The Director of Central Intelligence

Washington, D.C. 20505

23 April 1986

Dear Abe,

Thanks for sending me your Columbia Law School talk on "Law and Terrorism."

I thought it was very good and will plagiarize from it at my first opportunity.

Yours,

Bill

William J. Casey

The Honorable Abraham D. Sofaer
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Dear Bill,
Director Casey:

Enclosed is an analysis of where I think the law stands on international terrorism. I hope you find it worthwhile.

Warm regards,

Abraham D. Sofaer

"LAW AND TERRORISM"

BY

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LAW AND TERRORISM

YOUR INVITATION TO GIVE THIS LECTURE IS A WELCOME OPPORTUNITY. IT'S GOOD TO BE BACK AT COLUMBIA, ENLISTING YOU ONCE AGAIN AS COLLEAGUES AND FRIENDS, IN AN EFFORT THAT IS INTELLECTUALLY CHALLENGING AND OF THE GREATEST PRACTICAL IMPORTANCE.

TERRORISM HAS ABSORBED A GREAT DEAL OF MY TIME DURING THE LAST NINE MONTHS. DEALING WITH THESE ISSUES HAS TAUGHT ME FIRST-HAND THE DEEP FRUSTRATION EXPERIENCED BY CIVILIZED PEOPLE AROUND THE WORLD IN ATTEMPTING TO HALT TERRORIST VIOLENCE. THE SAME QUESTIONS ARE ASKED AFTER EVERY TERRORIST EPISODE: WHY IS INTERNATIONAL TERRORISM SO LOUDLY CONDEMNED, AND YET SO PREVALENT? WHAT GOOD IS THE LAW IN FIGHTING TERRORISM? THE LAW SEEMS INEFFECTIVE IN PREVENTING OR PUNISHING THESE ACTS. THIS LECTURE PROVIDES AN OPPORTUNITY TO ADDRESS THOSE FRUSTRATIONS AND CONCERNS.

THE STOCK RESPONSE TO COMPLAINTS ABOUT THE LAW'S FAILURE TO DEAL EFFECTIVELY WITH TERRORISM IS THAT WE NEED MORE LAWS. THAT IS A MISLEADING ANSWER. IMPORTANT GAPS DO EXIST IN THE LEGAL STRUCTURE THAT GOVERNS TERRORIST ACTS, AND THIS ADMINISTRATION IS WORKING WITH CONGRESS AND OTHER NATIONS TO

CLOSE THOSE GAPS. FOR EXAMPLE, THE U.S. GOVERNMENT LACKS JURISDICTION TO PROSECUTE THE TERRORISTS WHO KILLED LEON KLINGHOFFER DURING THE ACHILLE LAURO AFFAIR, OR THE TERRORISTS WHO KILLED FOUR AMERICAN CIVILIANS ON A TWA FLIGHT EARLIER THIS WEEK. A STATUTE ESTABLISHING JURISDICTION FOR TERRORIST MURDERS OF AMERICANS HAS BEEN PASSED BY THE SENATE, AND ITS ADOPTION IN THE HOUSE WOULD BE WELCOME. BUT WHAT IS THE LIKELIHOOD THAT SIGNIFICANT IMPROVEMENT IN LAW ENFORCEMENT WOULD RESULT FROM HAVING SUCH A LAW ON THE BOOKS? WE CANNOT KID OURSELVES THAT NEW LAWS, CLOSING "GAPS," WILL OVERCOME THE PROBLEMS THAT CAUSE POOR LAW ENFORCEMENT AGAINST TERRORISTS. RECENT EVENTS HAVE DEMONSTRATED THAT, EVEN WHEN LAWS CLEARLY GOVERN PARTICULAR CONDUCT, THEY ARE OFTEN DISREGARDED OR OTHERWISE FAIL TO ACHIEVE THEIR PURPOSE.

THE LAW HAS A POOR RECORD IN DEALING WITH INTERNATIONAL TERRORISM. SOME TERRORISTS ARE KILLED OR CAPTURED DURING THE COURSE OF THEIR CRIMES. BUT FEW OF THOSE WHO GET AWAY ARE EVER FOUND AND ARRESTED. THE TERRORIST WHO IS PROSECUTED IS LIKELY TO BE RELEASED FAR EARLIER THAN HIS SENTENCE SHOULD REQUIRE, OFTEN IN EXCHANGE FOR HOSTAGES IN A SUBSEQUENT TERRORIST EPISODE.

ONE REASON FOR THIS POOR RECORD IS THAT TERRORISM IS, IN ESSENCE, CRIMINAL ACTIVITY, AND LAW CANNOT ELIMINATE CRIME. IN APPLYING LAW DOMESTICALLY, WE HOPE TO ACHIEVE A LEVEL OF CRIME

THAT PERMITS US TO CONTINUE OUR WAY OF LIFE. WE CAN EXPECT EVEN LESS OF THE LAW IN DEALING WITH INTERNATIONAL TERRORISM. THE WORLD HAS NO INTERNATIONAL POLICE FORCE OR JUDICIAL SYSTEM.

BUT THE REASONS FOR THE LAW'S FAILURE TOLERABLY TO CONTROL TERRORISM GO MUCH DEEPER THAN THE ABSENCE OF LAW ENFORCEMENT MECHANISMS. INTERNATIONAL LAW AND COOPERATION IN LESS CONTROVERSIAL AREAS HAVE PROVED REASONABLY EFFECTIVE. IN THE AREA OF TERRORISM, HOWEVER, THE LAW HAS FAILED TO SERVE OUR POINT OF VIEW.

WE HAVE TRIED TO CONTROL INTERNATIONAL TERRORISM BY CONDEMNING IT, BY TREATING IT AS PIRACY, BY PROSECUTING THE ACTS OF TERRORISTS UNDER THE LAWS OF AFFECTED STATES, BY CREATING INTERNATIONAL NORMS MAKING SOME ACTS CRIMINAL WHEREVER COMMITTED, AND BY COOPERATING THROUGH EXTRADITION AND OTHER DEVICES IN AIDING NATIONS ATTACKED BY TERRORISTS. WE WILL EXAMINE SOME OF THESE DEVICES TO SEE WHY THEY HAVE NOT WORKED.

A FRANK APPRAISAL WILL, I BELIEVE, LEAD TO A PAINFUL CONCLUSION. THE LAW APPLICABLE TO TERRORISM IS NOT MERELY FLAWED, IT IS PERVERSE. THE RULES AND DECLARATIONS SEEMINGLY DESIGNED TO CURB TERRORISM HAVE REGULARLY INCLUDED PROVISIONS THAT DEMONSTRATE THE ABSENCE OF INTERNATIONAL AGREEMENT ON THE PROPRIETY OF REGULATING TERRORIST ACTIVITY. ON SOME ISSUES,

THE LAW LEAVES POLITICAL VIOLENCE UNREGULATED. ON OTHER ISSUES THE LAW IS AMBIVALENT, PROVIDING A BASIS FOR CONFLICTING ARGUMENTS AS TO ITS PURPOSE. THE LAW HAS, IN IMPORTANT WAYS, ACTUALLY SERVED TO LEGITIMIZE INTERNATIONAL TERROR, AND TO PROTECT TERRORISTS FROM PUNISHMENT AS CRIMINALS. THESE DEFICIENCIES ARE NOT THE PRODUCT OF NEGLIGENCE OR MISTAKE. THEY ARE INTENDED.

