COMBATTING INTERNATIONAL TERRORISM INTO THE 21ST CENTURY

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I. INTRODUCTION

As a private attorney I have dedicated a significant part of my practice to working with or representing victims of terrorism. In particular, I represent several family members who lost relatives in the bombing of Pan Am Flight 103 in a civil action against the government of Libya. Through the use of the judicial system, we are attempting to forge a new weapon for use against terrorist states as a means by which to achieve deterrence, punishment, and compensation for the victims.

Terrorism and the law are inexplicably interconnected, and the law is one of our most important weapons available to fight terrorists. The bottom line is terrorists are criminals who must be dealt with through the rule of law. It is the preservation and adherence to laws, both domestic and international, that separates us from the terrorists. In determining the proper course of action to be utilized against a particular terrorist or group, we must give serious consideration to the limits of the law. If we stray too far from those limits then that line of separation may no longer exist, and as a result, the terrorists in many ways will have secured a victory.

How to best combat terrorism, particularly international terrorism, remains a tantalizing and difficult subject. The United States counterterrorism policy is based on three general rules: first, no deals will be made with terrorists; second, terrorists will be treated as criminals; and third, maximum pressure must be brought to bear on states that sponsor and support terrorism.

Unfortunately, the United States’ legal response to terrorism has been, as has been of most nations, reactive rather than proactive.

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Following the rash of terrorist attacks in Europe against Americans in the 1980s, the United States enacted legislation to allow for prosecutions of terrorists who commit acts against Americans abroad. Now, in the 1990s, in the wake of terrorist attacks directed against Americans in the United States, legislation is pending to ensure these perpetrators can be prosecuted as the terrorists that they are. Hopefully, all the legal gaps have been finally filled to cover all prosecutorial possibilities, but that is not enough.

It is time to stop responding and to start acting. Terrorists are becoming more sophisticated in their techniques and skills. Their conventional weapons are growing more powerful and their capability and willingness to use weapons of mass destruction has arrived. Remember the line given by the Irish Republican Army to Prime Minister Thatcher, "you have to be lucky all the time, we only need to be lucky once." It may be that the next terrorist attack will not provide us with an opportunity to respond.

While 1994 witnessed a 25% decrease in the number of terrorist attacks that occurred worldwide, the lowest number in twenty-three years, and, for the most part, the state sponsors of terrorism have been relatively quiet during the 1990s, this is no time to relax our guard. In fact, according to the latest figures for 1995, attacks are on the rise again: approximately 160 recorded attacks in the first quarter of 1995, although the vast majority of these attacks were the result of PKK attacks in Europe. Figures, however, are often unnecessarily distracting and certainly not indicative of the imposing threat. Nor do they offer any solace to those who later become unfortunate victims. In any event, regardless of the statistics the trend is now toward a higher number of casualties, more extensive property damage, and increasingly devastating effects on economies.

Given the substantial devastation that might be caused by the next attack, rather than focusing on how best to prosecute terrorists, which remains, of course, an important and necessary objective, now is the appropriate time to address the need to increase and strengthen the legal resources needed to prevent future terrorist acts from occurring.

I would categorize the possible governmental responses to terrorism into three major groups: (1) military strikes; (2) diplomacy; and (3) legal measures, which would include, but is not limited to, law enforcement efforts, intelligence gathering, infiltration tactics, sanctions, civil suits, and reward programs. For the purposes of this panel, and due to the constraints on time, I will only address the legal measures that can be taken into the 21st century to combat international terrorism.
II. LEGAL MEASURES

There have been many recent successes in the last few years in capturing and prosecuting terrorists. Fawaz Yunis was convicted in federal court in 1989 for the 1982 bombing of a Pan Am flight. Mohammod Ali Hamadei was convicted in Germany for the June 1985 hijacking of TWA flight 847 and the murder of navy diver Robert Stethem. Just last year, on May 24, 1994, four men were convicted of bombing the World Trade Center in New York City and were each sentenced to 240 years in prison. The New York conspiracy trial of Sheik Omar Abdel Rahman and ten of his followers for "seditious conspiracy" resulted in a significant verdict of guilty. And Ramzi Ahmed Yousef, the alleged mastermind of the World Trade Center bombing, was apprehended this past February in Pakistan and immediately deported to the United States to stand trial.

