *Post* quotes the President as follows: "A civilized society cannot tolerate terrorism Any action which makes a diplomat, a government official or an innocent citizen a pawn in a politically motivated dispute undermines the safety of every other person." *See also* Rogers, *supra* note 5, at 429. Secretary Rogers states that terrorist acts "must be universally condemned, whether we consider the cause the terrorists invoke noble or ignoble, legitimate or illegitimate." *See also* Statement of M. Feldman, Assistant Legal Adviser for Inter-American Affairs, Department of State, in S. EXEC. DOC. NO. 92-23, 92d Cong., 2d Sess. 4 (1972).

²³ *See* Lawrence, *The Status Under International Law of Recent Guerrilla Movements in Latin*

Moreover, much of the ideological literature of revolutionaries contains the rhetorical "arguments" that: (1) violence permeates all societies and institutions ("everyone is doing it"); (2) man is exploited, tyrannized, and alienated ("they are doing it to you"); (3) violence is a cleansing force and frees the alienated ("you can resist and benefit from your own psychodrama"); and (4) violence is "necessary" in politics for the dominance of one's own political predilection ("you can do it and you can win").²⁴ A typical statement is that of Marcuse to the effect that violence used to uphold domination is bad, but violence practiced by the "oppressed" against the "oppressors" is good.²⁵ While that appeals to the terrorist, upon delineating the types of participants, perspectives, arenas of interaction, resource values, strategies employed, outcomes, and effects in connection with the "violence" in society and the strategies of "resistance" by the "oppressed," some additional questions must be asked, and simplistic justifications for any program of violent strategy must ultimately be rejected. In reality, not only is there superficial guidance in the terms "oppressed" and "oppressors," but also the "oppressed" who use coercive violence are necessarily going to become the "oppressors" of someone else or some other ideology. So the "guidance" abandons us to circular confusion and the spiral pursuit of self-

America, 7 INT'L LAW. 405, 406-20 (1973) [hereinafter cited as Lawrence]. See also T. FARER, THE LAWS OF WAR 25 YEARS AFTER NUREMBERG 42-43 (1971) [hereinafter cited as T. FARER]; Falk, *Six Legal Dimensions of the United States Involvement in the Vietnam War*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 216, 240 (R. Falk ed. 1969) [hereinafter cited as Falk]; Rubin, *The Status of Rebels Under the Geneva Conventions of 1949*, 21 INT'L & COMP. L.Q. 472, 481 (1972) [hereinafter cited as Rubin]. The Rubin article stated that the insurgent/guerrilla has no alternative other than terror to mobilize an effective operation. The incongruity of these claims with present and inherited legal expectations and the goals of human dignity and minimum world public order, and the inaccuracy of related guerrilla "myths" are explored in Paust, *supra* note 17, at 128-46. See also 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 7, 41; P. BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS 229-31 (1908); COMMENTARY, *supra* note 18, at 15-16, 31, 34, 37-40, 225-26 (concerning the peremptory prohibition of terrorism); W. FORD, RESISTANCE MOVEMENTS AND INTERNATIONAL LAW (Int'l Comm. of the Red Cross reprint 1968); H. HALLECK, INTERNATIONAL LAW 386-87, 400-01, 426-27 (1861); T. MERON, SOME LEGAL ASPECTS OF ARAB TERRORISTS' CLAIMS TO PRIVILEGED COMBATANCY 1-10, 25-28 (1970) [hereinafter cited as T. MERON]; T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 17, 22, 39-41, 136-37, 145, 192-95 (1970); 2 G. VON MARTENS, THE LAW OF NATIONS 287 (4th ed. W. Cobbett transl. 1829); Rosenblad, *Starvation as a Method of Warfare—Conditions for Regulation by Convention*, 7 INT'L LAW. 252, 258, 267 (1973); Schwarzenberger, *Terrorists, Guerrilleros, and Mercenaries*, 1971 UNIV. OF TOLEDO L. REV. 71 [hereinafter cited as Schwarzenberger].

²⁴ See PROPHETIC POLITICS: CRITICAL INTERPRETATIONS OF THE REVOLUTIONARY IMPULSE (M. Cranston ed. 1970). This work is useful for a concise reference to relevant claims by Che Guevara, Frantz Fanon, Jean-Paul Sartre, Herbert Marcuse, Ronald Laing, and others, and for a critical analysis of those claims from political, sociological, historical, and philosophical perspectives.

²⁵ *Id.* at 11. For evidence of recent parallel practice see N.Y. Times, May 28, 1973, at 3, col. 6.

destructive terror and counter-terror.²⁶ To argue simplistically that terrorism is "necessary" so that the "will of the people" can find expression is similarly unattractive and generally untenable. Intentionally created terror suppresses a free expression of viewpoints and a free participation in the political process.²⁷

With such simplistic analyses of social and political processes and with conclusions of the "necessity" of violent revolution, it is not difficult to understand sweeping generalizations concerning the necessity of terrorism and transpositional notions of legality. Such analytic inquiries and conclusions are also made by certain advocates of the "New Right" who articulate equally repugnant guardianship of the people. What is harder to understand is why some lawyers contribute to the abnegative claims that "just" or "good" groups or guerrillas can ignore the law—especially international norms governing armed conflict and human rights.²⁸

Observers willing to explore the relevant juristic efforts will discover that recent trends in authoritative pronouncement (which are themselves forms of legal response to terrorism) have made clear recognition that there are limits to permissible death, suffering, and competitive destruction, no matter what the goal or identity of participants. A basic human expectation incorporated into the customary law of war is that even in times of "armed conflict" mankind expects that each party to the conflict will conduct its operations in conformity with the laws and customs of war. It has also long been generally accepted that these norms do not allow to belligerents an unlimited power as to the choice of means of injuring the enemy,²⁹ and that a respect for the law is not owed merely

²⁶ See 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 9, 41; Schwarzenberger, *supra* note 23, at 76. See also M. MCDUGAL & F. FELICIANO, *supra* note 2, at 79-80, 652, 656-58.

²⁷ See notes 114-23 *infra*, and accompanying text, with regard to the principle of self-determination.

²⁸ See Lawrence, *supra* note 23, at 407-09. The article states that the inclusion of the requirement that guerrillas observe the rules of warfare is "highly objectionable," "unlikely," and "unbelievable" as a condition for prisoner-of-war status or recognition of the state of belligerency. Mr. Lawrence adds that "the only essential condition" should be political recognition (apparently deferring to politicized conclusions or raw power). *Id.* at 408. See also T. FAREY, *supra* note 23, at 42-43 (concerning terrorism); Falk, *supra* note 23, at 240. Mr. Lawrence's observations and goal values of human indignity, which are necessarily intertwined with the deference to raw power, are not surprising when we recognize that his teacher was Professor Rubin. See Rubin, *supra* note 23, at 476-79.

²⁹ Hague Convention, *supra* note 17, art. 22; Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 22, 32 Stat. 1803 (1902), T.S. No. 403 (effective April 9, 1902). The Hague Conventions were considered customary at Nuremberg. See I SECRETARIAT OF INT'L MIL. TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 221, 254 (1947); FIELD MANUAL, *supra* note 17, para. 6. See also W. WINTHROP, MILITARY LAW AND PRECEDENTS 778-79 (2d ed. 1920) [hereinafter cited as W. WINTHROP].

to the enemy but to all mankind. Furthermore, there is respected authority for the position that both the customary law of war and practice have prohibited terrorism as an intentional strategy.³⁰ There were at least two commissions established early in the 20th century for the purpose of articulating the established norms of the law of war, and they promulgated a widespread denunciation of terrorism as well as murder, massacres, torture, and collective penalties.³¹ A third group, charged with the investigation of the German control of Belgium in World War I, concluded that a deliberate "system of general terrorization" of the population to gain quick control of the region was contrary to the rules of civilized warfare and that German claims of military necessity and reprisal action were unfounded.³² The pre-World War I German military staff and jurists had advocated terrorization of civilians in war zones to hasten victory or in occupied territory to insure control of the population.³³ These views and the actions taken during the war to implement them were widely denounced as unlawful strategies.³⁴

³⁰ See 1 J. GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 283 (1920) [hereinafter cited as J. GARNER]; E. STOWELL & H. MUNRO, *INTERNATIONAL CASES* 173-76 (1916) [hereinafter cited as E. STOWELL & H. MUNRO]; 2 H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 789-80 (6th ed. 1929); Am. Soc'y Int'l L. Subcom. No. 1, *To Restate the Established Rules of International Law*, 15 PROC. AM. SOC'Y INT'L L. 102, 104 (1921) (stating that "treacherous killings, massacres, and terrorism are not allowed by the laws of war") [hereinafter cited as ASIL Report]; Wright, *The Bombardment of Damascus*, 20 AM. J. INT'L L. 263, 273 (1926). See also the 1818 trial of Arbuthnot and Ambrister, in 3 F. WHARTON, *A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES* 326, 328 (1886). The Code of Articles of King Gustavus Adolphus of Sweden, art. 97 (1621), reprinted in W. WINTHROP, *supra* note 29, at 907, stated that no man shall "tyrannize over any Churchmen, or aged people, men or women, maides or children, unless they first take up arms . . ." *Id.* at 913. This prohibition grew into the customary prohibition of any form of violence against noncombatants. See *id.* at 778, 843.

³¹ See COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT AND PENALTIES, REPORT, List of War Crimes, item nos. 1, 3, 17 (1919) (report presented to the Preliminary Peace Conference). The members were the United States, the British Empire, Japan, Belgium, Greece, Poland, Romania, and Serbia. See also ASIL Report, *supra* note 30. It was not clear whether all forms of violent terrorism were denounced, but a general ban on terrorism was affirmed, as well as other strategies generally utilized only against combatants or against both combatants and noncombatants (e.g., assassination, use of prohibited weapons, treachery).

³² See Bryce Committee, *Report*, in E. STOWELL & H. MUNRO, *supra* note 30, at 173. The Bryce Report added that the murder of large numbers of innocent civilians is "an act absolutely forbidden by the rules of civilized warfare."

³³ For a brief consideration of the German jurists and the Prussian War-book see T. BATY & J. MORGAN, *WAR: ITS CONDUCT AND LEGAL RESULTS* 176, 180-81 (1915). See also J. GARNER, *supra* note 30, at 278-82, 328. Garner added that it was "entirely in accord with the doctrines of the German militarists that war is a contest . . . against the civil population as well, that violence, ruthlessness, and terrorism are legitimate measures, and that whatever tends to shorten the duration of the war is permissible." *Id.* at 328. It is not clear whether Baty and Morgan repudiated the German views, but most other writers did. See *id.* at 283.

³⁴ FRENCH MINISTRY OF FOREIGN AFFAIRS, *GERMANY'S VIOLATIONS OF THE LAWS OF WAR*,

Equally distinguished authority has reiterated the need for a peremptory norm which prohibits the intentional terrorization of the civilian population or the intentional use of a strategy which produces terror that is not "incidental to lawful" combat operations.³⁵ Underlying these viewpoints are policy considerations involving the need for limiting the types of permissible participants and strategies in the process of armed violence and involving a shared awareness of the need to prohibit the deliberate terrorization of the population. Only such limitation and awareness can preserve any vestige of the claim that war can be regulated and save from extinction the "human rights" limitations on the exercise of armed coercion within the social process.³⁶

As if to reaffirm these trends in expectation, the 1949 Geneva Conventions were drafted to contain a specific peremptory prohibition of "all measures" of "terrorism."³⁷ Numerous humane treatment provi-

1914-1915, at 77-215 (J. Bland transl. 1915); J. GARNER, *supra* note 30, at 283; E. STOWELL & H. MUNRO, *supra* note 30; 2 H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 789-90 (6th ed. 1929); cf. E. STOWELL, *INTERNATIONAL LAW* 523-26 (1931). Stowell argues for a reconsideration of the German claim of permissible terror in cases where the principle of military necessity applies. He further warns of a "precedent" for a World War II calamity which he could only dimly envision and would not deny. The 1949 Geneva Convention would prohibit all acts of terrorism against protected persons regardless of military necessity claims, but Stowell's remarks were significant with respect to certain World War II bombardments which were arguably permissible at the time but would be condemned today. See M. MCDUGAL & F. FELICIANO, *supra* note 2, at 79-80, 652-57.

³⁵ See CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *REPORT OF THE CONFERENCE ON CONTEMPORARY PROBLEMS OF THE LAW OF ARMED CONFLICTS* 39, 42 (1971); J. GARNER, *RECENT DEVELOPMENTS IN INTERNATIONAL LAW* 174 (1925); M. MCDUGAL & F. FELICIANO, *supra* note 2, at 79-80, 652, 656-68; Lauterpacht, *supra* note 17, at 378-79; cf. E. STOWELL, *INTERNATIONAL LAW* 524-26 (1931). Present support for a peremptory prohibition of international terrorization of noncombatants would also seem to come from Professor R. Baxter, Professor Y. Dinstein, G.I.A.D. Draper, Professor J. Freymond, M. Greenspan, Professor H. Levie, T. Meron, Professor J. N. Moore, Dr. A. Rovine, J. Pictet, G. Schwarzenberger, Dr. H. Meyrowitz, and others. See T. MERON, *supra* note 23; 3 ISRAEL Y.B. HUMAN RIGHTS (1973); 1 ISRAEL Y.B. HUMAN RIGHTS (1971); Schwarzenberger, *supra* note 23.