I. Is Terrorism Wrong?

WE SHOULD BEGIN THIS PROCESS BY ASKING THE MOST FUNDAMENTAL QUESTION OF ALL: IS TERRORISM WRONG? AMERICANS TOO READILY ASSUME THAT OTHERS AGREE WITH US THAT AT LEAST CERTAIN ASPECTS OF INTERNATIONAL TERROR ARE UNACCEPTABLE. SURE, WE HEAR QADDHAFI CALLING THE KILLERS OF A FIVE YEAR OLD GIRL "HEROES," AND WE KNOW THAT OTHER FANATICS POSITIVELY APPROVE OF TERROR. BUT THE ACCEPTANCE OF TERROR IS FAR MORE WIDESPREAD. MANY NATIONS REGARD TERRORISM AS A LEGITIMATE MEANS OF WARFARE.

THE GENERAL ASSEMBLY BEGAN GIVING SPECIAL ATTENTION TO THE SUBJECT OF TERRORISM AFTER TWO ESPECIALLY HEINOUS ACTIONS. ON MAY 30, 1972, JAPANESE TERRORISTS, WORKING WITH THE PFLP, ATTACKED CIVILIAN PASSENGERS AT LOD AIRPORT IN ISRAEL WITH AUTOMATIC WEAPONS, KILLING 28 AND WOUNDING 78. ON SEPTEMBER 5, 1972, TERRORISTS FROM THE BLACK SEPTEMBER ORGANIZATION MURDERED 11 MEMBERS OF THE ISRAELI OLYMPIC TEAM IN MUNICH.

ON SEPTEMBER 8, SECRETARY GENERAL WALDHEIM ASKED FOR INCLUSION IN THE UNGA AGENDA OF AN ITEM ENTITLED, "MEASURES TO PREVENT TERRORISM AND OTHER FORMS OF VIOLENCE WHICH ENDANGER OR TAKE INNOCENT HUMAN LIVES OR JEOPARDIZE FUNDAMENTAL FREEDOMS." HE URGED, "THAT ALL CONCERNED TURN AWAY FROM SENSELESS AND DESTRUCTIVE VIOLENCE," AND NOTED THAT THE WORLD COMMUNITY SHOULD CONTINUE "TO EXERT ITS UTMOST INFLUENCE IN SEEKING PEACEFUL WAYS" TO FIND SOLUTIONS "FOR THE PROBLEMS UNDERLYING SUCH ACTS OF TERRORISM . . . ."

THE SECRETARY GENERAL'S STATEMENT EVOKED ANGRY OPPOSITION, WHICH TOOK THE IMMEDIATE FORM OF PROTESTS AGAINST CONSIDERING TERRORISM WITHOUT CONSIDERING ITS CAUSES. THE SECRETARY GENERAL REITERATED HIS REQUEST ON SEPTEMBER 20, BUT ADDED THAT IT IS NO GOOD TO CONSIDER TERRORISM "WITHOUT AT THE SAME TIME CONSIDERING THE UNDERLYING SITUATIONS WHICH GIVE RISE TO TERRORISM AND VIOLENCE IN MANY PARTS OF THE WORLD." HE THEN SAID:

> THE ROOTS OF TERRORISM AND VIOLENCE IN MANY CASES LIE IN MISERY, FRUSTRATION, GRIEVANCE AND DESPAIR SO DEEP THAT MEN ARE PREPARED TO SACRIFICE HUMAN LIVES, INCLUDING THEIR OWN, IN THE ATTEMPT TO EFFECT RADICAL CHANGES.

HE ASSURED THE GENERAL ASSEMBLY "IT IS NOT MY INTENTION, IN PROPOSING THE INCLUSION OF THIS ITEM, TO AFFECT PRINCIPLES

ENUNCIATED FOR PEOPLES SEEKING INDEPENDENCE AND LIBERATION."

THE TWO POINTS MADE BY MR. WALDHEIM MAY SEEM INNOCUOUS TO ORDINARY PEOPLE. IN THE U.N., HOWEVER, THEY WERE OF BOTH THEORETICAL AND PRACTICAL SIGNIFICANCE. ON THE THEORETICAL LEVEL, TO ATTRIBUTE ACTS OF TERRORISM TO INJUSTICE AND FRUSTRATION TENDS TO JUSTIFY OR AT LEAST EXCUSE THOSE ACTS. THIS IS ESPECIALLY SO WHEN THE CAUSES ARE ALL ASSUMED TO BE SYMPATHETIC. THE LANGUAGE CONCERNING EFFORTS TO SEEK "INDEPENDENCE," AND "LIBERATION," RELATED TO THE PRINCIPLES WHICH HAD BY THEN BEEN ADOPTED IN U.N. RESOLUTIONS SUPPORTING "SELF-DETERMINATION" AND WARS OF NATIONAL LIBERATION, IN THE PURSUIT OF WHICH OPPRESSED PEOPLE WERE SAID TO BE ABLE TO RESORT TO ALL AVAILABLE MEANS, INCLUDING ARMED STRUGGLE.

THE GENERAL COMMITTEE DEBATE ON WALDHEIM'S PROPOSAL TOOK UP THE QUESTION OF THE CAUSES OF TERRORISM, AS WELL AS THE CONCEPTS OF SELF-DETERMINATION AND WARS OF NATIONAL LIBERATION. MANY STATES OPPOSED ADDING TERRORISM TO THE AGENDA. SOME STRONGLY SUGGESTED THEIR SUPPORT FOR TERRORIST ACTIONS. ONE REPRESENTATIVE SAID, FOR EXAMPLE, THAT THE EXPRESSION TERRORIST "CAN HARDLY BE HELD TO APPLY TO PERSONS WHO WERE DENIED THE MOST ELEMENTARY HUMAN RIGHTS, DIGNITY, FREEDOM AND INDEPENDENCE AND WHOSE COUNTRIES OBJECTED TO FOREIGN OCCUPATION." CITING SITUATIONS IN AFRICA, THE MIDDLE EAST, AND ASIA, HE SAID "SUCH PEOPLES COULD NOT BE BLAMED FOR

COMMITTING DESPERATE ACTS WHICH IN THEMSELVES WERE REPREHENSIBLE; RATHER, THE REAL CULPRITS WERE THOSE WHO WERE RESPONSIBLE FOR CAUSING SUCH DESPERATION . . . ."