But there have also been the failures. The two suspected Pan Am Flight 103 bombers, Abdel Basset Ali Al-Megrahi and Lamen Khalifa Fhimah, still remain protected in Libya despite the passage of nearly four years and the imposition of international sanctions against the state of Libya. Mir Aimal Kansi, the alleged terrorist in the 1993 shooting at the CIA, is at large in Pakistan. Two of the suspects arrested for the 1994 bombing of the Israeli Embassy in Argentina were released for lack of evidence on July 29, 1995. No convictions have been obtained for the bombing of the Buenos Aires Jewish cultural center of last summer. And the attacks still continue.

We will never be able to completely eliminate terrorism, at least certainly not in our lifetimes. Although we have made a good start, there are steps that can be taken by which we can improve the legal tools we currently possess to combat terrorism. Let me suggest a few for implementation at the international level.

III. ADOPT A COMPREHENSIVE TREATY ON TERRORISM

In light of the collapse of communism in Eastern Europe and the former Soviet Union, now is the time to press States to draft and ratify a comprehensive treaty on terrorism. During the last ten years there has been great progress on the international level to condemn terrorism. In 1985, 1987, 1991, 1993, and most recently on November 17, 1994, the General Assembly adopted resolutions on measures to eliminate international terrorism. Each time the language of the resolution became stronger and received greater support. In fact, on most occasions, it was unanimous. But as significant as these resolutions are, they are merely guidelines without teeth. A formal treaty should be adopted which covers
such matters as the illegality of terrorist offenses, the principle of *aut dedere aut punire* (extradite or prosecute), the sharing of intelligence information, preventative measures, and punishment to be imposed on States that support or consent to terrorism, and compensation for the victims. Let me elaborate somewhat on some specifics.

The last reference, compensation, is a relatively new phenomena, although there are some recent international precedents. For example, (1) the Anglo-American Declaration of November 27, 1991 requires, as one of three prongs, Libya to pay “appropriate compensation” in order to lift the Security Council sanctions; (2) through the offices of the Secretary-General, following the French bombing of the Greenpeace ship “Rainbow Warrior,” arbitration was conducted to determine the amount of compensation France was to pay to New Zealand and Greenpeace; and (3) the United Nations established the Iraqi Claims Commission to compensate those harmed by Iraq’s aggression.

More simple extradition procedures are necessary, including the complete elimination of political offense exceptions (for example the United Kingdom — Irish Republican Army problems) and, possibly, any restrictions regarding extradition of a State’s nationals. The only reason the United States was able to secure custody over Ramzi Yousef so quickly was that, since he was not a Pakistani national, Pakistan could expel him immediately. The same will not occur when, or if, Amir Kansi is captured. Since he is a Pakistani national he could hold up his extradition through legal challenges for quite some time.

We need to adequately address issues of state sponsorship. What is meant by sponsorship varies. It could be direct (Iran), financial (Syria), or merely allowing the use of one’s territory (Sudan). Regardless, any aspect of sponsorship needs to be eliminated and severe penalties need to be created that will be adhered to by all States. The current manner of use of United Nations economic sanctions, I believe is a failure, particularly with respect to Libya. Let me cite you just two examples of why the Libyan sanctions are unsuccessful, although these would apply to any sanction situation.

First, sanctions have to hurt, not just be inconvenient. In Libya’s case, all sales and purchases of oil would need to be prohibited. This will never occur. Unfortunately, economic interests are apparently more important to most countries than most anything else. Not only is such a move opposed by two of our key allies, Germany and Italy, but even our co-sponsors of the sanctions, the United Kingdom and France, will not support the effort. In fact, France recently signed a one billion dollar oil deal with Libya.
Second, sanctions have to be rigorously and completely enforced. If even one country fails to stand firm, there may be serious consequences. There are various accounts of violations of the Libyan sanctions by countries and companies. The most recent report was that Libya was using its humanitarian flights to smuggle in embargoed goods through Malta. Of course, several months ago, Saudi Arabia enraged the United States by allowing a Libyan Arab Airlines aircraft to land and then depart from Saudi territory. Support for Libya is increasingly growing in the United Nation’s General Assembly. Indeed, concerns existed earlier this year that Libya may even be granted a seat on the Security Council. Fortunately, this did not occur, but the mere fact that it was possible helped strengthen Ghadaffi’s position in the international community.

Globalization will also have a significant effect on facilitating terrorism. It is becoming much easier for persons to travel from one country to another without a visa. For the most part, this is an immigration issue for an individual country to handle. However, at the same time, States need to crack down on the availability of illegal passports. It is very easy to purchase a valid, although improperly obtained, passport, including those from western powers. Ramzi Yousef entered and left the United States on two different valid passports. Law enforcement needs to play a more active role in preventing government officials from improperly selling or distributing passports.