³⁶ See note 33 *supra*.

³⁷ See, e.g., Geneva Convention, *supra* note 21, art. 33. The other conventions were: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (effective Feb. 2, 1956) [hereinafter cited as Convention No. 1]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces, Aug. 12, 1949, [1955] 3 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (effective Feb. 2, 1956) [hereinafter cited as Convention No. 2]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (effective Feb. 2, 1956) [hereinafter cited as Convention No. 3]. See also COMMENTARY, *supra* note 18, at 225-26, 594. Article 33 is technically applicable only to noncombatants in the terror process, because "protected persons" are defined in article 4. The article is also specifically applicable in case of an armed conflict of an international character including a civil war between "belligerents." See FIELD MANUAL, *supra* note 17, para. 11(a); H. HALLECK, *ELEMENTS OF INTERNATIONAL LAW AND LAWS*

sions prohibit terrorism and related acts of violence in all circumstances. Specific prohibitions include: violence to life and person, cruel treatment, torture, the taking of hostages, summary executions and other forms of murder or punishment without judicial safeguards, outrages upon personal dignity, and humiliating and degrading treatment.³⁸ A limited ban on all forms of "physical or moral coercion" against protected persons is also contained in the conventions. Jean S. Pictet states that the prohibition is very broad, although the drafters "had mainly in mind coercion aimed at obtaining information, work or support for an ideological or political idea."³⁹ Recent efforts to supplement the conventions through two protocols have also contained specific reiterations of the prohibition of terrorism as well as the prohibition of any other form of armed violence directed at the civilian population.⁴⁰ The new prohibitions in the protocols are significant because they underscore customary and current expectations prohibiting attacks on the civilian population as such. In contrast, the present conventions primarily protect persons already in military control or in occupied territory, and they also protect the wounded, infirm, women, children, and "other persons" who are "exposed to grave danger."⁴¹

Similar trends in expectation have developed within the interconnected sphere of human rights (contained in norms other than the law of armed conflict). Whether the 1474 trial of Peter von Hagenback fits

OF WAR 151-53 (1866) (concerning the applicability of the law of war to civil war between "belligerents"); 2 L. OPPENHEIM, *supra* note 18, at 370 n.1. Respected authority states that terrorism is also prohibited in an article 3 conflict (defined as one not of an international character), and it seems sufficiently clear that those who follow article 3 will not commit acts of terrorism against noncombatants. See COMMENTARY, *supra* note 18, at 31, 40.

³⁸ See Geneva Convention, *supra* note 21, arts. 3, 16, 27, 31-34, 147.

³⁹ COMMENTARY, *supra* note 18, at 219-20; see Geneva Convention, *supra* note 21, art. 31. Permissible derogations from this ban must serve other Geneva policies.

⁴⁰ See 1 International Committee of the Red Cross, Basic Texts, protocol I, art. 45, & protocol II, art. 5 (Jan. 1972) (proposed draft protocols to the Conventions, Conference of Governmental Experts, Geneva) [hereinafter cited as ICRC, Basic Texts]. The protocols concerned specific prohibitions of "terrorization attacks" and "acts of terrorism." These prohibitions appear in articles designed to protect the general population and individual noncombatants against the dangers of armed conflict in both article 2 and 3 types of conflict (*i.e.*, in both "international" and "internal" armed conflicts) under the 1949 Geneva Conventions.

⁴¹ It should be noted that most of those protected by the Geneva Convention, *supra* note 21, art. 4, are those in force control ("protected persons"). However, article 4 also refers to part II of the Convention and to a broader group of persons protected, for example, by articles 13 and 16. See COMMENTARY, *supra* note 18, at 50-51, 118-37; Paust, *Legal Aspects of the My Lai Incident: A Response to Professor Rubin*, 50 ORE. L. REV. 138 (1971), reprinted in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 359 (R. Falk ed. 1972). No such "in the hands of" or control limitations attach to article 3, which is the same in all four Conventions. Its prohibitions apply "in all circumstances" including "any time" and "any place."

into developing trends of human rights, the law of war or norms prohibiting the dominance of other people and territory by a "regime of arbitrariness and terror," is not important for this inquiry. The significance of that decision for our focus stems from the identification of an early community condemnation of government by terror as an egregious defiance of "the laws of God and Man."⁴² In that case, the arrant denial of shared expectation necessitated community military action and the subsequent trial of captured perpetrators.

Similarly, efforts to control the population of occupied territory in times of war through a process involving the taking of hostages and their execution in response to local population resistance were authoritatively condemned after both World Wars. After World War II it was further declared that the executions (of hostages) without strict compliance with reprisal principles and certain minimum judicial safeguards "are merely terror murders," and are impermissible regardless of "reprisal" or other purported objectives.⁴³ The Geneva conventions prohibit the taking of hostages in any type of armed conflict and for any purpose.⁴⁴ To serve a similar policy, they also prohibit collective penalties and reprisals against protected persons, no matter what the postulated need of those engaged in the armed struggle.⁴⁵

At present, it also seems reasonable to conclude that all forms of violent terrorism against noncombatants and captives, and the governmental or private terrorization of others to forbid them free participation in the governmental process, would violate the human rights expect-

⁴² See 2 G. SCHWARZENBERGER, *INTERNATIONAL LAW* 462-66 (1968). Ancient warriors had used terror to dominate others, but by the time of Vattel this was condemned. See 3 R. PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW* 78 (3d ed. 1879). John MacQueen states that "cruelty, pillage and marauding, though practised largely in the first Napoleon's wars, have no sanction from any modern jurist." J. MACQUEEN, *CHIEF POINTS IN THE LAWS OF WAR AND NEUTRALITY* 1-2 (1882).

⁴³ 10 NUREMBERG MILITARY TRIBUNALS, *TRIALS OF WAR CRIMINALS* 1 (1948); 11 *id.* at 528 (adding that it might be impermissible to execute hostages under any circumstances); *cf. id.* at 757, 1250.

⁴⁴ Geneva Convention, *supra* note 21, arts. 3, 34, 147; Conventions Nos. 1, 2, & 3, *supra* note 37, arts. 3; see COMMENTARY, *supra* note 18, at 35-40, 229-31, 596-601.

⁴⁵ See, e.g., Geneva Convention, *supra* note 21, arts. 27 & 33; COMMENTARY, *supra* note 18, at 199-202, 205, 224-29. These prohibitions are arguably applicable to an article 3 conflict as well, even though no specific mention of reprisals or collective penalties exists in that article. See *id.* at 34, 39-40. In any event, it would be a very limited type of "reprisal" or "collective penalty" that could avoid the absolute ban on hostages, murder, cruel treatment, torture, outrages upon personal dignity, other forms of inhuman treatment, and summary executions or the "passing of sentences" without regular court proceedings. Indeed, in view of the purpose of the article and the last mentioned form of prohibition, it would seem that collective "penalties" are also prohibited unless the personal guilt of each accused has been somehow determined by an authoritative judicial body utilizing fair procedure. See *also id.* at 225.

tations documented in numerous international instruments. The 1948 Universal Declaration of Human Rights states that "[e]veryone has the right to life, liberty and security of person" and that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁴⁶ This language parallels that of the 1949 Geneva Conventions, and it seems to profess a similar expectation of the prohibition of all forms of terrorism through threats or acts of violence to persons.⁴⁷ Similar language also appears in the 1966 Covenant on Civil and Political Rights,⁴⁸ and in two regional human rights conventions.⁴⁹ In addition to these trends in the documentation of human rights, other authoritative pronouncements have declared that acts of terrorism constitute serious violations of the fundamental rights, freedoms, and dignity of Man.⁵⁰ The U.N. Secretary-General has added that "terrorism threatens, endangers or destroys the lives and fundamental freedoms of the innocent,"⁵¹ and a recent resolution of the U.N. General Assembly stated that that body was "deeply perturbed" over acts of international terrorism which take a toll of innocent human lives or jeopardize fundamental freedoms and human rights.⁵² In 1969 the Red Cross Istanbul Declaration provided that "it is a human right to be free from all fears,

⁴⁶ G.A. Res. 217A, U.N. Doc. A/810 at 71, arts. 3 & 5 (1948); see J. CAREY, U.N. PROTECTION OF CIVIL AND POLITICAL RIGHTS 13-14 (1970) [hereinafter cited as J. CAREY].

⁴⁷ This type of language appears in article 3, which is common to all of the 1949 Geneva Conventions, and respected authority asserts that it is broad enough to cover acts specifically prohibited in other articles such as acts of terrorism. See COMMENTARY *supra* note 18, at 3, 40. Detailed prohibitions contained in the Geneva Convention, *supra* note 21, art. 3, but not necessarily in the 1948 human rights declaration as such, include the taking of hostages and mutilation.

⁴⁸ G.A. Res. 2200, 21 U.N. GAOR, Supp. 16, at 52, arts. 6(1) & 7, U.N. Doc. A/6316 (1966) (not yet in effect). Note that article 4(2) prohibits all derogations from this basic expectation. One wonders, however, if some claims to terrorize combatants, not in force control, could survive this broad prohibitory language through policy inquiry and a comparison with developed expectations concerning the law of war. Note that the law of war may not forbid *all* terrorism. See Paust, *Terrorism and the International Law of War*, 64 MIL. L. REV. 1 (1974). Since the human rights provisions apply to all persons and no derogation is allowed from relevant articles even in times of war or grave public danger, the presumption may lie with a peremptory prohibition with respect to all participants.

⁴⁹ 1969 Am. Convention, *supra* note 21, arts. 4, 5, 7(1), 11(1); 1950 Eur. Convention, *supra* note 21, arts. 2 & 3. These regional human rights conventions also prohibit all derogations from the listed articles. See 1969 Am. Convention, *supra* note 21, art. 27(2); 1950 Eur. Convention, *supra* note 21, art. 15(2).

⁵⁰ See 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 35-39 (which also cites the 1970 Inter-American Commission on Human Rights resolution on terrorism); 1970 O.A.S. Res. 4, *supra* note 18.

⁵¹ 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 41.

⁵² G.A. Res. 3034, 27 U.N. GAOR, Supp. 30, at 119, U.N. Doc. A/8730 (1972); see Ambassador Bennett, *supra* note 2. It should be noted that the word "innocent" is not a very useful criterion for distinction; nor does terrorization of the "guilty" leave mankind in a more defensible position.

acts of violence and brutality, threats and anxieties likely to injure man in his person, his honour and his dignity."⁵³ Certainly included in such fear-producing acts are acts of violent terrorism.

Human rights expectations seem to prohibit all forms of violent terrorism *per se*. Furthermore, terrorism utilized as a strategy to forbid others a free and full participation in the governmental process pointedly offends norms designed to promote a full sharing of power in the political process (for all participants in the social process) and a full sharing of enlightenment and the free exchange of ideas.⁵⁴ These fundamental norms are supplemented by specific human rights references to equality, the impermissible distinction of persons on the basis of conflicting political or other opinion,⁵⁵ and the general principle of self-determination.

In view of the numerous documented expectations prohibiting the types of acts of violence that usually occur during the terroristic process, one might conclude that any new convention on terrorism would but reaffirm these expectations and that its most significant contribution would be to establish implementary mechanisms.⁵⁶ Already supplementing the law of armed conflict and human rights are the more specific air hijacking and sabotage conventions⁵⁷ and the regional 1971 O.A.S. Convention on Terrorism.⁵⁸

IV. EDUCATION

One implementary response that is available to all participants in the community process, yet which is not specifically mentioned in new instruments on international terrorism, involves the valuable prevention

⁵³ Twenty-first International Conference of the Red Cross, Res. XIX (1969), *reprinted in* 104 INT'L REV. RED CROSS 620 (1969). *See also* International Conference on Human Rights, Res. XXIII (1968); J. PICTET, *THE PRINCIPLES OF INTERNATIONAL LAW* 34-36 (1966).

⁵⁴ *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 at 71, arts. 18, 19, 21 (1948); 1969 Am. Convention, *supra* note 21, arts. 6(1), 12, 13; 1966 Covenant on Civil and Political Rights, *supra* note 21, arts. 18 & 19; 1950 Eur. Convention, *supra* note 21, arts. 9 & 10 (*cf. id.* art. 16); *id.* protocol I, art. 3.

⁵⁵ *See* Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 at 71, arts. 1 & 2; 1966 Covenant on Civil and Political Rights, *supra* note 21, arts. 2(1), 3, 18(2); 1950 Eur. Convention, *supra* note 21, arts. 1 & 24.

⁵⁶ If this assertion is accurate, then the main focus of this paper should allow the reader to examine new efforts put before the United Nations in terms of the proximity of new Convention language to implementary needs and realistic possibilities.

⁵⁷ 1971 Montreal Convention, 1970 Hague Convention, 1963 Tokyo Convention, *supra* note 18.