IN THE GENERAL ASSEMBLY THE ITEM WAS AMENDED TO INCLUDE WALDHEIM'S LANGUAGE ON CAUSES OF TERRORISM, AND THE MATTER WAS REFERRED TO THE SIXTH COMMITTEE, WHERE REPRESENTATIVES VERY CLEARLY SUPPORTED THE RIGHT OF NATIONAL LIBERATION MOVEMENTS "TO UNDERTAKE ANY TYPE OF ACTION TO ENSURE THAT THEIR COUNTRIES ATTAINED INDEPENDENCE . . . ." ANOTHER REPRESENTATIVE REJECTED ANY PROPOSAL OF "RULES FOR THE PURPOSE OF ASSIGNING LEGAL LIMITS" TO REVOLUTIONARY ARMED STRUGGLE. "THE METHODS OF COMBAT USED BY NATIONAL LIBERATION MOVEMENTS COULD NOT BE DECLARED ILLEGAL WHILE THE POLICY OF TERROR UNLEASHED AGAINST CERTAIN PEOPLES WAS DECLARED LEGITIMATE." YET ANOTHER SPEAKER COULD NOT HAVE BEEN CLEARER IN THIS REGARD. HE SAID:

> ACTS OF TERRORISM INSPIRED BY BASE MOTIVES OF PERSONAL GAIN WERE TO BE CONDEMNED. ACTS OF POLITICAL TERRORISM, ON THE OTHER HAND, UNDERTAKEN TO VINDICATE HALLOWED RIGHTS RECOGNIZED BY THE UNITED NATIONS, WERE PRAISEWORTHY. IT WAS, OF COURSE, REGRETTABLE THAT CERTAIN ACTS IN THE LATTER CATEGORY AFFECTED INNOCENT PERSONS.

AND ONE REPRESENTATIVE PRESENTED THE PHILOSOPHICAL RATIONALE

USED SINCE TIME IMMEMORIAL TO JUSTIFY TERROR:

> HIS DELEGATION DID NOT AGREE WITH THE STATEMENT IN THE SECRETARIAT'S REPORT THAT THE LEGITIMACY OF A CAUSE DID NOT ITSELF JUSTIFY RECOURSE TO CERTAIN FORMS OF VIOLENCE; THOSE SERVING THE CAUSE IN QUESTION SHOULD HAVE A CHOICE OF MEANS TO BE USED.

THESE POSITIONS WERE REPEATED IN ONE FORM OR ANOTHER FOR THIRTEEN YEARS. DURING THAT PERIOD, THE ASSEMBLY PASSED SEVEN RESOLUTIONS AS PART OF ITS CONSIDERATION OF TERRORISM AND ITS CAUSES. THE FIRST, ADOPTED ON DECEMBER 18, 1972, HAD LITTLE TO SAY ABOUT THE FORMS OF TERRORISM WHICH LED TO THE SUBJECT'S BEING PLACED ON THE AGENDA. IT EXPRESSED "DEEP CONCERN" OVER INCREASED ACTS OF VIOLENCE WHICH TAKE INNOCENT LIVES OR JEOPARDIZE FUNDAMENTAL FREEDOMS, AND INVITED STATES TO CONSIDER JOINING RELEVANT CONVENTIONS. BUT THE RESOLUTION WAS A VICTORY FOR THOSE WHO SUPPORTED THE RIGHT TO USE ALL AVAILABLE MEASURES TO ADVANCE THE ENDS OF SELF-DETERMINATION AND WARS OF NATIONAL LIBERATION. THE RESOLUTION IN FACT CONDEMNED ONLY ONE THING: "THE CONTINUATION OF REPRESSIVE AND TERRORIST ACTS BY COLONIAL, RACIST AND ALIEN REGIMES. . . ."

IN 1974, THE UNGA DEFINED AGGRESSION. WHILE ITS RESOLUTION PROHIBITED AGGRESSION, ARTICLE 7 SPECIFICALLY PRESERVED THE RIGHT TO SELF-DETERMINATION AND TO STRUGGLE AGAINST ALL FORMS OF ALIEN DOMINATION IN ACCORDANCE WITH THE CHARTER. WITHIN

DAYS OF THE RESOLUTION'S ADOPTION, THE ASSEMBLY ADMITTED THE PALESTINE LIBERATION ORGANIZATION TO OBSERVER STATUS, AND RECOGNIZED THE RIGHT OF PALESTINIANS TO REGAIN THEIR NATION "BY ALL MEANS IN ACCORDANCE WITH THE PURPOSES AND PRINCIPLES OF THE CHARTER. . . ."

THE TERRORISM RESOLUTION ADOPTED IN 1977 ADDED AN IMPORTANT ELEMENT. IT INVITED THE AD HOC COMMITTEE SET UP TO STUDY TERRORISM, TO STUDY FIRST THE UNDERLYING CAUSES OF TERROR, AND THEN TO RECOMMEND MEASURES TO DEAL WITH ACTS OF TERRORISM. THE 1979 RESOLUTION FOR THE FIRST TIME CONDEMNED ACTS OF TERROR, BUT IT REFERRED TO THE PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTION, WHICH SEEK TO GIVE GROUPS FIGHTING WARS OF NATIONAL LIBERATION THE PROTECTION OF THE LAWS OF WAR. FINALLY, IN DECEMBER 1985, AFTER A FURTHER SERIES OF TERRORIST ACTS, THE ASSEMBLY ADOPTED A RESOLUTION THAT "UNEQUIVOCALLY CONDEMNS AS CRIMINAL ALL ACTS OF TERRORISM," AND CONTAINS SEVERAL PROVISIONS CALLING FOR INTERNATIONAL COOPERATION AGAINST TERRORISM. AT THE SAME TIME, HOWEVER, THE RESOLUTION REAFFIRMED THE INALIENABLE RIGHT TO SELF-DETERMINATION, AND THE LEGITIMACY OF STRUGGLES AGAINST COLONIAL AND RACIST REGIMES, AND OTHER FORMS OF ALIEN DOMINATION. THE DEBATES BOTH BEFORE AND AFTER THIS RESOLUTION WAS ADOPTED MAKE CLEAR THAT MANY STATES CONTINUE TO BELIEVE THAT WARS OF NATIONAL LIBERATION JUSTIFY OR EXCUSE TERRORIST ACTS. TERRORISM, THEY CONTEND, DOES "NOT INCLUDE ACTS BY MEMBERS OF NATIONAL LIBERATION

MOVEMENTS AND OPPONENTS OF RACISM."

THE WIDE ACCEPTANCE OF THE PREMISE THAT TERRORIST ACTS CAN BE LAWFUL IN THE PURSUIT OF PROPER GOALS IS AN UNEASY FIRST LESSON. THE U.S. ALSO RECOGNIZES THAT OPPRESSED PEOPLE ARE SOMETIMES JUSTIFIED IN RESORTING TO FORCE, BUT ONLY IF PROPERLY EXERCISED. THE DEBATES AND RESOLUTIONS RELATING TO TERRORISM DO NOT SUGGEST PRINCIPLED LIMITS ON THE USE OF FORCE, OR ANY REASONED, FAIR-MINDED BASIS FOR DETERMINING WHICH PEOPLES ARE ENTITLED TO WAGE WARS OF NATIONAL LIBERATION. THE RESULT IS A CLEAR SIGNAL TO ALL THAT THOSE GROUPS DEEMED BY THE MAJORITY TO BE OPPRESSED WILL BE FREE LEGALLY TO USE FORCE, AND THEREFORE CANNOT FAIRLY BE CALLED TERRORISTS. IN OTHER WORDS, ACTS OF TERRORISM BY SUCH PEOPLE ARE NOT WRONG, AND THE LAW HAS NO PROPER ROLE IN PUNISHING OR DETERRING SUCH ACTS