Finally, in designing a comprehensive treaty, we should not waste any time attempting to define international terrorism, although we do need a domestic definition, as contained, for example, in the Foreign Intelligence Surveillance Act, for prosecutions under the common law system. We all know the old adage that one person’s freedom fighter is another person’s terrorist. The difficulties in formulating an agreed upon definition has resulted in a significant loss of time. One 1983 study found that from 1936 to 1981, at least 109 definitions were advanced. Terrorism should be considered in this respect like obscenity. As Justice Stewart once remarked, “I know it when I see it.”

The solution is quite simple. Worry about the underlying crime and not the definition. You do not need to be a lawyer to recognize the difference between the killing of a soldier under rules of engagement and the deliberate slaughter of innocent women and children. The types of offenses that terrorism involves, such as murder, serious bodily harm, and infliction of serious mental distress, are common crimes. There are many acts which have been clearly identified as terrorist by international treaties and constitute unacceptable conduct: aircraft hijacking, aircraft sabotage, attacks on internationally protected persons, hostage-taking, torture, extrajudicial killing, and the use of the mail for the delivery of explosives.
Acts of terrorism also violate such international conventions as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, and various resolutions of both the General Assembly and the Security Council. It is clear that international terrorism violates the basic human rights principles developed over the course of this century. Therefore, every form of terrorism that has been discussed at this conference, the use of chemical and biological weapons, car bombings, the assassination of dissidents, etc., is unlawful, no matter what definition is adopted.

IV. NEED TO PRESSURE STATES TO PROSECUTE SUSPECTED TERRORISTS AND ENSURE THEIR MAXIMUM SENTENCES ARE SERVED

There are occasions where States refuse to extradite a suspected terrorist. For instance, some States will not extradite individuals to countries, such as the United States, where the individual may be subject to the death penalty. Many of the terrorist offenses under United States law now include such a penalty.

Recent examples include the Hamadei and Rashid cases where Germany and Greece respectively denied the United States extradition request. Thereafter, United States prosecutors and investigators worked with their German and Greek counterparts. Hamadei is now serving a life sentence, and Rashid was sentenced to fifteen years. It must now be ensured, however, that these and other convicted terrorists serve their sentences. Italy, we recall, prematurely and secretly released two of the Achille Lauro hijackers only about half-way through their sentences. I already referenced the bombing of the "Rainbow Warrior." Let's not forget that although the aggressor was a western democracy, France, in this case, it was a terrorist act. And despite the promise of France, it, too, released the two agents responsible for the bombing, which claimed the life of one person prematurely. This is the wrong message to send.

A better ending story occurred in 1993 when after only seven years had passed, Malta, because of internal political debate, released Omar All Rezaq, who had been convicted for the 1985 Egypt Air Hijacking. An American passenger was killed during the event. Fortunately, the United States, with the assistance of two African nations, attained custody over Rezaq. He is now pending trial in Washington, D.C. Bilateral or multilateral agreements should be drafted between States to ensure that those States whose nationals have been killed or harmed in a terrorist attack have the option to prosecute the terrorist if the current State
of incarceration is considering releasing the individual. The clear message must be sent that terrorists will pay the full price for their actions.

V. CREATE AN INTERNATIONAL CRIMINAL COURT

For most of this century, the international community has debated the issue of establishing an International Criminal Court (ICC) to prosecute, in particular, war criminals and terrorists. In 1994, the International Law Commission issued a draft statute for the Court. I was fortunate enough to recently serve as a member of a Commission of Experts organized by the International Association of Penal Law and the Max Planck Institute to further develop the statute, and was present as an observer for the American Society of International Law at the Ad Hoc meeting on an ICC which was held at the United Nations this past August.

An ICC can effectively remove some of the obstacles that have confronted prosecution of terrorists. In particular, the uncomfortable political and internal pressures faced by a State when it is called upon to extradite a suspected terrorist to another State could be alleviated by the existence of an ICC. Many States, including the United States, are, at least in principle, dedicated to seeing a court established which would include terrorist offenses, although the question of whether the ICC or a national court would have primary jurisdiction remains unresolved. Obviously, States such as the United States wish to be in the position of prosecuting terrorists who harm their nationals.

The case of Pan Am Flight 103 comes to mind as a prime example justifying the necessity for the creation of an ICC to handle a terrorist case. One thing unique about the Lockerbie case has been the legal arguments now before the International Court of Justice regarding Libya's right to prosecute the two suspects under the Montreal Convention. The Convention allows the State of custody to choose between prosecution or extradition. Libya, therefore, argues it has the right to prosecute. But Libya is itself accused of ordering the suspects to commit the bombing, which brings about an unusual situation. Thus, I have suggested that in cases where a State itself is accused of complicity, the ICC should possess primary jurisdiction. If an ICC existed right now, the Lockerbie stalemate might not exist. Unfortunately, the prospect for an ICC is still years, if not decades, away.