⁵⁸ Note 18 *supra*. Note that article 1 articulates the undertaking of the contracting parties to prevent and punish all acts of terrorism, although the Convention's principal aim seems to lie in the protection of "persons to whom the State has the duty to give special protection according to international law," notably diplomatic personnel. *Id.* art. 1.

of terrorism through normative awareness and the serving of human dignity goal values by members of the legal profession. An expansion of effort should be made to acquaint all members of the legal community with the fundamental principles of the law of armed conflict and human rights and to facilitate a fuller sharing of all knowledge. Education has been recognized by eminent scholars as a key to implementing the principles of human rights and the law of war.⁵⁹ The United States, though lacking in a far-reaching human rights educational program for civilians, has advocated a more pervasive awareness of international law and the formation of a "moral" consensus which will discredit and discourage terrorist activities.⁶⁰ A broader understanding of international norms can supplement perspectives and foster new expectations which constitute the working foundation of law, *i.e.*, its meaning and its efficacy in the social process, and can thereby contribute to efforts occurring in the dynamic and multifarious sanction process.⁶¹

Since 1899, states have solemnly declared themselves bound to issue instructions to their armed forces.⁶² The 1949 Geneva Conventions contain articles which continue the trend and expand the basic obligation of all parties to "respect and to ensure respect" for the Conventions "in all circumstances."⁶³ A common article of the Geneva Conventions provides that contracting parties undertake

to disseminate the text of the present Convention as widely as possible . . . and in particular, to include the study thereof in their programmes of military and, if possible, civilian instruction, so that the principles thereof may become known to the entire population⁶⁴

Since it is possible to devise numerous types of civilian education pro-

⁵⁹ See J. CAREY, *supra* note 46, at 17-21. See also Draper, *The Ethical and Juridical Status of Constraints in War*, 55 MIL. L. REV. 169, 183-84 (1972) [hereinafter cited as Draper].

⁶⁰ See ROLE OF INT'L LAW, *supra* note 4, at 2.

⁶¹ See COMMENTARY, *supra* note 18, at 13, 580-82; M. McDOUGAL & F. FELICIANO, *supra* note 2, at 285, 317-19, 376-78; McDougal, Lasswell, & Chen, *Human Rights and World Public Order*, 63 AM. J. INT'L L. 237, 260-62 (1969) [hereinafter cited as McDougal, Lasswell, & Chen]. See also Wright, *Toward A Universal Law For Mankind*, 63 COLUM. L. REV. 435 (1963).

⁶² See Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 1, 32 Stat. 180 (1902), T.S. No. 403 (effective April 9, 1902).

⁶³ Geneva Convention, *supra* note 21, art. 1; Conventions Nos. 1, 2, & 3, *supra* note 37, arts. 1. See also COMMENTARY, *supra* note 18, at 13, 15-16; Paust, *supra* note 17, at 118-28.

⁶⁴ Geneva Convention, *supra* note 21, art. 144; Convention No. 1, *supra* note 37, art. 47; Convention No. 2, *supra* note 37, art. 48; Convention No. 3, *supra* note 37, art. 127. See also COMMENTARY, *supra* note 18, at 580-82; International Institute of Humanitarian Law, *Guidelines for Military Instruction*, Nov. 1972 (San Remo, Italy) [hereinafter cited as Int'l Inst. of Humanitarian Law]; Draper, *supra* note 59, at 184; G.I.A.D. Draper Addresses JAG School, 1 ARMY LAW. 1, 2 (1971) [hereinafter cited as *Draper Addresses*].

grams on human rights and Geneva law with supplemental media and education usage,⁶⁵ it is recommended that states do so not only to fulfill Geneva Convention requirements, but also to engage in broad educational efforts as a "preventive law" measure to combat terrorism.⁶⁶ Since the United States, with vast educational capacity, has recognized this need and is bound by the Geneva Conventions to implement civilian educational programs, one should anticipate improvements in implementation by the United States during the next few years. If such programs are not forthcoming from the United States Government, international lawyers can be more than spectators; they can initiate the process themselves.

Several international entities may be engaged by states or private groups for coordinative, promotional, and advisory services or for limited educational roles.⁶⁷ Indeed, in light of the U.N. Charter pledge of

⁶⁵ Civilian education programs could be coordinated with the United States Department of State through the Department of Health, Education, and Welfare to include programs of public broadcasts, lectures, advertisements or other media usage, Government Printing Office pamphlets, seminars, college courses, fellowship programs, grants, and emphasis on human rights and the American tradition in primary and secondary schools. See also E. CORWIN, UNDERSTANDING THE CONSTITUTION 2-5, 131-32 (4th ed. 1967); SOURCES OF OUR LIBERTIES (R. Perry & J. Cooper eds. 1972). One preventive and "educational" measure that seems imperative is the regulation of violence in media which reaches children. See, e.g., NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 187-207 (1969) (final report of the Commission); SUB-COUNCIL ON ADVERTISING AND PROMOTION OF THE NATIONAL BUSINESS COUNCIL FOR CONSUMER AFFAIRS, VIOLENCE AND THE MEDIA (1972) (mentioning numerous congressional hearings and the Surgeon General's study on television).

⁶⁶ The necessary interrelationship between educational efforts to prevent violations of the Geneva Conventions and "preventive" law measures to curb terrorism is underscored by the prohibition of terrorism in the Geneva Convention, *supra* note 21, art. 33, and the new draft protocols. Concerning the connection between the deprivation of human rights and terrorism, see 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 41; 1971 O.A.S. Convention on Terrorism, *supra* note 18; 1970 O.A.S. Res. 4, *supra* note 18. Certainly far more can be done in this field and there is no impediment to an active educational effort.

⁶⁷ Examples might include U.N. entities such as: (1) the United Nations Educational, Scientific and Cultural Organization (UNESCO); (2) the United Nations Institute for Training and Research (UNITAR); or (3) the International Committee of the Red Cross (ICRC) and its staff and national societies. See J. CAREY, *supra* note 46, at 19-21 (noting recent U.N. efforts including lectures, seminars, and fellowships); Veuthey, *The Red Cross and Non-International Conflicts*, 113 INT'L REV. RED CROSS 422 (1970) [hereinafter cited as Veuthey]. A private organization has recently suggested several guidelines for action. See Int'l Inst. of Humanitarian Law, *supra* note 64. New military efforts could be expanded and copied elsewhere. See U.S. DEP'T OF ARMY, SUBJECT SCHEDULE NO. 27-1, THE GENEVA CONVENTIONS OF 1949 AND HAGUE CONVENTION NO. IV OF 1907 (1970); U.S. Dep't of Army, *The Law of Land Warfare—A Self-Instruction Text*, Pam. No. 27-200 (1972); U.S. Dep't of Army, *Your Conduct in Combat: Under The Law of War*, Training Circular No. 27-12, April 1973. For other suggestions as to dissemination and educational implementation techniques, see S.G. Report A/8052, *supra* note 17, at 10-11, 116; S.G. Report A/7720, *supra* note 17, at 41-43; INTERNATIONAL COMMITTEE OF THE RED CROSS, *SOLDIER'S MANUAL* (1971); UNESCO, *Some Suggestions on Teaching About Human Rights*, U.N. Doc. Ed.

all members "to take joint and separate action in co-operation with the Organization"^{67.1} and to promote "respect for, and observance of, human rights and fundamental freedoms,"⁶⁸ it seems incumbent upon all members to initiate civilian education programs and to seek cooperative educational and other measures which can precipitate an active and viable U.N. entity functioning in this area. While global educational coordination is an important purpose of the United Nations, it is clearly anticipated that signatories will individually ensure respect for all relevant human rights in addition to U.N. efforts.⁶⁹ In connection with this expectation, it has been stated by the Secretariat that "United Nations human rights instruments as well as the Geneva Conventions appear to belong to the category of treaties setting forth 'absolute obligations' . . . [which are not] dependent upon a corresponding performance by others."⁷⁰ Pictet adds that pledges to ensure respect for Geneva law, including educational measures, are not dependent upon reciprocity or upon the existence of signatories' participation in actual conflict. The pledge requires affirmative action on the part of every state to ensure that the principles are "applied universally" and "in all circumstances."⁷¹

V. DATA SHARING AND INTELLIGENCE

Another important anti-terrorist measure, which is likewise available to U.N. coordinative functioning, has been proposed by several states. It involves the collection and sharing of data on suspected terrorists, their organizations, and their movements. Previous attempts to accomplish this aim include the 1905 and 1920 Latin American Conventions "for the exchange of information concerning individuals dangerous to society,"⁷² and the 1904 Protocol which detailed measures to be taken

69/D.37a/A (1968); Paust, *An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis*, 1 YALE STUDIES IN WORLD PUB. ORDER 148 (1974).

^{67.1} U.N. CHARTER art. 56.

⁶⁸ *Id.* art. 55(c). Articles 55(c) and 56 are supplemented by the Geneva Convention, *supra* note 21, arts. 1, 144-49.

⁶⁹ See U.N. CHARTER arts. 1(3), 55(c), 56.

⁷⁰ S.G. Report A/7720, *supra* note 17, at 31.

⁷¹ See COMMENTARY, *supra* note 18, at 15-16, 34, 37 (compulsory minimum). Unless otherwise specified in a particular article, the pledge "prohibited absolutely and permanently, no exception or excuse being tolerated," the following: lack of reciprocity, reprisal, terrorism, political needs, guerrilla needs, or military necessity. *Id.* at 38-40. There the book also notes that the pledge to "ensure" respect requires cooperative international implementary action including cooperative sanction strategy. For a thorough consideration of sanction strategy see M. MCDUGAL & F. FELICIANO, *supra* note 2, at 280-353.

⁷² 7 M. HUDSON, INTERNATIONAL LEGISLATION 862 (1941).

against the anarchist movement and which may still be considered to be in effect by some of its nine European signatories.⁷³ The 1904 Protocol stated that cooperative action against "anarchist machinations and attacks" shall include: (1) certain transfer arrangements for expelled anarchists; (2) coordinated secret surveillance; (3) the establishment of a Central Police Bureau in each state for "the collection of information on anarchists" (article II); and (4) the exchange of data and warning arrangements to include a secret transfer of "a note on the previous life and, if possible, a photograph of the anarchist" (article IV). Additionally, the Central Police Bureau was obligated to notify all other states of criminal conspiracies of an anarchist character "immediately," to provide regular reports to each state on anarchist movements within its own territory, and to answer the questions of other Bureaus pertaining to such movements (article V).⁷⁴

Doubtlessly, the International Criminal Police Organization (Interpol) is presently utilized in similar functional capacities.⁷⁵ Furthermore, there is evidence that "this co-operation by police forces" (referring to the 1937 Convention on Terrorism) was, in Europe, "already, to a large extent, effective without the existence of any international treaty obligation, and has been, is, and will be, of great value."⁷⁶ The 1937 Convention on Terrorism supplemented this trend with a general article for collaboration on prevention and punishment (article 1) and articles requiring extensive investigation and notification (articles 15-17). Specifically included were: (1) close contacts between appropriate agencies, especially with states preparing for prosecution or connected in some way with a known preparation for an act of terrorism; (2) the exchange of "all necessary particulars," including descriptions, fingerprints,

⁷³ Protocol concerning the measures to take against the anarchist movement, *done* March 14, 1904, 10 Martens Nouveau Recueil 81 (ser. 3) [hereinafter cited as 1904 Protocol]. The adherents to the 1904 Protocol, which was signed at St. Petersburg, include Germany, Austria-Hungary, Denmark, Romania, Russia, Serbia, Switzerland, Sweden-Norway, Turkey, and Bulgaria. It is doubtful whether the Russians consider themselves bound by the 1904 Protocol, although some of its provisions might have a limited acceptance. The 1904 Protocol took effect upon signature, and nonsignatories could give approval to its provisions by separate act and notification to Russia. It was copied from "secret" Russian files, but its early publication in 1920 suggests a questionable acceptance.

⁷⁴ The above translations from the German copy of the 1904 Protocol are the author's—with extensive aid from Doctor Christoph Schreuer of Salzburg, Austria.

⁷⁵ For some evidence of Interpol's cooperation in this area see Statement by Secretary Rogers, Oct. 2, 1972, in 67 DEP'T STATE BULL. 476, 477, 479 (1972) [hereinafter cited as Rogers Statement].

⁷⁶ Note, *The Convention for the Protection and Punishment of Terrorism*, 19 BR. Y.B. INT'L L. 214, 215 (1938) which added that such cooperative measures are likely to be far more effective than punishment after the fact.

photos, and documents; (3) notifications of searches, arrests, prosecution/conviction, and expulsion of terrorist movements; and (4) letters of communication "between the judicial authorities" or Ministers of Justice. In contrast, recent developments demonstrate certain requirements for the collection and sharing of data but in less detail and perhaps with greater latitude for state refusal.⁷⁷ The primary impetus, however, seems generally cooperative in nature, and there are already existing intergovernmental and nongovernmental organizations usable for the exchange of relevant preventive intelligence.⁷⁸

However constituted, a cooperative exchange of information could induce other coordinated efforts such as police investigations, discovery of illegal weapons or contraband,⁷⁹ tighter security of borders, greater safety for users of transportation and other facilities, greater protection for internationally "protected" persons, contingency planning, arrests, and useful data for studies of participants and underlying causes of terrorism. While good faith implementation of data exchange procedures and expectancies of "friendly relations" between nations would encourage those aware of possible terrorist plans to inform potential targets and to take affirmative action commensurate with peaceful cooperative arrangements, certain trends in prescription demand specific warning requirements to clarify this element of cooperation.⁸⁰

⁷⁷ The 1972 U.S. Draft Convention, *supra* note 3, arts. 5 & 10(2), would require the exchange of information in two specific cases: (1) where acts are believed to have been committed and the offender has fled, and (2) where it is believed that an offense is about to occur and another state is involved. Other notification requirements exist in articles 6(1) and 11(1). The 1971 O.A.S. Convention on Terrorism, *supra* note 18, art. 8(b), declares that signatories accept the obligation to "exchange information and consider effective administrative measures for the purpose of protecting" internationally protected persons. The 1971 Montreal Convention, *supra* note 18, arts. 12 & 13, requires certain exchanges of information for preventive law purposes between signatories and the International Civil Aviation Organization (ICAO). The 1970 Hague Convention, *supra* note 18, art. 11, has a relevant provision on the transfer of information to ICAO.