II. Extradition and Political Crimes

OUR NEXT SUBJECT IS EXTRADITION, A CENTRAL ASPECT OF THE EFFORT TO USE LAW TO COMBAT INTERNATIONAL TERRORISM. EXTRADITION TREATIES BETWEEN STATES INVARIABLY MAKE EXTRADITABLE THOSE CRIMES WE ASSOCIATE WITH TERRORISM, SUCH AS MURDER, BOMBINGS, ARMED ASSAULTS, AND ROBBERY. IN ADDITION, MOST STATES HAVE AGREED TO EXTRADITE FOR VIOLATIONS OF THE MULTILATERAL CONVENTIONS AGAINST HIJACKINGS, ASSAULTS ON DIPLOMATS, AND HOSTAGE TAKING. DESPITE THESE PROVISIONS,

STATES FREQUENTLY REFUSE TO EXTRADITE TERRORISTS, OFTEN BECAUSE THE OFFENSE CHARGED IS "POLITICAL."

SOME RELATIVELY RECENT DECISIONS, DENYING EXTRADITION ON THE GROUND THAT THE CHARGE IS A "POLITICAL OFFENSE," SHOULD ILLUSTRATE HOW DETRIMENTAL THE LAW CAN BE IN THE BATTLE AGAINST TERRORISM. IN 1976, ONE NATION REFUSED TO EXTRADITE FIVE INDIVIDUALS WHO HIJACKED A PLANE IN THE U.S., EXTORTED $1 MILLION, AND FLEW TO ALGERIA WHERE THEY WERE RECEIVED AS POLITICAL MILITANTS. THEY PRESENTED NO EVIDENCE OF POLITICAL INVOLVEMENT, BEYOND THE CLAIM THAT THEY WERE ESCAPING RACIAL SEGREGATION IN AMERICA AND WERE ASSOCIATED WITH THE "BLACK LIBERATION MOVEMENT." WE FAILED TO OBTAIN THE EXTRADITION OF ABU ABBAS FROM TWO STATES, ONE OF WHICH CLAIMED HE WAS ENTITLED TO DIPLOMATIC IMMUNITY.

SOME U.S. DECISIONS ARE EQUALLY DISTURBING. OUR COURTS REFUSED TO EXTRADITE ARTUKOVICH TO YUGOSLAVIA FOR THE ALLEGED MALICIOUS MURDERS OF 200,000 CROATIANS IN CONCENTRATION CAMPS. A FEDERAL COURT DETERMINED THAT THESE MURDERS WERE "POLITICAL." IN FOUR RECENT CASES, OUR COURTS HAVE REFUSED TO EXTRADITE PIRA GUNMEN, ON THE GROUNDS THAT AN UPRISING EXISTS IN NORTHERN IRELAND, WHICH MAKES CRIMES IN FURTHERANCE OF THE REVOLT "POLITICAL."

HOW DID WE GET TO THE POINT OF GIVING SANCTUARY TO

TERRORISTS WHO KILL PEOPLE TO HAVE THEIR WAY IN A DEMOCRACY SUCH AS THE U.K.? OR TO A MASS MURDERER? THE STORY IS BOTH INTERESTING AND INSTRUCTIVE.

THE POLITICAL OFFENSE EXCEPTION HAS NOBLE ROOTS. IT DEVELOPED IN THE PERIOD OF THE FRENCH AND AMERICAN REVOLUTIONS, AND REFLECTED THE VALUE THE NEW DEMOCRACIES PLACED UPON POLITICAL FREEDOM. JEFFERSON COMMENTED, FOR EXAMPLE, THAT "UNSUCCESSFUL STRUGGLERS AGAINST TYRANNY HAVE BEEN THE CHIEF MARTYRS OF TREASON LAWS IN ALL COUNTRIES." AT THAT TIME, POLITICAL OFFENSES WERE ASSOCIATED WITH ACTS AGAINST THE SECURITY OF A STATE, SUCH AS TREASON, REBELLION, AND SEDITION.

THE CONCEPT WAS SOON EXPANDED, HOWEVER, TO SO-CALLED RELATIVE POLITICAL OFFENSES -- ORDINARY CRIMES COMMITTED IN A POLITICAL CONTEXT OR WITH POLITICAL MOTIVATION. THE LEADING CASE IN THIS RESPECT IS IN RE CASTIONI, WHERE THE ENGLISH COURTS DENIED EXTRADITION FOR A KILLING THAT OCCURRED IN THE MIDST OF A DEMONSTRATION AGAINST THE GOVERNMENT OF A SWISS CANTON FOR REFUSING TO PUT THE QUESTION OF A NEW CONSTITUTION TO A POPULAR VOTE. THE SHOOTING SERVED NO MILITARY PURPOSE. BUT THE COURT FOUND IT "POLITICAL" BECAUSE IT WAS INCIDENTAL TO AND A PART OF A POLITICAL DISTURBANCE. EVEN IF AN ACT IS "CRUEL AND AGAINST ALL REASON," THE COURT HELD, ITS PERPETRATOR IS PROTECTED IF HE ACTED "FOR THE PURPOSE OF FURTHERING AND IN FURTHERANCE OF A POLITICAL RISING . . . ." CASTIONI WAS

QUICKLY QUALIFIED IN ENGLAND. WHEN IN 1894 ONE OF THE MANY ANARCHISTS OF THE PERIOD, MEUNIER, WAS EXTRADITED TO FRANCE FOR PLACING BOMBS IN A PARISIAN CAFE AND AN ARMY BARRACKS. BUT IT TOOK HOLD IN THE U.S. AND ELSEWHERE.

IN 1894, THE SAME YEAR MEUNIER WAS DECIDED, A U.S. COURT IN IN RE EZETA REFUSED TO EXTRADITE HIGH OFFICIALS OF SALVADOR ACCUSED OF MURDERS IN THEIR UNSUCCESSFUL EFFORT TO RETAIN POWER. RELYING ON CASTIONI, THE COURT HELD THAT ALL ACTS ASSOCIATED WITH AN UPRISING WERE POLITICAL OFFENSES. THE COURT ACCEPTED WITHOUT DISCUSSION THE PREMISE THAT THE DOCTRINE WAS POLITICALLY NEUTRAL, AND THAT PROTECTION SHOULD BE GIVEN EQUALLY TO DEMOCRATS AND DICTATORS. IT ALSO EXPLICITLY REJECTED THE NOTION THAT THE OFFENDER'S CONDUCT IN KILLING NONCOMBATANTS COULD DISQUALIFY HIM FROM THE DOCTRINE'S PROTECTION. DURING HOSTILITIES, SAID THE COURT, "CRIMES MAY HAVE BEEN COMMITTED BY THE CONTENDING FORCES OF THE MOST ATROCIOUS AND INHUMAN CHARACTER, AND STILL THE PERPETRATORS OF SUCH CRIMES ESCAPE PUNISHMENT AS FUGITIVES BEYOND THE REACH OF EXTRADITION."