VI. INCREASE THE INTERNATIONAL USE OF COUNTERTERRORISM REWARDS PROGRAMS

Under the 1984 Act to Combat International Terrorism, the United States Congress established a reward program for individuals who provide
information to the United States about international terrorism. The Diplomatic Security Service was assigned responsibility for implementing the program under the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986. The program offers rewards of up to $2,000,000.00. The Justice Department is also in a position to make available rewards for acts of domestic terrorism.

Following the terrorist bombing of Pan Am Flight 103 on December 21, 1988, my client, Bruce Smith, who lost his wife in the attack, undertook efforts to lobby the Bush Administration and airline trade organizations to strengthen the program. As a result of Smith's efforts, in 1990, the State Department forged a unique public-private partnership with the Air Transport Association of America (ATA) and the Air Line Pilots Association, International (ALPA). Each organization pledges up to $1,000,000.00 to supplement rewards authorized by the United States government.

Therefore, at present, the program offers rewards of up to $4,000,000.00 to individuals who provide information leading to the prevention, frustration, or favorable resolution of an act of international terrorism directed against United States air carriers, their passengers and crew. Rewards will also be authorized for information that leads to the arrest and conviction of any person who has committed such an act. However, payment of supplemental rewards under the public-private partnership are available only if the air carrier is a member of ATA and/or the crew members are represented by ALPA. Information regarding all other incidents only have a maximum available reward of $2,000,000.00.

The Secretary of State is authorized to pay for information regarding any past, present, or planned future act of terrorism. Individuals who provide information are afforded protection of their identity by the United States government and may be eligible for relocation to the United States or elsewhere.

The State Department has an ongoing public campaign to promote awareness of the rewards program. Diplomatic posts are furnished with printed materials on the program and Public Service Announcements are broadcast featuring such movie stars as Charles Bronson, Charlton Heston and Charlie Sheen. Posters are displayed overseas in areas of high visibility acceptable to the local authorities and in the United States wherever possible. Paid advertisements have been placed in an effort to promote widespread awareness of the program, and to reach those with information. Information about the rewards is also disseminated on the Internet throughout the world.

Since the program was instituted in 1990, the United States government has disbursed rewards totaling about $3,000,000.00 in over a
dozen separate cases. ALPA and ATA have also paid out supplemental
rewards under the program. The highest single award was $750,000.00
and was paid out to an Iraqi Palestinian who provided information that
eventually led to the arrest of a leading terrorist figure. The program has
resulted in several terrorists being imprisoned and hundreds of American
lives have been saved. The most recent success of the program was the
apprehension of Ramzi Yousef who was apparently identified by a South
African who came across a matchbook cover with Yousef’s picture.

Rewards can play a prominent role in preventing terrorist attacks
or capturing terrorists. In light of the success of the United States
program, other governments should be encouraged to institute a formal
rewards program. Other countries do, of course, utilize rewards on a
case-by-case basis. This past May, Canada offered a $740,000.00 reward
for information about the 1985 Air India bombing that claimed 329 lives.
A Canadian official has stated that the “reward has given the investigation
new life” after ten years of investigation. Following the Paris commuter
train bombing of last week, French officials announced the posting of a
$200,000.00 reward. This was an unusual step for the French, and it
resulted in over 200 calls within two days.

Recently, I helped found the Foundation to Combat International
Terrorism which sought to forge a new public/private partnership with the
Department of State. It was planned that the Foundation would seek to
provide supplemental rewards of up to $2,000,000.00 to the program to
ensure that any terrorist incident involving American lives will receive the
maximum possible reward. Where appropriate, the Foundation also hoped
to assist with other areas of the program such as advertising. Unfortunately, political reasons resulted in the State Department declining
our proposal.

We are also in the process of forming the Center for the Studies of
Terrorism which will serve as a think-tank policy institute on terrorism
issues. It will maintain a terrorism database, a library, offer graduate
fellowships to promote the study of terrorism, publish policy papers, and
organize seminars on contemporary topics. We hope to hold our first
major conference early next year.

VII. CONCLUSION

In closing, terrorism is an old evil that is constantly creating new
threats to survive. With increased multilateral cooperation among States,
although we might not be able to eliminate terrorism altogether, the threat
can hopefully be sufficiently contained.