⁷⁸ These include U.N. entities and Interpol, the International Air Transport Association (IATA), the Inter-Parliamentary Union (IPU), and ICAO. See Rogers Statement, *supra* note 75, at 476, 477, 479. For an analysis of the American computerized files on numerous terrorist organizations see Sulzberger, *Terror in a Legal Vacuum*, N.Y. Times, May 25, 1974, at 29, col. 1 [hereinafter cited as Sulzberger].

⁷⁹ See 1937 Convention on Terrorism, *supra* note 6, art. 16(c); 1904 Protocol, *supra* note 73. Recently Israel claims to have intercepted a shipment of arms destined for the United States and sent by a leader of the militant Jewish Defense League, but it is not yet known if international exchanges of data led to the disclosure. See N.Y. Times, May 11, 1973, at 4, col. 6.

⁸⁰ See note 77 *supra* and 1904 Protocol, *supra* note 73, concerning the recognition in several instruments of a general obligation to cooperate for preventive law purposes (as well as prosecution purposes), which necessarily implies a need for a warning of probable terrorist acts. See also U.N. CHARTER preamble, arts. 1 & 56; Geneva Convention, *supra* note 21, art. 1; COMMENTARY, *supra* note 18, at 15-16. The warning requirement is specifically mentioned in several conventions. See 1972 U.S. Draft Convention, *supra* note 3, art. 10(2); 1971 Montreal Convention, *supra* note 18,

It should be noted that the policy of the United States is to cooperate with others on data sharing and related measures. Armin Meyer, special assistant to the Secretary of State and head of the United States Working Group on Terrorism, has observed that "the United States does collect and share data on terrorists with other nations, particularly those with which we already have defense treaty relationships [and] cooperate in joint investigation and prosecution efforts"⁸¹

VI. INVESTIGATION AND PROSECUTION

Trends in prescription also include measures designed to promote cooperative investigation and prosecution efforts where offenses have already been committed.⁸² All relevant international instruments call for the enactment of necessary state supplementary legislation and the prosecution of all offenders in cases where extradition has not been or cannot be granted.⁸³ Indeed, all instruments which prohibit terrorism, or acts

art. 12; 1904 Protocol, *supra* note 73. See also 1971 O.A.S. Convention on Terrorism, *supra* note 18, art. 8(b); 1970 Hague Convention, *supra* note 18, art. 9(1); 1937 Convention on Terrorism, *supra* note 6, art. 16(a). Prior to the 1937 Convention, Italy failed to warn Yugoslavia of an assassination plot before its execution, and this failure precipitated the Convention. See M. HAVENS, C. LEIDEN & K. SCHMITT, *THE POLITICS OF ASSASSINATION* 85-95 (1970). "Friendly relations" expectations and the principle of *pacta sunt servanda*, in connection with present prescriptions, would seem to necessitate a more cooperative attitude. See Vienna Convention on the Law of Treaties, art. 26, U.N. Doc. A/Conf. 39/27 (1969), reprinted in 4 INT'L LAW. 172 (1969). Cooperative efforts have already begun to assure letter bomb alerts and to achieve warnings through Interpol and other institutions. See Rogers Statement, *supra* note 75, at 475, 477, 480.

⁸¹ Letter from Armin Meyer to Jordan J. Paust, June 25, 1973.

⁸² See 1972 U.S. Draft Convention, *supra* note 3, arts. 11(1) & 12; 1971 Montreal Convention, *supra* note 18, arts. 11 & 13; 1937 Convention on Terrorism, *supra* note 6, arts. 1, 15-17; 1904 Protocol, *supra* note 73. The West German and Israeli cooperation after the Munich tragedy points to an encouraging trend. It should be noted that the 1949 Geneva Conventions contain broad obligations to ensure respect for the Conventions in all circumstances and these could cover similar expectations. For a discussion of the enquiry procedure see notes 68 and 71 *supra* and COMMENTARY, *supra* note 18, at 589-96, 602-06. Additionally, the Conventions provide for supervision by the protecting power or by a substitute, with broad coequal powers in the ICRC. Signators are under a duty to cooperate with them. See Geneva Convention, *supra* note 21, arts. 9, 11, 143; COMMENTARY, *supra* note 18, at 567-80, 604-05. It should be noted, however, that the ICRC typically performs impartial humanitarian functions, and any investigations of state or individual violations would be performed privately with the state concerned. See S.G. Report A/8052, *supra* note 17, at 11, 49, 76-79; Freymond, *The International Committee of the Red Cross Within the International System*, 133 INT'L REV. RED CROSS 245 (1972); Gottlieb, *International Assistance to Civilian Populations in Armed Conflicts*, 4 N.Y.U.J. INT'L L. & POL. 403 (1971); Veuthey, *supra* note 67. See also 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 22-39 (on cooperative measures).

⁸³ See 1972 U.S. Draft Convention, *supra* note 3, arts. 4(1)-(2), 6; 1971 Montreal Convention, *supra* note 18, arts. 3, 5, 7, 8, 11 (assistance in prosecution); 1970 Hague Convention, *supra* note 18, arts. 2, 4, 7, 8, 10, 11; 1963 Tokyo Convention, *supra* note 18, arts. 3, 4, 16; Geneva Convention, *supra* note 21, arts. 146 & 147; 1937 Convention on Terrorism, *supra* note 6, arts. 2, 3, 8-11. The

that would be included in the violent terroristic process, adopt the principle of universal jurisdiction over offenders with its concomitant expectations that such offenses are offenses against mankind, not against a single state, and that no state can obviate the universal character of those offenses through purely unilateral activity.⁸⁴ A typical authoritative elaboration of this principle affirms that as soon as a state "realizes" that there exists "on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is arrested and prosecuted with all speed."⁸⁵ The necessary police action should be taken spontaneously and should extend to any person, including the state's own nationals.

The United States strongly supports universal jurisdiction over perpetrators of international terrorism and the state duty of prosecution or extradition as an "important contribution to be made by international law . . . aimed at deterring terrorist acts by eliminating any safe haven

regional 1971 O.A.S. Convention on Terrorism, *supra* note 18, also contains these expectancies in arts. 1, 3, 5, 8(d)-(e). See also G.A. Res. 2583, 24 U.N. GAOR, Supp. 30, at 58, U.N. Doc. A/7630 (1969); ECOSOC Res. 1500, 48 U.N. ECOSOC, Supp. 1A, at 5, U.N. Doc. E/4832/Add. 1 (1970); 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 22-39; S.G. Report A/8052, *supra* note 17; S.G. Report A/7720, *supra* note 17. Prosecution is generally recognized for its "preventive" sanction objective, although it is also in one sense an after-the-fact corrective response. See M. McDUGAL & F. FELICIANO, *supra* note 2, at 330-33. Several countries (e.g. Yugoslavia), in implementing the Geneva Convention have adopted national legislation outlawing terrorism. Geneva Convention, *supra* note 21, art. 146. See S.G. Report A/8052, *supra* note 17, Annex III; COMMENTARY, *supra* note 18, at 592. See also N.Y. Times, April 13, 1973, at 6, col. 1. For analysis of recent national trials of terrorists in Belgium, Greece, Israel, Malaysia, the Netherlands, and Switzerland see T. MERON, *supra* note 23, at 18-19, 27-28, 33-35. See also N.Y. Times, March 16, 1973, at 3, col. 7; N.Y. Times, March 5, 1973, at 7, col. 1. Note also that the choice of prosecution or extradition exists so that the principle of *non-refoulement* is maintained.

⁸⁴ Under the Geneva Convention, terrorism is specifically prohibited. Geneva Convention, *supra* note 21, art. 33. Under all of the 1949 Geneva Conventions, most intentional acts of terrorism would seem covered by the "grave breach" provisions for which universal jurisdiction is prescribed. Geneva Convention, *supra* note 21, art. 147; Convention No. 1, *supra* note 37, art. 50; Convention No. 2, *supra* note 37, art. 51; Convention No. 3, *supra* note 37, art. 130; see COMMENTARY, *supra* note 18, at 587 (on universality), 592-93 (on the duty to arrest and prosecute any person who commits a "grave breach"), 597-601 (on universality and the explanation of "grave breach"), 602 (on the provisions' applicability "to all offenders, whatever their nationality and whatever the place where the offense has been committed"). See also M. McDUGAL & F. FELICIANO, *supra* note 2, at 717 n.612; Paust, *supra* note 17, at 118-25. Similarly, the 1970 O.A.S. Res. 4, *supra* note 18, condemned acts of terrorism as crimes against humanity. See also 1971 Montreal Convention, *supra* note 18, art. 7; 1971 O.A.S. Convention on Terrorism, *supra* note 18, arts. 2 & 5; 1970 Hague Convention, *supra* note 18, art. 7; 1937 Convention on Terrorism, *supra* note 6, arts. 9 & 10; U.N. Doc. No. A/C.6/418, *supra* note 6, at 22 (on the 1934 League of Nations Resolution), 25, 33-34; note 83 *supra*. The one exception in the trend is the 1963 Tokyo Convention, *supra* note 18. See ROLE OF INT'L LAW, *supra* note 4, at 2.

⁸⁵ COMMENTARY, *supra* note 18, at 592-93; see Geneva Convention, *supra* note 21, arts. 146 & 148.

for the perpetrators⁸⁶ These notions complement the general and customary trend which recognizes that until an international or regional criminal court process can be adopted the obligation to enforce international law rests upon each state.⁸⁷ Although an international criminal court would aid community efforts to prevent terrorism, such a court does not now exist, and future prospects for such a body are not encouraging.⁸⁸ An interesting and more viable suggestion would be the supplementation of state prosecutorial efforts with tribunals composed of judges from neutral states to assure a more representative perspective and increased procedural fairness to the accused. However, such a mechanism of inclusive application is subject to substantial problems in connection with state constitutional instruments and certain parochial perspectives among some state elites.⁸⁹

⁸⁶ ROLE OF INT'L LAW, *supra* note 4, at 2-3. The words first came from Stevenson, *supra* note 4. Stevenson stated that "our efforts are aimed at deterring terrorist acts by eliminating any safe haven for the perpetrators of these crimes," and mentioned United States support of the trends in prescription which establish universal jurisdiction over specified offenses. *Id.* at 645. See also Statement by Charles N. Brower, Department of State Deputy Legal Adviser, submitted to the Senate Committee on Foreign Relations, Sept. 22, 1972, in 67 DEP'T STATE BULL. 444 (1972) [hereinafter cited as Brower]. Brower stated that "[t]his basic extradite-or-prosecute obligation, applicable to all parties regardless of where the offense takes place, is designed to deny to hijackers sanctuary anywhere in the world." *Id.*; see U.S.-Cuba Agreement, *supra* note 20; 1972 U.S. Draft Convention, *supra* note 3, arts. 4(2) & 6(1). See also A.B.A., SECTION OF INTERNATIONAL LAW, COUNCIL RESOLUTION ON INTERNATIONAL TERRORISM, reprinted in 2 INT'L L. NEWS 4 (1973), also reprinted in VISTA, vol. 8, April 1973, at 53, 56; cf. Rovine, *supra* note 18, at 36 *passim* (with regard to the Hague and Montreal air conventions).

⁸⁷ See, e.g., Henfield's Case, 11 F. Cas. 1099 (No. 6360) (C.C.D. Pa. 1793); FIELD MANUAL, *supra* note 17, para. 506(b); 2 H. GROTIUS, DE JURE BELLI ET PACIS 253 (Kelsey transl. 1925); J. KENT, COMMENTARY ON INTERNATIONAL LAW 3, 427 (1866); M. MCDUGAL & F. FELICIANO, *supra* note 2, at 330-33, 703-21; E. DE Vattel, LE DROIT DES GENS, OU PRINCIPLES DE LA LOI NATURELLE 163 (Fenwick transl. 1916); Paust, *supra* note 17, at 111, 119-20; Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 59-60 (1947).