THE RULINGS AND DICTA IN EZETA HAD SOME SUPPORT IN U.S. AND FOREIGN PRACTICE DURING THE NINETEENTH CENTURY. GRANTING ASYLUM TO REVOLUTIONARIES WAS SEEN AS ENLIGHTENED. BUT THE POLITICAL OFFENSE DOCTRINE HAS ANOTHER SIDE. SEVERAL INCIDENTS, DIPLOMATIC DECISIONS, AND RULINGS DURING THE

NINETEENTH AND TWENTIETH CENTURIES INDICATE THAT THE U.S. AND OTHER COUNTRIES HAVE TAKEN THEIR PARTICULAR INTERESTS AND POLITICAL IDEALS INTO ACCOUNT IN FORMULATING THE DOCTRINE'S PRECISE CONTOURS. THIS HAS LED TO CERTAIN MODIFICATIONS AND LIMITATIONS OF THE POLITICAL OFFENSE CONCEPT.

A PARTICULARLY DRAMATIC INSTANCE FOLLOWED THE ASSASSINATION OF PRESIDENT LINCOLN. DESPITE THE POLITICAL NATURE OF THE CRIME THE U.S. SOUGHT AND OBTAINED COOPERATION FOR THE POSSIBLE APPREHENSION ABROAD OF BOOTH AND ONE OF HIS SUSPECTED CONSPIRATORS. ONE SUSPECT ACTUALLY WAS CAPTURED IN EGYPT, AND SENT BACK TO THE U.S. ON AN AMERICAN PUBLIC VESSEL. THE NEED TO PROTECT HEADS OF STATE WAS RECOGNIZED BY OTHER STATES AS WELL, AND IS NOW A WIDELY ACCEPTED QUALIFICATION TO POLITICAL-OFFENSE TREATMENT.

STATES HAVE ALWAYS FELT FREE TO ADOPT, REJECT, OR MODIFY THE POLITICAL OFFENSE DOCTRINE TO SUIT THEIR INTERESTS. DURING THE CIVIL WAR, FOR EXAMPLE, THE U.S. SEIZED IN MOROCCO, WITH THE ACQUIESENCE OF THE GOVERNOR, TWO CONFEDERATE SAILORS ASHORE TO OBTAIN COAL. AN OBJECTION WAS RAISED THAT THE SAILORS SHOULD HAVE BEEN ALLOWED TO ASSERT THE POLITICAL OFFENSE DOCTRINE. SECRETARY SEWARD REJECTED THE ARGUMENT, REASONING THAT THESE MEN WERE "TAKEN IN THE VERY ACT OF WAR AGAINST THIS GOVERNMENT." A SIMILAR INSTANCE OCCURRED WHEN FRANCE AND BELGIUM AGREED TO SURRENDER INDIVIDUALS CONVICTED OF CRIMES

DURING WORLD WAR II. AN OFFENDER CLAIMED THE SPYING AND ASSASSINATION WITH WHICH HE WAS CHARGED WERE POLITICAL OFFENSES. THE FRENCH COURTS REJECTED THE ARGUMENT BECAUSE FRANCE COULD NOT BE DEEMED A NEUTRAL ON THE ISSUE: "THE OFFENSE WAS COMMITTED IN TIME OF WAR BOTH AGAINST AN ALLY AND AGAINST FRANCE, WHOSE INTERESTS WERE LINKED."

THE MORE RECENT PROBLEM OF AIRCRAFT HIJACKING FURTHER DEMONSTRATES HOW THE DOCTRINE CAN BE APPLIED IN ACCORDANCE WITH OUR NATIONAL INTERESTS. DURING THE 1950'S, DESPITE OUR STRONG OPPOSITION TO AIRCRAFT HIJACKINGS, WE (AND OUR WESTERN ALLIES) REFUSED REQUESTS FROM CZECHOSLAVAKIA, THE U.S.S.R., POLAND, YUGOSLAVIA, AND OTHER TOTALITARIAN REGIMES FOR THE RETURN OF PERSONS WHO HIJACKED TO ESCAPE FROM THOSE REGIMES. WHEN AIRCRAFT HIJACKING REACHED EPIDEMIC PROPORTIONS IN THE LATE 60'S AND EARLY 70'S WE DETERMINED THAT HIJACKINGS WERE TOO SERIOUS A PROBLEM, AND TOO GREAT A THREAT TO THE SAFETY OF INNOCENT PASSENGERS, TO BE TOLERATED. WE REEXAMINED THE POLICY AND "CONCLUDED THAT THE HIJACKER OF A COMMERCIAL AIRCRAFT CARRYING PASSENGERS FOR HIRE SHOULD BE RETURNED REGARDLESS OF ANY CLAIM HE WAS FLEEING POLITICAL PERSECUTION." WE SUGGESTED, DURING CONSIDERATION OF THE HAGUE CONVENTION ON HIJACKING, TO ELIMINATE THE POLITICAL OFFENSE EXCEPTION FOR THAT CRIME. THE EXCEPTION WAS RETAINED, HOWEVER, IN BOTH THE HIJACKING AND THE MONTREAL SABOTAGE CONVENTIONS, THEREBY AUTHORIZING STATES TO REFUSE EXTRADITION ON POLITICAL GROUNDS.

PRIOR PRACTICE SHOWS, THEREFORE, THAT WE HAVE PRINCIPLED GROUNDS UPON WHICH TO APPLY THE POLITICAL OFFENSE EXCEPTION SO IT SERVES OUR NATIONAL VALUES AND INTERESTS RATHER THAN THOSE OF TERRORISTS AND NATIONS WHICH SPONSOR TERRORISM. AS A FIRST STEP, WE SHOULD REVISE OUR TREATIES WITH DEMOCRATIC ALLIES TO NARROW THE POLITICAL OFFENSE EXCEPTION TO MAKE IT INAPPLICABLE TO CRIMES OF VIOLENCE AND BREACHES OF ANTITERRORIST CONVENTIONS. WE ARE OPPOSED TO REBELLIONS, REVOLUTIONS, AND POLITICAL ASSASSINATION IN DEMOCRACIES, AND WE SHOULD NOT PERMIT A DOCTRINE BORN TO REFLECT OUR BELIEF IN FREEDOM TO SERVE THE INTERESTS OF THOSE SEEKING TO IMPOSE UNDEMOCRATIC VIEWS THROUGH FORCE. IN THIS SENSE, WE ARE IN A SITUATION VERY SIMILAR TO THAT IN WHICH FRANCE AND BELGIUM FOUND THEMSELVES DURING WORLD WAR II; TERRORIST ACTS AGAINST ANY ONE OF THE DEMOCRACIES CAN LEGITIMATELY BE SEEN AS PART OF A WAR AGAINST US ALL.