⁸⁸ See J. CAREY, *supra* note 46, at 61-69; M. MCDUGAL & F. FELICIANO, *supra* note 2, at 707-10. The leading authorities are concerned with the need for such a tribunal and the trends in proposals and consensus. See L. KUTNER, WORLD HABEAS CORPUS (1962); W. REISMAN, NULLITY AND REVISION (1971); J. STONE, AN INTERNATIONAL CRIMINAL COURT (1971); Kutner, *Politicide: The Necessity for an International Court of Criminal Justice*, 2 DEN. J. INT'L L. & POL. 55 (1972); Kutner, *World Habeas Corpus, Human Rights and World Community*, 17 DE PAUL L. REV. 3 (1967); Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37 (1950); Wright, *Proposal for an International Court*, 46 AM. J. INT'L L. 63 (1952). A related suggestion calls for the creation of an international prison and the use of the International Court of Justice (ICJ) for criminal prosecution. See Smith, *The Probable Necessity of an International Prison in Solving Aircraft Hijacking*, 5 INT'L LAW. 269 (1971).

⁸⁹ See, e.g., MacDermot, *Crimes Against Humanity in Bangladesh*, 7 INT'L LAW. 476 (1973). The International Commission of Jurists has favored this ad hoc substitute for a world criminal court, and it seems worth pursuing where the capturing state (forum) agrees. It should be noted that the state has an obligation to proceed with prosecution or, in any case, to extradite terrorists to those states that will prosecute. For evidence of a current parochial attitude in complete defiance

In view of these trends and expectations, any new convention on international terrorism should specifically include: (1) articles on the advantages of data collection and sharing with pragmatic coordination through U.N. entities;⁹⁰ (2) warning requirements; (3) articles on cooperative investigatory procedures; (4) requirements for search and arrest and prosecution where extradition is not utilized;⁹¹ (5) procedures for the cooperative application of the law through more inclusive prosecution tribunals for those states agreeable to the arrangement; and (6) a specific denial of POW status or "political" offense impediments to a uniform prosecution effort.⁹² Similarly, political asylum should not be granted to international terrorists, since the offense is against mankind and not merely against a particular state or geopolitical system.⁹³ In

of community expectation and pledges under the Geneva Conventions see N.Y. Times, May 29, 1973, at 3, col. 1. Certain American "efforts" have not been much better. See Paust, *After My Lai: The Case for War Crime Jurisdiction over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 6-7 (1971).

⁹⁰ It is evident that the present U.S. Draft Convention does not contain a sufficiently broad article to require general preventive law exchanges of information (except by implication and good faith). Compare 1972 U.S. Draft Convention, *supra* note 3, arts. 5 & 10(2) with 1971 O.A.S. Convention on Terrorism, *supra* note 18, arts. 1 & 8(b); 1971 Montreal Convention, *supra* note 18, art. 13; 1970 Hague Convention, *supra* note 18, art. 11; and 1937 Convention on Terrorism, *supra* note 6, arts. 15-17. See also Rogers Statement, *supra* note 75, at 476. However, it is recognized that realistically such cooperative exchanges will be just that—cooperative. See U.S. FOREIGN POLICY 1972, *supra* note 1, at 95.

⁹¹ A specific mention of the obligation to search for violators is found in the Geneva Convention, *supra* note 21, art. 146. See also 1971 Montreal Convention, *supra* note 18, arts. 5(1)-(2), 6(1); 1970 Hague Convention, *supra* note 18, arts. 4(2) & 6(1). It would be difficult, of course, for a state signatory to fulfill its prosecute-or-extradite duties if it did not search for alleged violators. See also COMMENTARY, *supra* note 18, at 593 (an interpretation of language relevant to the articles of all conventions listed above). The Deputy Legal Adviser of the United States Department of State, in a statement before the Senate Committee on Foreign Relations concerning the United States position on the 1971 Montreal Convention, said that adoption "will mean relentless pursuit of such criminals by the world community." Brower, *supra* note 86, at 445. *Contra*, Rovine, *supra* note 18.

⁹² See notes 23, 28 *supra*. See also 1972 U.S. Draft Convention, *supra* note 3, art. 13(b), which merely defers to the norms of the law of armed conflict concerning claims to POW status.

⁹³ This seems to be the position of the United States, since the policy has been to preclude any "safe haven" for terrorists. See note 86 *supra*. The general reason for this recommendation lies in the fact that terrorism prohibited by international instruments and customary law has constituted a crime against mankind, and no state should be able unilaterally to preclude prosecution. See M. McDUGAL & F. FELICIANO, *supra* note 2, at 717 (inclusivity); Paust, *supra* note 17, at 118-25. It should be noted that the 1971 O.A.S. Convention on Terrorism, *supra* note 18, art. 6, states that "[n]one of the provisions of this Convention shall be interpreted so as to impair the right of asylum." It seems clear, however, that this provision was merely intended as an over-precaution to save other types of asylum for acts not constituting a crime under the Convention, since article 2 makes covered acts of terrorism "common crimes of international significance, regardless of motive" and article 5 requires prosecution or extradition without exception. This interpretation is supported by the 1970 O.A.S. Res. 4, *supra* note 18. See also U.S.-Cuba Agree-

supplementation of these cooperative efforts and prosecutorial requirements, the policy of requiring an exchange of all implementary legislation should be followed. Implementary regulations and outlines or the content of programs for instruction should be exchanged for comparative analysis and a further coordination of implementary functioning.⁹⁴

VII. OTHER PREVENTIVE OR RESPONSIVE MEASURES AVAILABLE TO A STATE

There are other related legal solutions to terrorism which individual states may initiate. Although these generally involve matters of domestic concern under the U.N. Charter,⁹⁵ two important types of

ment, *supra* note 20. One possible addition to a terrorism convention on this point would be the establishment of an enquiry procedure for determining whether an act of terrorism has been committed. Without such a procedure a state could claim that it is not granting "asylum" and refuse to extradite or prosecute a person on the basis that he has not committed any offense. See 1971 Montreal Convention, *supra* note 18, arts. 6(1), 13(c), 14(1) (suggesting that an enquiry mechanism could be initiated and eventually lead to arbitration or ICJ action); 1970 Hague Convention, *supra* note 18, arts. 11(c) & 12(1); 1963 Tokyo Convention, *supra* note 18, art. 24(1); Geneva Convention, *supra* note 21, art. 149; 1937 Convention on Terrorism, *supra* note 6, art. 3(2) (exclusive responsibility of the state). Apparently, Cuba supports asylum of "political" terrorists and others (although it is doubtful that a reciprocal stand would occur in connection with "rightists"). See N.Y. Times, May 7, 1973, at 1, col. 1; N.Y. Times, May 13, 1973, § 4, at 4, col. 3.

⁹⁴ See, e.g., Geneva Convention, *supra* note 21, art. 145. The signatories "shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the . . . laws and regulations which they may adopt to ensure the application" of the Convention. *Id.* "The widest possible interpretation should be given to the expression 'laws and regulations' This means all legal documents issued by the executive and legislative authorities connected in any way with the application of the Convention." COMMENTARY, *supra* note 18, at 583; see *Draper Addresses*, *supra* note 64, at 3; Int'l Inst. of Humanitarian Law, *supra* note 64. Although the 1971 O.A.S. Convention on Terrorism, *supra* note 18, recognizes the need to adopt general standards for cooperative measures and to create a general obligation of parties to cooperate "by taking all the measures they may consider effective, under their own laws," no similar provision for assurance of a cooperative exchange of implementary material is specifically mentioned. Nor was such a provision specifically part of the 1937 Convention on Terrorism, *supra* note 6; the 1963 Tokyo Convention, *supra* note 18; or the 1972 U.S. Draft Convention, *supra* note 3. However, the functioning of ICAO seems to fulfill some aspects of the problem and such an exchange of implementary measures could take other forms in connection with the air hijacking and sabotage conventions. Quite often the exchanges of such measures can be found in replies to the U.N. Secretary-General. See, e.g., S.G. Report A/8052, *supra* note 17, Annex III; S.G. Report, Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, 25 U.N. GAOR, U.N. Doc. A/8038 (1970). The Secretary-General's continuous functioning in this manner seems highly useful for comparative study of domestic strategies and analyses of domestic measures in terms of community needs and the compatibility of measures with goal values.

⁹⁵ Article 2, paragraph 7 of the U.N. Charter articulates the principle of domestic jurisdiction. However, to the extent that authoritative international instruments create an international expectation that states will be obligated to seek to prevent acts of terrorism within their borders, the matter becomes one of international concern. See M. McDUGAL & F. FELICIANO, *supra* note 2, at 360, 370; McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968) [hereinafter cited as McDougal & Reisman].

international expectations supplement their legal nature. These expectations relate to a state's "keeping her own house in order" or to domestic police or administrative efforts and controls. While strategies and the intensity of effort will vary, a pattern in relevant instruments reiterates the requirement of a good faith effort by states to prevent from originating within their own borders specific types of terrorism aimed at other states. A general approach seems to emphasize the expectation that states will take all practicable measures, in accordance with international and domestic law, to prevent violations of the instruments.⁹⁶ Technological developments have made possible sophisticated equipment and planning, including increased airport surveillance, airline passenger search,⁹⁷ crowd "searching," and other devices for the protection of state elites making public appearances and of diplomatic installations.⁹⁸ Permissible techniques of crowd control have also been developed which could aid in preventing certain acts of terrorism.⁹⁹ Several relevant instruments recognize that in a state of public emergency, methods of population control including evacuation, provisional detention, temporary relocation, curfews, and other measures can be utilized,

⁹⁶ See, e.g., 1972 U.S. Draft Convention, *supra* note 3, arts. 10(1) & 12; 1971 O.A.S. Convention on Terrorism, *supra* note 18, arts. 1 & 8; 1971 Montreal Convention, *supra* note 18, art. 10(1); 1970 Hague Convention, *supra* note 18, art. 9(1) (which seems to cover only preventive measures with regard to aircraft hijackings); 1937 Convention on Terrorism, *supra* note 6, arts. 1(1) & 12; Geneva Convention, *supra* note 21, arts. 1 & 146; COMMENTARY, *supra* note 18, at 15-16, 594. Customary international law also requires that states provide protection for diplomatic agents. See ROLE OF INT'L LAW, *supra* note 4, at 4. These specific declarations are, of course, supplemented by the arrest and prosecution provisions and the general principle of *pacta sunt servanda*.

⁹⁷ Among the measures employed are the following: (1) armed security guards ("sky marshals"); (2) inspection of passengers by local police; (3) electronic search and surveillance equipment; (4) trained dogs capable of detecting gunpowder or gun oil; (5) "terrorist profiles" as aids for extra-precautionary surveillance or searches of passengers; and (6) measures of physical security for aircraft, buildings, and baggage areas. Expanded cooperation in technological exploitation was also begun recently at a NATO conference in Brussels, December 13-14, 1972. See generally November, *Aircraft Piracy: The Hague Hijacking Convention*, 6 INT'L LAW. 642, 653-54 (1972).

⁹⁸ See N.Y. Times, May 7, 1973, at 20, col. 4. Among the devices to be used are the following: dogs, hidden x-rays at building entrances, miniature metal detectors, advanced infrared scanners, infrared imaging systems to pick up concealed weapons in crowds, "psychological stress" analyzers, and systems involving bacteria. *Id.* For a look at American efforts to increase protection see 67 DEP'T STATE BULL. 477, 478 (1972).

⁹⁹ On the permissibility of certain techniques of crowd or population control, see, e.g., M. McDUGAL & F. FELICIANO, *supra* note 2, at 84, 790-808; Kelly, *Legal Aspects of Military Operations in Counterinsurgency*, 21 MIL. L. REV. 91, 99 (1963); Kelly & Pelletier, *Legal Control of Populations in Subversive Warfare*, 5 VA. J. INT'L L. 174 (1965) [hereinafter cited as Kelly & Pelletier]. Terrorists often seek to provoke excesses by the army or police during confrontations. To avoid this provocation, troops or police utilized for crowd control purposes must be highly disciplined and trained in relevant laws of armed conflict and human rights. This need can be further demonstrated by comparing the conduct of national troops with the conduct of local police during civil disturbances in the United States or in Northern Ireland.

if necessary, but they must be proportionate to the threat, and compatible with certain minimum humanitarian safeguards.¹⁰⁰ At all times efforts must be made, however, to ensure that such preventive measures are not carried to impermissible excess in violation of international law and its integral component of public expectation.¹⁰¹ Excesses are counter-productive because of public opinion and because the effects of impermissible excesses can enhance the terrorist political rhetoric and potentially promote the overthrow of governments by terrorist elites.¹⁰²

In the United States, recent legislation acknowledges certain aspects of the duty to take preventive measures. In 1972 a federal law was enacted to create new criminal offenses designed to deter assaults, kid-

¹⁰⁰ See, e.g., 1969 Am. Convention, *supra* note 21, arts. 13, 15, 22(3)-(4), 27, 29; 1966 Covenant on Civil and Political Rights, *supra* note 21, arts. 4, 5, 9(1), 10, 22(2); 1950 Eur. Convention, *supra* note 21, arts. 10(2), 11(2), 15; Geneva Convention, *supra* note 21, arts. 5, 27(4), 49; COMMENTARY, *supra* note 18, at 52-58, 207, 278-83, 599. For a legal analysis of control measures in Israeli-held territory, see, e.g., Grunis, *The United Nations and Human Rights in the Israel Occupied Territories*, 7 INT'L LAW. 271 (1973); 1 ISRAEL Y.B. HUMAN RIGHTS 273-78, 283-90, 295-322, 376-86, 428 (1971); cf. Meguid, *Israeli Practices and Human Rights in Occupied Arab Territories*, 7 INT'L LAW. 279 (1973). See also "Lawless" Case, [1960] Y.B. EUR. CONV. ON HUMAN RIGHTS 454 [hereinafter cited as "Lawless" Case]; S.G. Report A/8052, *supra* note 17, at 15, 17; McDougal, Lasswell, & Chen, *supra* note 61, at 256-57, 267-69; cf. Rauch, *The Compatibility of the Detention of Terrorists Order (Northern Ireland) with the European Convention for the Protection of Human Rights*, 6 N.Y.U.J. INT'L L. & POL. 1 (1973) [hereinafter cited as Rauch].