TO ADVANCE THIS OBJECTIVE, WE RECENTLY SIGNED A SUPPLEMENTAL TREATY WITH GREAT BRITAIN, WHICH NARROWS THE POLITICAL OFFENSE DOCTRINE TO NONVIOLENT CRIMES. SIMILAR TREATIES WITH OTHER NATIONS ARE IN THE WORKS. BUT WE HAVE RUN INTO FIERCE OPPOSITION IN THE SENATE TO THE PROPOSED TREATY WITH GREAT BRITAIN. INTENSE LOBBYING AND STRONG, EMOTIONAL CONCERN ABOUT THE IRISH PROBLEM MAY LEAD THE SENATE TO REFUSE TO RATIFY THIS TREATY. THAT WOULD BE A GRAVE SETBACK. IT

WOULD MAKE US NO BETTER THAN THE OTHER NATIONS THAT HAVE THEIR FAVORITE TERRORISTS. IF WE FAIL TO REJECT ABSOLUTELY THE USE OF FORCE IN A DEMOCRACY THAT IS OUR CLOSEST ALLY, WE WILL LOSE OUR CREDIBILITY IN URGING OTHER STATES TO COOPERATE IN OUR OWN EFFORTS AGAINST TERRORISM.

WE WILL NEED TO DEVELOP OTHER IDEAS AS WELL. WE MUST ESTABLISH THE PRINCIPLE, FOR EXAMPLE, THAT THE POLITICAL OFFENSE EXCEPTION WOULD NOT BE APPLIED FOR VIOLATIONS OF ESTABLISHED HUMAN RIGHTS. WE ALSO NEED TO BE MORE COOPERATIVE WITH ALL NATIONS IN CONNECTION WITH VIOLATIONS OF ANTITERRORIST MULTILATERAL CONVENTIONS, EVEN THOSE WHO ARE NOT OUR ALLIES. WE HAVE A COMMON INTEREST IN REPRESSING SOME FORMS OF POLITICAL VIOLENCE, WHATEVER THE ALLEGED CAUSE OR JUSTIFICATION.

III. Terrorism as Piracy

PIRACY PROVIDES A RICH SOURCE OF EXPERIENCE BY WHICH TO UNDERSTAND HOW LAW HAS DEALT WITH POLITICALLY MOTIVATED CRIME. THE ACHILLE LAURO INCIDENT PRESENTED THE QUESTION WHETHER THE ACTS OF THE HIJACKERS OF THAT VESSEL CONSTITUTED PIRACY "UNDER THE LAW OF NATIONS," AND WERE THEREFORE A FELONY UNDER U.S. LAW. THE HIJACKERS STOLE MONEY AND JEWELRY FROM THE SHIP'S PASSENGERS, BUT THEIR PRIMARY PURPOSES WERE POLITICAL. THEY WERE ALLEGEDLY SEEKING TO COMMIT ACTS OF VIOLENCE IN ISRAEL, WHERE THE VESSEL PLANNED TO DOCK, AND AFTER TAKING CONTROL THEY

DEMANDED THAT ISRAEL RELEASE CERTAIN TERRORISTS IT HAD IMPRISONED. IS SUCH AN ENTERPRISE "PIRACY"?

THE ANCIENT LAW OF PIRACY COULD HAVE BEEN ONE VEHICLE FOR REACHING TERRORISTS, WITH FEWER LOOPHOLES FOR POLITICAL CRIMES THAN RECENT CONVENTIONS. BUT PIRACY HAS BEEN DEFINED IN THE U.N. CONVENTION ON THE LAW OF THE SEA, AND IN THE 1958 GENEVA CONVENTION ON THE HIGH SEAS, AS ANY ILLEGAL ACT OF VIOLENCE, DETENTION, OR DEPREDATION, COMMITTED AGAINST A SHIP "FOR PRIVATE ENDS." THE PRIVATE-ENDS REQUIREMENT WAS USED DELIBERATELY TO EXCLUDE ACTS WITH PUBLIC OR POLITICAL ENDS. THE SPECIAL RAPPORTEUR FOR THE INTERNATIONAL LAW COMMISSION, WHICH DRAFTED THE GENEVA CONVENTION, EXPLAINED THAT "HE HAD DEFINED AS PIRACY ACTS OF VIOLENCE OR DEPREDATION COMMITTED FOR PRIVATE ENDS, THUS LEAVING OUTSIDE THE SCOPE OF THE DEFINITION ALL WRONGFUL ACTS PERPETRATED FOR A POLITICAL PURPOSE."

THE DECISION TO LIMIT THE DEFINITION OF PIRACY TO WRONGFUL ACTIONS TAKEN FOR "PRIVATE ENDS" HAD, AND CONTINUES TO HAVE, GREAT SIGNIFICANCE. THE CONVENTION ON THE HIGH SEAS WAS INTENDED TO CONFIRM THE EXISTENCE OF UNIVERSAL JURISDICTION FOR ANY STATE TO CAPTURE AND PUNISH ALL PERSONS WHO COMMITTED WRONGFUL ACTS ON THE HIGH SEAS OR IN THE AIR, OR IN ANY OTHER PLACE WHERE NO STATE HAS JURISDICTION. THE CONVENTION, IN FACT, GOES FURTHER THAN MERELY PERMITTING STATES TO ACT. ARTICLE 14 PROVIDES THAT "ALL STATES SHALL COOPERATE TO THE

FULLEST POSSIBLE EXTENT IN THE REPRESSION OF PIRACY . . . ." AND THE COMMENTARY TO THIS PROVISION STATES THAT "ANY STATE HAVING AN OPPORTUNITY OF TAKING MEASURES AGAINST PIRACY, AND NEGLECTING TO DO SO, WOULD BE FAILING IN A DUTY LAID UPON IT BY INTERNATIONAL LAW." BY NARROWING THE DEFINITION OF PIRACY, THE CONVENTION EXCLUDED FROM THIS INTERNATIONAL DUTY TO REPRESS PIRACY "TO THE FULLEST POSSIBLE EXTENT," ALL POLITICALLY MOTIVATED ATTACKS ON VESSELS AND AIRCRAFT.

THIS MISSED OPPORTUNITY TO SUPPRESS TERRORISM WAS NOT REQUIRED NOR EVEN SUPPORTED BY TRADITIONAL DOCTRINE. PIRACY LAW HAD LONG EXEMPTED STATE VESSELS AND RECOGNIZED BELLIGERENTS, WHEN THEY ENGAGED IN LAWFUL ACTS OF WAR. WRITERS WHO BELIEVED THAT INSURGENTS SHOULD NOT BE TREATED AS PIRATES REASONED THAT THEY WERE THE ENEMIES, NOT OF MANKIND, BUT ONLY OF A PARTICULAR STATE. THIS RECOGNIZED EXEMPTION APPLIED, HOWEVER, ONLY IF THE INSURGENT VESSEL "CONFINES ITSELF TO DEPREDATIONS AGAINST ITS OWN COUNTRY. . . ." BY FAILING TO ABIDE BY THIS TRADITIONAL RULE, THE CONVENTION COMES OUT SQUARELY AGAINST ALLOWING STATES TO RELY ON THE UNIVERSAL JURISDICTION AS A BASIS FOR REPRESSING POLITICALLY MOTIVATED CRIMES AS PIRATICAL ACTS.