¹⁰¹ Excesses which have occurred in Northern Ireland, South Africa, Southern Rhodesia, Bangladesh, Vietnam, Uganda, and elsewhere remain fresh in the memory of international lawyers and are still prominent in newspaper articles. See, e.g., LAW, JUSTICE AND SOCIETY (P. Randall ed. 1972); LEGISLATION AND RACE RELATIONS (M. Horrell ed. 1971); Dugard, *South West Africa and the "Terrorist Trial,"* 64 AM. J. INT'L L. 19 (1970); McDougal & Reisman, *supra* note 95; Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321 (1972); N.Y. Times, April 25, 1973, at 2, col. 3; Rauch, *supra* note 100. In the case of Vietnam, excesses have occurred on both sides, but the allegations in connection with population control are sometimes overbroad. For indications of other excesses, see Letter from Theodore A. Coulombis and John A. Nicolopoulos, in N.Y. Times, April 21, 1973, at 26, col. 3; Letter from Valery Chalidze, April 2, 1973, in N.Y. Times, April 18, 1973, at 46, col. 5; N.Y. Times, April 17, 1973, at 4, col. 4. For a discussion of collective punishments against tribes "suspected" of giving aid to guerrillas, including such measures as new plans for black resettlement, curfews, and the confiscation or destruction of property "useful" to insurgents regardless of military necessity, see N.Y. Times, May 19, 1973, at 9, col. 3. For allegations of torture, assassination and violent suppression of certain groups see *id.* at 8, col. 4.

¹⁰² See, e.g., M. McDUGAL & F. FELICIANO, *supra* note 2, at 53, 54 n.129, 86 n.215; M. OPPENHEIMER, *THE URBAN GUERRILLA* 57, 59-60, 63-64, 66, 69 (1969); T. TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 191-95 (1970); Carroll, *The Search For Justice in Northern Ireland*, 6 N.Y.U.J. INT'L L. & POL. 28, 31-35 (1973); Hutchinson, *supra* note 14, at 392; Kelly & Pelletier, *supra* note 99; Paust, *supra* note 17, at 139, 163-65. The use of terrorism by revolutionaries can also be self-defeating. See N.Y. Times, May 20, 1973, at 14, col. 3 (stating that "[l]eftists have lost popularity . . . because of terrorist activities"); N.Y. Times, March 7, 1973, at 1, col. 1 (announcing the ban on PLO operations in the Sudan); N.Y. Times, March 6, 1973, at 6, col. 1; N.Y. Times, March 5, 1973, at 7, col. 1; Wash. Post, Dec. 2, 1972, at 1, col. 5.

napping and murder, destruction of property, and public demonstrations within 100 feet of internationally protected premises, such as foreign embassies.¹⁰³ Earlier legislation prohibits similar public demonstrations within 500 feet of such premises inside the District of Columbia.¹⁰⁴ More recently, the President authorized an emergency detail of members of the Executive Protective Service to protect a diplomatic mission in New York,¹⁰⁵ and he set up a special Cabinet Committee to Combat Terrorism.¹⁰⁶ Assorted precautionary measures have included: (1) coordination of information; (2) tightening of visa, immigration, and customs procedures; (3) protection of high-risk targets; (4) interception of letter bombs; and (5) strengthening of anti-hijacking procedures.¹⁰⁷ In addition, the United States utilizes computers to maintain records of organizations, members, and their activities if there is a substantial likelihood that such groups or persons have used or are prone to use terroristic tactics. This effort is supplemented by congressional investigation.¹⁰⁸

¹⁰³ See Act for the Protection of Foreign Officials and Guests of the United States, 18 U.S.C. § 112 (Supp. II, 1972). Parts of the act are rather broad and may not stand court challenges in view of recent cases striking down prosecutions under "vague" military offenses. Compare *Levy v. Parker*, 478 F.2d 772 (3d Cir. 1973), *rev'd*, 417 U.S. 733 (1974), with *Avrech v. Secretary of the Navy*, 477 F.2d 1237 (D.C. Cir. 1973), *rev'd*, 418 U.S. 676 (1974). See also Note, *Taps for the Real Catch-22*, 81 YALE L.J. 1518 (1972). Note that the Secretary of State can now designate foreign nationals as official guests of the United States who receive the protection of this new legislation.

¹⁰⁴ See *Zaimi v. United States*, 261 A.2d 233 (D.C. App. 1970), *rev'd*, 476 F.2d 511 (D.C. Cir. 1973); *Jews for Urban Justice v. Wilson*, 311 F. Supp. 1158 (D.D.C. 1970). See also *Frend v. United States*, 100 F.2d 691 (D.C. Cir. 1938), for earlier measures.

¹⁰⁵ See N.Y. Times, Sept. 13, 1972, at 3, col. 1. Forty members of the Executive Protective Service were transferred from normal duties in the District of Columbia to protect high risk targets of terrorist groups.

¹⁰⁶ The special Cabinet Committee was created September 25, 1972, to prevent and respond to acts of terrorism. See 67 DEP'T STATE BULL. 475 (1972).

¹⁰⁷ See *id.* at 477-80. The F.B.I. has the responsibility of protecting some 140,000 foreign officials, but this protection has been temporarily supplemented by the use of Secret Service and Executive Protective Service agents at nearly 140 posts. Overseas posts were alerted to give "high priority" to the collecting and reporting of intelligence on terrorism. Special screening of over 28,000 visa applications of "suspected individuals" has occurred, resulting in four denials of entry. The United States intercepted six out of 100 letter bombs known to have been mailed internationally. See UNITED STATES FOREIGN POLICY 1972, *supra* note 1, at 92-93. For a discussion of United States action against hijackers see Lissitzyn, *In-Flight Crime and United States Legislation*, 67 AM. J. INT'L L. 306 (1973), and Stephen, "Going South"—*Air Piracy and Unlawful Interference With Air Commerce*, 4 INT'L LAW. 433 (1970) (also mentioning Cuban prosecutions) [hereinafter cited as Stephen]. Recent American prosecution of hijackers has been vigorous. See, e.g., N.Y. Times, May 15, 1973, at 14, col. 1. Prosecution in the United States of other types of terrorists has not been substantial in the last few years.

¹⁰⁸ See, e.g., Sulzberger, *supra* note 78; STAFF OF HOUSE COMM. ON INTERNAL SECURITY, 93D CONG., 2D SESS., THE SYMBIONESE LIBERATION ARMY (Comm. Print 1974).

VIII. THE RESTRAINTS UPON EXPORTED TERROR

An extremely important international solution, which also supplements the expectation that a state will keep "her own house in order" or be subject to international scrutiny and sanction, is the widely recognized prescription that:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts¹⁰⁹

A similar prescription prohibits related attempts to "organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities."¹¹⁰ The U.N. Secretariat has stated that a punishable act should include the incitement, encouragement, or toleration of activities designed to spread terror among the population of another state.¹¹¹ These prescriptions have historic background. The assassination of King Alexander I of Yugoslavia in 1934, which precipitated the effort to create the 1937 Convention on Terrorism, led to a claim by Yugoslavia that Hungary "had been tolerating irredentist activity within its territory directed against the former, and . . . the League [of Nations] Council adopted a resolution declaring it the duty of every state to desist from encouraging or tolerating such activity."¹¹² These prescriptions are

¹⁰⁹ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. 28, at 123, U.N. Doc. A/8028 (1970) [hereinafter cited as G.A. Res. 2625]. The resolution elaborates the expectations connected with article 2, paragraph 4, of the U.N. Charter. See also 1972 U.S. Draft Convention, *supra* note 3, preamble & art. 10(1); 1971 O.A.S. Convention on Terrorism, *supra* note 18, art. 8(a); 1971 Montreal Convention, *supra* note 18, art. 10(1); 1937 Convention on Terrorism, *supra* note 6, arts. 1(1) & 3; G.A. Res. 2131, 20 U.N. GAOR, Supp. 14, at 11-12, U.N. Doc. A/6014 (1965); Draft Code of Offenses Against the Peace and Security of Mankind, 9 U.N. GAOR, Supp. 9, at 11-12, U.N. Doc. A/2693 (1954) (see particularly article 2). See also LEAGUE OF NATIONS COVENANT art. 10; 1 L. OPPENHEIM, INTERNATIONAL LAW 292-93 (8th ed. H. Lauterpacht 1955) [hereinafter cited as 1 L. OPPENHEIM]; 2 L. OPPENHEIM, *supra* note 18, at 698, 704, 751-54. For comments on G.A. Res. 2625, *supra*, see 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 27-29, and Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713 (1971) [hereinafter cited as Rosenstock, *A Survey*].

¹¹⁰ G.A. Res. 2625, *supra* note 109, at 123. This prescriptive elaboration is listed under a section on article 2, paragraph 7, of the U.N. Charter.

¹¹¹ 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 26. This would include individual sanctioning of criminal activity. Such individual responsibility can be found in numerous examples of current expectation or traced to customary law as in the 1818 case of *Arbuthnot and Ambrister*. See F. WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES 326 (1886).

¹¹² B. MURTY, *supra* note 15, at 230-31, citing Kuhn, *The Complaint of Yugoslavia Against Hungary with Reference to the Assassination of King Alexander*, 29 AM. J. INT'L L. 87 (1936).

also supported by a long history of expectation, often categorized in terms of aggression or norms of intervention.¹¹³

Likewise, supplementing these prescriptions is the principle of self-determination. It is difficult for one state to support terrorist activity against persons in another state without interfering with the political process of that second state to such an extent that participants in the political process of the target state are denied a share of power or the "determination" of an aggregate "self."¹¹⁴ This seems true even when terrorist activity supports the majority of the participants in the other state, since the process of terrorism implies coercion in the denial of an opportunity for the sharing of power and for the free expression and exploration of ideas. It is fundamental that "self-determination" does not refer merely to a goal value of majority rule within a group of persons, but rather to a full participation in the political process by all individuals and subgroups in the widest sharing of power and enlightenment.¹¹⁵ Indeed, the 1970 Declaration Concerning Friendly Relations

Kuhn stated that this principle was not well settled in international law by 1935. *Id.* at 89. Murty also notes some of the laws of war which prohibit incitements to assassination.

¹¹³ See, e.g., *United States v. Arjona*, 120 U.S. 479 (1887); 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 30; 2 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 334-36 (1943); 2 L. OPPENHEIM, *supra* note 18, at 656, 678-80, 698, 704, 751-54, 757-58; Wright, *Subversive Intervention*, 54 AM. J. INT'L L. 521, 533 (1960).

¹¹⁴ See 1966 Covenant on Civil and Political Rights, *supra* note 21, arts. 1, 25(a)-(b); G.A. Res. 2625, *supra* note 109; G.A. Res. 2131, 20 U.N. GAOR, Supp. 14, at 11-12, U.N. Doc. A/6014 (1965); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 at 71, arts. 21(1) & 21(3) (1948).

¹¹⁵ See authorities cited note 114 *supra*; L. GOODRICH, E. HAMBRO, & A. SIMONS, *CHARTER OF THE UNITED NATIONS* 29-34 (3d ed. 1969) [hereinafter cited as L. GOODRICH]; W. HALL, *A TREATISE ON INTERNATIONAL LAW* 347 (8th ed. 1924); M. McDOUGAL & F. FELICIANO, *supra* note 2, at 11 n.24; Moore, *Intervention: A Monochromatic Term for a Polychromatic Reality*, in 2 *THE VIETNAM WAR AND INTERNATIONAL LAW* 1061, 1068-69 (R. Falk ed. 1969); Mustafa, *The Principle of Self-determination in International Law*, 5 INT'L LAW. 479, 481, 483 (1971); Rosenstock, *A Survey*, *supra* note 109, at 731-32. *Contra*, R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 104 (1963) (the author argues for majority rule). The position of the United States and the United Kingdom has been to equate self-determination with the concept of a state "possessed of a representative government, effectively functioning as such with respect to all distinct peoples within their territory." Proposals on Self-determination, submitted by the United States (U.N. Doc. A/AC.125/L.32) and the United Kingdom (U.N. Doc. A/AC.125/L.44), cited in Mustafa, *supra* at 486 n.21; see Rosenstock, *A Survey*, *supra* note 109, at 732. Aligned with the American and British position is the view that although "majority vote" can suffice for an authoritative decision within the group, all persons must be allowed to freely and fully participate in the process. See L. GOODRICH, *supra* at 36. It has not been contended that "majority vote" can allow terroristic dominance or the derogation from the values of human rights on the basis of ethnic, racial, religious, political, social, cultural, class, or economic minority status per se. For background notes on relevant U.N. activity, see Haight, *United Nations*, 1 INT'L LAW. 96, 122-26 (1967); Haight, *United Nations Affairs*, 1 INT'L LAW. 475, 480-81 (1967); Starr, *United Nations Affairs*, 2 INT'L LAW. 519, 534-36 (1968).

and Cooperation authoritatively declared that peoples are entitled to seek and receive support in accordance with the purposes and principles of the U.N. Charter. It also declared that this shall not be construed as authorizing or encouraging action which would dismember or impair the territorial integrity or political unity of another state, and that a state which is self-determined is one "possessed of a government *representing the whole people* belonging to the territory without distinction as to race, creed or colour" and a unity of authoritative power that is "freely determined" and "without external interference."¹¹⁶ What is expected is a free and full sharing of power or participation in the group constitutive process.