CONCEIVABLY, THE CONVENTION COULD BE READ TO COVER INDISCRIMINATE ATTACKS ON CIVILIANS, OR ATTACKS MOTIVATED BY RACE OR NATIONALITY, HAVING NO ORDINARY RELATIONSHIP TO AN

INSURGENCY, SUCH AS THE MURDER OF KLINGHOFFER. BUT THE INSURGENTS INVOLVED WOULD NO DOUBT CLAIM THEY WERE ACTING POLITICALLY, EVEN IN KILLING KLINGHOFFER, AND HENCE COULD NOT BE CALLED PIRATES UNDER THE CONVENTION.

WE MUST REVERSE THE PRIVATE-ENDS REQUIREMENT, AND REVERSE THE CONVENTION IN ANY OTHER RESPECTS NECESSARY TO ENABLE NATIONS MORE EFFECTIVELY TO SUPPRESS TERRORIST ACTS. PIRACY FOR PUBLIC ENDS IS A GRATER INTERNATIONAL EVIL THAN PIRACY FOR PRIVATE ENDS, AND SHOULD BE REGULATED ACCORDINGLY.

IV. TERRORISM AND THE LAWS OF WAR

THE LAWS OF WAR MARK THE LINE BETWEEN WHAT IS CRIMINAL AND WHAT IS AN ACT OF COMBAT. A PERSON WHO KILLS SOMEONE IS NORMALLY A MURDEROR. IF HE DOES IT DURING COMBAT, HOWEVER, HE IS A SOLDIER AND CAN ONLY BE HELD AS A POW AND PUNISHED IF THE KILLING IS IMPROPER UNDER THE LAWS OF WAR. RADICAL GROUPS RESPNSIBLE FOR TERRORIST ACTS HAVE LONG SOUGHT LEGITIMACY FOR THEIR CRIMES BY SECURING TREATMENT UNDER THE LAWS OF WAR AS COMBATANTS RATHER THAN CRIMINALS.

THE EFFORT OF RADICAL GROUPS TO ACQUIRE LEGAL LEGITIMACY HAD A SIGNIFICANT SUCCESS IN THE GENEVA DIPLOMATIC CONFERENCE ON THE REAFFIRMATION OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT, WHICH SAT BETWEEN 1974 AND 1977.

THE CONFERENCE, UNDER THE AUSPICES OF THE INTERNATIONAL COMMITTEE FOR THE RED CROSS ("ICRC"), WAS CALLED TO IMPROVE THE LAWS OF WAR SET FORTH IN THE GENEVA CONVENTIONS OF 1949. IT PRODUCED TWO ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS, ONE DEALING WITH INTERNATIONAL, THE OTHER WITH NON-INTERNATIONAL, ARMED CONFLICT.

THE ICRC AND THE CONFERENCE DEVELOPED MANY CONSTRUCTIVE IDEAS TO HELP MINIMIZE THE SUFFERING OF COMBATANTS AND NONCOMBATANTS IN ARMED CONFLICT. BUT FROM THE BEGINNING OF THE CONFERENCE, AN EFFORT BEGAN TO EXTEND THE LAW OF INTERNATIONAL ARMED CONFLICTS TO COVER THE PLO AND OTHER RADICAL GROUPS, MANY OF WHOM WERE ACCORDED OBSERVER STATUS.

THE FIRST SUBSTANTIVE ADDRESS, AFTER ELECTION OF THE CONFERENCE PRESIDENT, URGED THE CONFERENCE TO RECOGNIZE "CERTAIN VALUES AND ELEMENTARY RIGHTS WHICH WENT BEYOND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS," BECAUSE MILLIONS WERE "STILL UNDER COLONIAL OPPRESSION IN THE AFRICAN CONTINENT, WHILE INTERNATIONAL ZIONISM HAD PLACED THE PALESTINIAN POPULATION IN AN IMPOSSIBLE SITUATION." THE SPEAKER ASKED THE CONFERENCE TO CONSIDER, NOT ONLY EFFECTS, BUT CAUSES AS WELL, AND TO RECOGNIZE "THERE WERE SUCH THINGS AS JUST WARS." HE SAID: "IT WAS QUITE OBVIOUS THAT IT WAS THE ZIONISTS WHO WANTED TO THROW THE ARABS INTO THE SEA . . .. [AND THAT] NATIONAL LIBERATION MOVEMENTS DID NOT WANT TO SHED BLOOD, ONLY TO SECURE

RECOGNITION OF THEIR RIGHTS."

THE CONFERENCE ADOPTED IN ITS FIRST SESSION WHAT IS NOW ARTICLE 1(4) OF PROTOCOL I. THIS ARTICLE MAKES THE LAWS OF INTERNATIONAL ARMED CONFLICT APPLICABLE TO "ARMED CONFLICTS IN WHICH PEOPLES ARE FIGHTING AGAINST COLONIAL DOMINATION AND ALIEN OCCUPATION AND AGAINST RACIST RÉGIMES IN THE EXERCISE OF THE RIGHT OF SELF-DETERMINATION . . ." NEVER BEFORE HAS THE APPLICABILITY OF THE LAWS OF WAR BEEN MADE TO TURN ON THE PURPORTED AIMS OF A CONFLICT. MOREOVER, THIS PROVISION OBLITERATED THE TRADITIONAL DISTINCTION BETWEEN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT. ANY GROUP WITHIN A NATIONAL BOUNDARY, CLAIMING TO BE FIGHTING AGAINST COLONIAL DOMINATION, ALIEN OCCUPATION, OR A RACIST RÉGIME, CAN NOW ARGUE THAT IT IS PROTECTED BY THE LAWS OF WAR, AND THAT ITS MEMBERS ARE ENTITLED TO POW STATUS FOR THEIR OTHERWISE CRIMINAL ACTS. MEMBERS OF RADICAL GROUPS IN THE U.S. HAVE ALREADY DONE SO IN OUR OWN FEDERAL COURTS.

THE ICRC AND MOST WESTERN NATIONS EXPRESSED NO ADMIRATION FOR ARTICLE 1 (4). SOME CONTEND, HOWEVER, THAT AS A RESULT OF THE NEW RULE, HUMANITARIAN LAW NOW GOVERNS THE ACTIONS OF NATIONAL LIBERATION GROUPS. WHILE THE PLO AND OTHER "FREEDOM FIGHTERS" MAY NOW CLAIM THE BENEFITS OF THE LAWS OF WAR, THEY THEREBY BECOME BOUND TO OBEY THESE RULES. THIS, IN SOME EYES, IS SEEN AS AN ADVANCE FOR HUMANITARIAN LAW.