This thinking indicates a full swing from the position that a *prohibition* of the strategy of international terrorism does not impair self-determination to a position that international terrorism *itself* seems necessarily contrary to the principle of self-determination. These two positions are not inconsistent but congruous. Indeed, terrorism as a strategy to coerce others through violence offends not only the free choice of the whole people, but also the freedom and dignity of the individual.¹¹⁷ Thus, a state which engages in such conduct against its own people or which wilfully organizes, instigates, assists, finances, incites, participates in, or tolerates such activity from its own borders against another state, impairs the free choice of a people and is, at least, in complicity with the deprivation of fundamental human rights and freedoms.

Furthermore, since one of the main purposes of the United Nations is the respect for and observance of human rights and fundamental freedoms,¹¹⁸ it is evident that when a member participates in an interna-

See also Paust & Blaustein, *The Arab Oil Weapon: A Threat to International Peace*, 68 AM. J. INT'L L. 410, 415-20 (1974) [hereinafter cited as Paust & Blaustein].

¹¹⁶ G.A. Res. 2625, *supra* note 109, at 124 (emphasis added). The resolution also discusses article 1, paragraph 2, of the U.N. Charter and mentions the need for a "freely-expressed will of the people." *Id.* Dominance by a person or group through coercive violence offends the principles for which our forefathers fought and to which the world has awakened. *See generally* Declaration on the Granting of Independence to Colonial Countries, G.A. Res. 1514, 15 U.N. GAOR, Supp. 16, at 66, U.N. Doc. A/4684 (1960); Paust & Blaustein, *supra* note 115.

¹¹⁷ 1970 O.A.S. Res. 4, *supra* note 18; 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 7, 9, 41; S. EXEC. DOC. No. D, 92d Cong., 1st Sess. 3 (1971). Acts of terrorism constitute crimes against humanity, serious violations of the "fundamental rights and freedoms of man" or "essential human rights," and flagrant violations of "the most elemental principles of the security of the individual and community as well as offences against the freedom and dignity of the individual." 1970 O.A.S. Res. 4, *supra* note 18. "[T]errorism threatens, endangers or destroys the lives and fundamental freedoms of the innocent." 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 41. *See also* G.A. Res. 3034, 27 U.N. GAOR, Supp. 30, at 119, art. 4, U.N. Doc. A/8730 (1972); Ambassador Bennett, *supra* note 2, at 81-83, 92; Rogers, *supra* note 5, at 429.

¹¹⁸ *See* U.N. CHARTER preamble, arts. 1(3) & 55(e).

tional threat or use of force in any manner inconsistent with the human rights purpose it violates article 2, paragraph 4, of the U.N. Charter.¹¹⁹ This violation of the Charter does not rest upon a claim that state-supported terrorism has violated the territorial integrity or political independence of another state, although such a claim could occur, but upon a claim that the state-supported terrorism involved the threat or use of force in a manner inconsistent with a fundamental purpose of the United Nations (*i.e.*, the purpose related to the respect for and observance of human rights). It is clear that article 2, paragraph 4, does not merely preclude the threat or use of force against territorial integrity or political independence.¹²⁰ These views are affirmed by the 1970 Declaration Concerning Friendly Relations and Cooperation, which authoritatively declared, in connection with article 2, paragraph 4, that it prohibits "any forcible action" by a state "which deprives peoples . . . of their right to self-determination" or which supports "terrorist acts in another state."¹²¹ Therefore, a related solution to terrorism will involve the whole panoply of sanctions that may be taken against a state which violates the U.N. Charter by engaging in international terrorism or by supporting it in some impermissible manner.¹²² The "whole panoply" of sanction objectives may be somewhat fatuous in actual practice.¹²³

IX. SANCTIONS BY INTERNATIONAL ORGANIZATIONS AND SELF-HELP

This concept of restraining the export of terror leads to the next set of international responses—organizational sanction strategies against states and permissible unilateral state responses. It is useful to consider generally some of the possible responses that states and organizations might utilize in connection with the international processes of terrorism. One such organizational response has been recently advocated in the form of a new treaty "which would provide a basis for joint action such as suspension of all air service to countries which fail to follow the basic

¹¹⁹ Article 2(4) states: "All members shall refrain in their international relations from the *threat or use of force* against the territorial integrity or political independence of any state, or *in any other manner inconsistent with the Purposes of the United Nations.*" U.N. CHARTER art. 2, para. 4 (emphasis added).

¹²⁰ See M. McDOUGAL & F. FELICIANO, *supra* note 2, at 177-79, citing D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 151 (1958); 2 L. OPPENHEIM, *supra* note 18, at 154. See also L. GOODRICH, *supra* note 115, at 51-52.

¹²¹ G.A. Res. 2625, *supra* note 109, at 123; see Ambassador Bennett, *supra* note 2, at 84. Ambassador Bennett states that many "terrorist acts, particularly the involvement of states in assisting terrorist groups or the use of force to deny the right of self-determination are already prohibited under international law." *Id.*

¹²² On powers to pursue sanction objectives, see U.N. CHARTER arts. 10-13, 24-25, 33-42, 48-49, 52-54, 56, 94, 97-99.

¹²³ See N.Y. Times, May 23, 1973, at 3, col. 1.

rules set out in the Hague and Montreal Conventions.”¹²⁴ In 1973 a diplomatic conference on air security considered this proposal but it was not acted upon. Although there has been some opposition to the strategy, some commentators feel that there is a good possibility that it will be formally adopted in the future, if not on a global basis, at least on a regional basis by means of various bilateral arrangements.¹²⁵ The organizational entity most likely to be associated with a global response would be the International Civil Aviation Organization (ICAO), since the United States and Canada have already proposed a draft treaty of this nature to that entity, with a boycott proposed as the primary sanction. If bilateral arrangements are not worked out, and perhaps in some cases even if they are, it is not unlikely that private action will utilize a similar boycott technique supplemented by local ground strikes of airline pilots and air service personnel. Ambassador Bennett has warned the U.N. of the fact that private groups “such as airline pilot associations and labor organizations speak of acting in their own self-defense” regardless of governmental consensus.¹²⁶ But what went unmentioned was the fact that the active pilot group (IFALPA) had already demonstrated the role which private entities could take in sanction objectives by supporting a 1-day suspension of air service in several parts of the world.¹²⁷ In Argentina, private preventive measures against terrorist attacks and kidnappings have already begun as some individuals continue to form protection groups or to take self-protective measures.¹²⁸ It is quite possible that private police or paramilitary action will arise in some parts of the world to supplement local police measures where citizens are either not satisfied with local police protection or view the police with suspicion.

Furthermore, there are governments ready to act unilaterally or bilaterally, even though it is recognized that such action could damage the U.N. structure and be less effective than action or involvement in coordinated responses to acts of terrorism under aegis of the U.N. The United States advocates a unilateral sanction strategy where there is no other viable alternative,¹²⁹ although it must be surmised that the lack of

¹²⁴ Stevenson, *supra* note 4, at 647. See generally 67 DEP'T STATE BULL. 357-64 (1972); Brower, *supra* note 86, at 444-48; Evans, *Aircraft Hijacking: What Is To Be Done?*, 66 AM. J. INT'L L. 819 (1972) [hereinafter cited as Evans].

¹²⁵ See Rovine, *supra* note 18. The United States will “support suspension of all air service to countries that fail to abide by the Hague and Montreal Conventions.” Letter from Armin Meyer to Jordan J. Paust, June 25, 1973.

¹²⁶ Ambassador Bennett, *supra* note 2, at 86.

¹²⁷ See Evans, *supra* note 124, at 819; Stephen, *supra* note 107, at 442.

¹²⁸ See N.Y. Times, April 28, 1973, at 7, col. 1.

¹²⁹ See Ambassador Bennett, *supra* note 2, at 86; Statement by George Bush, United States

United States support for U.N. Security Council sanctions against Rhodesia indicates that other motivations lie behind the whole picture of United States policy in connection with sanctions against all forms of terrorism. United States policy is evident from both executive and legislative conduct. For example, the Senate has voted for a resolution supporting the suspension of aid and the imposition of economic sanctions against any state providing "sanctuary" for persons committing international terrorism. This type of response has been used by the Senate before in connection with other international problems.¹³⁰ However, it is not clear whether the Senate considered the question of war criminal "sanctuary" in refusing to prosecute grave breaches of the 1949 Geneva Conventions which have involved acts of terrorism. Nor is pressure evident to press for the prosecution of grave breaches of the Conventions arising out of the India-Bangladesh-Pakistan conflict in the face of India-Pakistan conduct which reflects, at least, a neglect of article 1 (which is common to all four of the 1949 Geneva Conventions) and the grave breach provisions of the Geneva law. It is also not clear whether the Senate considered acts of terrorism utilized by a government against its own people. This is because no major review of Senate and Presidential action in connection with the Rhodesian trade legislation and/or executive implementary measures in violation of the U.N. Charter seems to have taken place after the Senate voted to cut off "all contacts," including economic aid and trade, with any nation providing support or sanctuary for terrorism and terrorists. It is not apparent what the Senate's position on United States war crime prosecution is with respect to war crimes that involve the threat or use of violence of a terroristic nature. It seems fair to state that the Senate, by its conduct, has left international lawyers in a state of uncertainty over present United States sanction strategy to combat all forms of international terrorism.

While United States policy may be inconsistent, it is instructive to note that other states also are pursuing their own sanction strategies, and these strategies also involve uncoordinated sanction objectives and goal values. It was recently announced that the Sudan has suspended prosecution of the eight Palestinian guerrillas who assassinated the dip-

Ambassador to the U.N., before the plenary session of the U.N. General Assembly, December 18, 1972, in 68 DEP'T STATE BULL. 92, 93 (1973) [hereinafter cited as Ambassador Bush].

¹³⁰ See Wash. Post, Sept. 29, 1972, at 7, col. 2; N.Y. Times, Sept. 7, 1972, at 1, col. 2. The *New York Times* article discusses the congressional vote, following the Munich terrorist attack, to "cut off all contacts" with nations providing support or sanctuary to terrorists. This form of economic sanction strategy has been used before by the Nixon administration. See Wash. Post, Sept. 19, 1972, at 1, col. 3; Wash. Post, Sept. 15, 1972, at 16, col. 1.

lomats at Khartoum because of the recent Israeli raids in Beirut which led to the deaths of three members of the Palestine Liberation Organization (PLO).¹³¹ The United States countered with its own sanction strategy against the Sudan.¹³² If this illustration of one case of entangled sanction strategies and objectives does not demonstrate the need for a more coordinated international effort, there is the retaliatory violence punctuating the Middle East struggle. This violence has left scholars in disagreement over the question of permissibility in connection with U.N. ineffectiveness and over state claims allowing unilateral measures of law enforcement or responses involving the use of force across national boundaries.¹³³

It has become increasingly evident that when the U.N. machinery is not functional in connection with human rights or state security needs, states will resort to varied unilateral or collective strategies with claims of legal propriety.¹³⁴ Indeed, the Secretary-General warned the General Assembly about some of the consequences of inaction,¹³⁵ and the

¹³¹ See N.Y. Times, May 12, 1973, at 1, col. 1. The article adds that no Arab statesman can convict a member of the PLO of "a crime that in Arab eyes was as much a patriotic deed as the raid into Beirut was in Israeli eyes." The unanswered question is whether the Israeli raid was "terrorism" and assassination, a defensive attack on a military objective inside a neutral country à la Cambodia and *The Caroline* case, or some combination of these; there is little doubt of the Khartoum objective and strategy.

¹³² See *id.* at 1, col. 1. The article states that the United States served notice to the Sudanese that no new United States ambassador will be sent to the Sudan unless prosecutions commence. The *New York Times* adds that economic matters are involved. *Id.*

¹³³ See, e.g., Blum, *The Beirut Raid and the International Double Standard*, 64 AM. J. INT'L L. 73 (1970); Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969) (setting forth a useful policy framework at 441-42); N.Y. Times, April 15, 1973, § 4, at 6, col. 1; Wash. Post, Oct. 15, 1972, § B, at 3, col. 1. See also F. KALSHOVEN, *BELLIGERENT REPRISALS* (1971); W. REISMAN, *NULLITY AND REVISION* (1971); Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1 (1972) [hereinafter cited as Bowett]; Fawcett, *Intervention in International Law*, 2 RECUEIL DES COURS 347 (1961); Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967) [hereinafter cited as Lillich, *Human Rights*]; Lillich, *Forcible Self-Help Under International Law*, 22 NAVAL WAR COLLEGE REV. 56 (1970) [hereinafter cited as Lillich, *International Law*]. Relevant documents also include G.A. Res. 2625, *supra* note 109, stating that states "have a duty to refrain from any acts of reprisal involving the use of force," and S.C. Res. 188, 19 U.N. SCOR, Supp. April-June 1964, at 9, U.N. Doc. S/5650 (1964). Terms of conclusion used in the debates include intervention, interdiction, intercession, interposition, self-defense, evacuation, retorsion, reprisal, and humanitarian intervention. None of these terms, of course, is either a substitute for thinking or a comprehensive map of policy and contextual factors. See also references cited note 115 *supra*.

¹³⁴ See note 133 *supra*; J. PAUST & A. BLAUSTEIN, *WAR CRIMES JURISDICTION AND DUE PROCESS: A CASE STUDY OF BANGLADESH* (1974) [hereinafter cited as J. PAUST & A. BLAUSTEIN]; Bond, *A Survey of the Normative Rules of Intervention*, 52 MIL. L. REV. 51 (1971); Frank & Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275 (1973) [hereinafter cited as Frank & Rodley]; Tucker, *Reprisals and Self-Defense*, 66 AM. J. INT'L L. 576 (1972).

¹³⁵ See N.Y. Times, Sept. 13, 1972, at 3, col. 1.

United States added a prophetic remark that the U.N. hesitancy may lead to unilateral or bilateral sanctioning. This might lead to a deleterious effect upon the overall authority of the U.N. in areas of peace management and self-help retaliation for breaches of international norms governing human rights and freedoms, and even of the very survival of a freely determined governmental process within a state.¹³⁶ It is possible that with U.N. hesitancy to abandon ideological conflicts and to cooperate in joint implementation of human rights, increased use of regional arrangements will occur. The Council of Europe has already passed a resolution inviting boycott strategies,¹³⁷ and this form of a regionally inclusive response is encouraging. It is hoped that a more coordinated international response will soon be possible, but some view the problem with pessimism.¹³⁸ Indeed, it has been argued that "[c]oercion of private parties by local private groups might well prove more effective than U.N. coercion of governments,"¹³⁹ and several private initiatives which include state action have been suggested in connection with economic sanction strategies against South Africa and Rhodesia.¹⁴⁰

A related use of force involves the principle of self-defense and the claim of the right to use proportionate force to engage terrorists in neutral or other territory when foreign governments are unable or unwilling to carry out their obligations to prevent terrorist groups from using their territory as a base or to refrain from assisting, participating

¹³⁶ See Ambassador Bennett, *supra* note 2, at 86, 91; Ambassador Bush, *supra* note 129, at 93.

¹³⁷ The Council of Europe's Consultative Assembly met from October 21 to 23, 1972, and took a regional approach by adopting a resolution which invited "the organs of the Council of Europe not to maintain relations with organizations that consider terrorism as a legitimate method of action." See INTERNATIONAL LEAGUE FOR THE RIGHTS OF MAN, REPORT ON THE DEBATE ON TERRORISM—STRASBOURG, COUNCIL OF EUROPE, OCTOBER 21-22, 1972 (N. Fox ed. 1972). A similar response from the O.A.S. is not unlikely despite a certain rapprochement with Cuba. Certainly regional coordination is preferable to none at all. See also U.N. CHARTER arts. 52 & 54.

¹³⁸ See U.S. FOREIGN POLICY 1972, *supra* note 1, at 129. The report states that the "process of bringing the traditional rules of law and concepts of sovereignty into line with the new needs of the international community . . . is long and slow." *Id.* The report also stated that a new need is for collective action in an increasingly interdependent world. Some have expressed the view that collective U.N. economic sanctions against South Africa and Rhodesia were applied under unique circumstances, and that it would be unrealistic to expect such a coordinated effort against others who obstruct human rights expectations. See J. CAREY, *supra* note 46, at 22-36; cf. N.Y. Times, April 18, 1973, at 5, col. 3.

¹³⁹ J. CAREY, *supra* note 46, at 36.

¹⁴⁰ See N.Y. Times, April 28, 1973, at 10, col. 4; Sagay, *The Right of the United Nations to Bring Actions in Municipal Courts in Order to Claim Title to Namibian (South West African) Products Exported Abroad*, 66 AM. J. INT'L L. 600 (1972).

in, or tolerating terrorist activities.¹⁴¹ This "solution" is not directed against the foreign state as such, which may be subject to U.N. sanctions for its part in the terroristic process, but against an imminent terrorist threat. A different defensive approach might involve claims to protect and evacuate nationals or to protect or evacuate others on humanitarian grounds when substantial deprivations of human rights occur in the terroristic process or when there are actual armed attacks on such persons.¹⁴²

There are, of course, other strategies and institutions which could be utilized in aid of legal solutions to terrorism. Where possible, U.N. or regional action might include international investigative, supervisory, prescribing, promotional, or related functions.¹⁴³ United Nations peace-keeping and supervisory efforts have occurred in some 37 countries but they generally remain subject to consensual arrangements.¹⁴⁴ Since the U.N. is presently unable to agree on a new convention on international terrorism, it is not likely that consensus within the U.N. will support this type of community response or even a prescriptive

¹⁴¹ See 1972 U.N. Doc. A/C.6/418, *supra* note 6, at 30, for an example of a claim to use "all reasonable and adequate steps to safeguard its existence . . . without having recourse to the right of individual or collective self-defense . . ." A type of self-defense claim may have been behind the Israeli attack on the PLO quarters inside Lebanon; it was utilized also to justify attacks by the United States on Viet Cong and North Vietnamese combatants inside Cambodia. For a related consideration of these claims, see note 133 *supra*; Falk, *The Cambodian Operation and International Law*, 65 AM. J. INT'L L. 1 (1971); Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 AM. J. INT'L L. 38 (1971); Chapter 1: *The Cambodian Incursion of 1970*, in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 9-160 (R. Falk ed. 1972). The claim is generally traced to the *Caroline* case. See J. MOORE, A DIGEST OF INTERNATIONAL LAW 412 (1906). It may also be traced to questions of armed "attack," proportionality, necessity, and the prohibition of attacks on noncombatants and neutrals. See also W. HALL, INTERNATIONAL LAW 264-65 (6th ed. 1909); M. MCDUGAL & F. FELICIANO, *supra* note 2, at 211-12, 244, 405-09; 2 L. OPPENHEIM, *supra* note 18, at 678-80, 698, 704, 751-54.

¹⁴² On the propriety of "defense of nationals" and "humanitarian intervention" subsequent to the U.N. Charter, see M. MCDUGAL & F. FELICIANO, *supra* note 2, at 217-44; 1 L. OPPENHEIM, *supra* note 109, at 309; Bowett, *supra* note 133; Frank & Rodley, *supra* note 134; Lillich, *Human Rights*, *supra* note 133; Lillich, *International Law*, *supra* note 133; Moore, *The Control of Foreign Intervention in Internal Conflicts*, 9 CALIF. J. INT'L L. 205 (1969). See also G.A. Res. 2625, *supra* note 109, concerning the permissibility of outside assistance in a predictable context where terrorists are substantially interfering with the process of political self-determination. These legal principles and others on terrorism are relevant to the Indian intervention in aid of the emerging state of Bangladesh. See J. PAUST & A. BLAUSTEIN, *supra* note 134. For an emphatic denial of the viability of self-help claims since the U.N. Charter see I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 301 (1963).

¹⁴³ For an extremely useful and comprehensive consideration of these functions and the six sanction objectives of prevention, deterrence, restoration, rehabilitation, reconstruction, and correction see M. MCDUGAL & F. FELICIANO, *supra* note 2, at 280-353.

¹⁴⁴ See 5 UNITAR NEWS 13-16 (1973).

sanction strategy which condemns terrorist activity.¹⁴⁵ More viable functional capacity within the U.N. system could deal with needed long-range prevention and rehabilitation through the general implementation of human rights, laws of armed conflict, humanitarian relief, educational and advisory services, coordinating functions, goal promotion, and diplomatic strategy.¹⁴⁶ Similarly, regional organization capacity can be utilized.¹⁴⁷ It has been suggested that the time is ripe for at least a regional prosecution effort to supplement present state effort.¹⁴⁸ The United States policy is to support these efforts, and a new proposal would increase the use of the International Court of Justice (ICJ) to handle cases against terrorists.¹⁴⁹

Another field of development in international preventive and protective functioning relates to efforts to implement the law of armed con-

¹⁴⁵ A seemingly relevant exception is the U.N. Security Council's "one-sided" condemnation of Israeli raids against PLO elites in Lebanon. See N.Y. Times, April 22, 1973, at 1, col. 5. The representative of the United States said that this was the first time in U.N. history that the Security Council "has rejected the cycle of violence and terrorism," but added that it was one-sided, and did not mention either Munich or Khartoum. In earlier years, international support of Greek communist terrorism by Albania, Bulgaria, Romania, and Yugoslavia had been condemned; the kidnapping of small children was especially denounced. See, e.g., G.A. Res. 193, U.N. Doc. A/810 at 18 (1948); U.N. Special Comm. on the Balkans, Report on the removal of Greek children to Albania, Bulgaria, Yugoslavia and other northern countries, 3 U.N. GAOR, Supp. 8, at 29, U.N. Doc. A/574 (1948), reported in M. McDUGAL & F. FELICIANO, *supra* note 2, at 191.

¹⁴⁶ General systemic functioning in these areas is well underway but not without difficulty. See J. CAREY, *supra* note 46; V. PECHOTA, THE QUIET APPROACH: A STUDY OF THE GOOD OFFICES EXERCISED BY THE UNITED NATIONS SECRETARY-GENERAL IN THE CAUSE OF PEACE (1972); Korye, *The Key to Human Rights Implementation*, 1968 INT'L CONCILIATION No. 570; Schwelb, *Civil and Political Rights: The International Measures of Implementation*, 62 AM. J. INT'L L. 827 (1968); Sohn, *United Nations Machinery for Implementing Human Rights*, 62 AM. J. INT'L L. 909 (1968). For a relevant proposal to implement fact-finding functions in world trouble spots see Bowett, *supra* note 133, at 29-32. More specific U.N. functions include the work of the Secretary-General and the Ad Hoc Committee on International Terrorism appointed by the President of the General Assembly. See G.A. Res. 3034, 27 U.N. GAOR, Supp. 30, at 119, U.N. Doc. A/8730 (1973).

¹⁴⁷ The most notable regional system is the European Human Rights framework. Even judicial systemic capacity is utilizable in that arena as evidenced by the "Lawless" Case, *supra* note 100, and the pending "case" on Northern Ireland (still in the International Law Commission). See also European Commission of Human Rights, Stock-taking on the European Convention on Human Rights, DH(72)2, Feb. 14, 1972 (periodic note on results achieved under the Convention, composed by A. B. McNulty, Secretary to the Commission); O.A.S. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS (1970). Both systems have some form of individual petition which can supplement state efforts against terrorism.

¹⁴⁸ See Evans, *supra* note 124, at 822. See also M. McDUGAL & F. FELICIANO, *supra* note 2, at 707-09, 731.

¹⁴⁹ See INTERNATIONAL LEAGUE FOR THE RIGHTS OF MAN, SECOND REPORT ON U.N. CONSIDERATION OF INTERNATIONAL TERRORISM 4 (H. Shapiro ed. 1972); UNITED STATES FOREIGN POLICY 1972, *supra* note 1, at 129-30; Rogers, *supra* note 5, at 428. See also M. McDUGAL & F. FELICIANO, *supra* note 2, at 373.

flict. Supervisory functioning had been dependent upon a "Protecting Power" system, and efforts by the International Committee of the Red Cross (ICRC) were supplemented by state elementary measures.¹⁵⁰ New efforts, however, envision the creation of civilian safety zones (as attempted in Dacca during the India-Bangladesh-Pakistan conflict), national ombudsmen or commissions, and a new international structure for authoritative intelligence, promotion, prescription, invocation, and application of functional capacity.¹⁵¹

In this effort to explore some of the possible legal responses to international terrorism, several approaches and institutional mechanisms have been identified. Now men need only seek their use and begin with more dedication to guard each other against their own excesses. This, after all, is the most important response.

¹⁵⁰ See, e.g., Geneva Convention, *supra* note 21, arts. 9-12, 142-43; COMMENTARY, *supra* note 18, at 80-117, 556-80.

¹⁵¹ See, e.g., ICRC, Basic Texts, *supra* note 40; S.G. Report A/8052, *supra* note 17, at 49-51, 75-79, 109-11. The new Geneva protocols will also specifically reiterate the prohibition of acts of terrorism in all types of conflict to reinforce the expectation that intentional acts of terrorism, at least against noncombatants, are prohibited in all contexts of war and peace. For a related proposal to implement the annex on civilian safety zones in the Geneva Convention, *supra* note 21, see H. LEVIE, WHEN BATTLE RAGES, HOW CAN LAW PROTECT? (J. Carey ed. 1971). For a discussion of general elementary needs see Paust, *An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis*, 1 YALE STUDIES IN WORLD PUBLIC ORDER 148 (1974).