IN FACT, RADICAL GROUPS RARELY HAVE THE RESOURCES AND FACILITIES TO PROVIDE THE PROTECTIONS FOR PRISONERS OF WAR REQUIRED BY THE LAWS OF WAR. EVEN IF THEY HAD THE RESOURCES, NO REASON EXISTS TO BELIEVE THEY HAVE THE INCLINATION TO PROVIDE THEM, OR TO ABIDE BY THE LAW'S LIMITATIONS ON THE ACTIONS THEY MAY TAKE, PARTICULARLY AGAINST CIVILIANS. IN FACT, NO DOUBT RECOGNIZING THAT THE PLO AND OTHER "FREEDOM FIGHTERS" HAVE CONCENTRATED THEIR GUNS, BOMBS, AND ROCKETS ON CIVILIAN NONCOMBATANTS, THE SUPPORTERS OF ARTICLE 1(4) OBTAINED AT THE CONFERENCE AN ADDITIONAL PROTECTION FOR THESE GROUPS. ARTICLE 44(1) PROVIDES THAT, ONCE A GROUP QUALIFIES AS A NATIONAL LIBERATION MOVEMENT, PROTECTED BY ARTICLE 1(4), NO CONDUCT BY MEMBERS OF THE GROUP CAN LEAD TO THE LOSS OF ITS STATUS AS A PROTECTED ORGANIZATION. THE RATIONALE FOR THIS RULE IS THAT INDIVIDUALS CAN BE PUNISHED SEPARATELY FOR THEIR CONDUCT. THE EFFECT IS TO PRESERVE THE RIGHT OF SUCH ORGANIZATIONS TO BE TREATED AS COMBATANTS, EVEN THOUGH THEY ARE ALMOST EXCLUSIVELY ENGAGED IN TERRORIZING CIVILIANS.

THE CONFERENCE WENT EVEN FURTHER IN ACCOMMODATING THE NEEDS OF TERRORIST GROUPS, AND AT THE EXPENSE OF THE CIVILIAN POPULATION THAT HUMANITARIAN LAW IS INTENDED TO PROTECT. A FUNDAMENTAL PREMISE OF THE GENEVA CONVENTIONS HAS BEEN THAT, TO EARN THE RIGHT TO PROTECTION AS MILITARY FIGHTERS, SOLDIERS MUST DISTINGUISH THEMSELVES FROM CIVILIANS BY WEARING UNIFORMS,

AND CARRYING THEIR WEAPONS OPENLY. THUS, UNDER THE 1949 GENEVA CONVENTIONS, IRREGULAR FORCES ACHIEVE COMBATANT (AND, IF CAPTURED, POW) STATUS, WHEN THEY (1) ARE COMMANDED BY A PERSON RESPONSIBLE FOR SUBORDINATES; (2) WEAR A FIXED, DISTINCTIVE INSIGNIA RECOGNIZABLE FROM A DISTANCE; (3) CARRY WEAPONS OPENLY; AND (4) CONDUCT THEIR OPERATIONS IN ACCORDANCE WITH THE LAWS AND CUSTOMS OF WAR. FIGHTERS WHO ATTEMPT TO TAKE ADVANTAGE OF CIVILIANS BY HIDING AMONG THEM IN CIVILIAN DRESS, WITH THEIR WEAPONS OUT OF VIEW, LOSE THEIR CLAIM TO BE TREATED AS SOLDIERS. THE LAW THUS ATTEMPTS TO ENCOURAGE FIGHTERS TO AVOID PLACING CIVILIANS IN UNCONSCIONABLE JEOPARDY.

THE TERRORIST GROUPS THAT ATTENDED THE CONFERENCE HAD NO INTENTION TO MODIFY THEIR CONDUCT TO SATISFY THESE TRADITIONAL RULES OF ENGAGEMENT. TERRORISTS ARE NOT SOLDIERS. THEY DON'T WEAR UNIFORMS. THEY HIDE AMONG CIVILIANS. AND AFTER STRIKING THEY TRY TO ESCAPE ONCE AGAIN INTO CIVILIAN GROUPS. INSTEAD OF MODIFYING THEIR CONDUCT, THEY SUCCEEDED IN MODIFYING THE LAW. ARTICLE 44(3) OF PROTOCOL I RECOGNIZES THAT "TO PROMOTE THE PROTECTION OF THE CIVILIAN POPULATION FROM THE EFFECTS OF HOSTILITIES, COMBATANTS ARE OBLIGED TO DISTINGUISH THEMSELVES FROM THE CIVILIAN POPULATION WHILE THEY ARE ENGAGED IN AN ATTACK OR IN A MILITARY OPERATION PREPARATORY TO AN ATTACK." BUT THE PROVISION GOES ON TO STATE "THAT THERE ARE SITUATIONS IN ARMED CONFLICTS WHERE, OWING TO THE NATURE OF THE HOSTILITIES AN ARMED COMBATANT CANNOT SO DISTINGUISH

HIMSELF. . . ." IN SUCH SITUATIONS, "HE SHALL RETAIN HIS STATUS AS A COMBATANT, PROVIDED . . . HE CARRIES HIS ARMS OPENLY: (A) DURING EACH MILITARY ENGAGEMENT, AND (B) DURING EACH TIME AS HE IS VISIBLE TO THE ADVERSARY WHILE HE IS ENGAGED IN A MILITARY DEPLOYMENT PRECEDING THE LAUNCHING OF AN ATTACK IN WHICH HE IS TO PARTICIPATE." FURTHERMORE, THE SECTION PROVIDES THAT "[A]CTS WHICH COMPLY WITH THE REQUIREMENTS OF THIS PARAGRAPH SHALL NOT BE CONSIDERED AS PERFIDIOUS" -- FOR EXAMPLE, FEIGNING PROTECTED STATUS BY USING SIGNS, EMBLEMS OR UNIFORMS OF THE U.N. OR STATES NOT PARTIES TO THE CONFLICT.

THESE CHANGES UNDERMINE THE NOTION THAT THE PROTOCOL HAS SECURED AN ADVANTAGE FOR HUMANITARIAN LAW BY GRANTING TERRORIST GROUPS PROTECTION AS COMBATANTS. UNDER THE GENEVA CONVENTION, A TERRORIST COULD NOT HIDE AMONG CIVILIANS UNTIL JUST BEFORE AN ATTACK. UNDER PROTOCOL I HE MAY DO SO; HE NEED ONLY CARRY HIS ARMS OPENLY WHILE HE IS VISIBLY ENGAGED IN A DEPLOYMENT OR WHILE HE IS IN AN ACTUAL ENGAGEMENT.

THE SIGNIFICANCE OF PROTOCOL I TO TERRORIST ORGANIZATIONS IS NOT A MATTER OF HYPOTHETICAL SPECULATION. THEY WERE AT THE CONFERENCE AND LOBBIED HARD FOR THESE PROVISIONS. THE DEGREE OF THEIR SUCCESS IS NOT IN DOUBT. AFTER THE VOTE ON PROTOCOL I, THE PLO'S REPRESENTATIVE "EXPRESSED HIS DEEP SATISFACTION AT THE RESULT OF THE VOTE, BY WHICH THE INTERNATIONAL COMMUNITY HAD RE-CONFIRMED THE LEGITIMACY OF THE STRUGGLES OF PEOPLES

EXERCISING THEIR RIGHT TO SELF-DETERMINATION." TURNING TO ARTICLE 1(4), HE EXPLAINED ITS SIGNIFICANCE AS AUTHORITY FOR THE PLO'S ACTIONS:

> THE ARAB PEOPLE OF PALESTINE FELL WITHIN ALL THREE OF THE CATEGORIES MENTIONED IN PARAGRAPH 4: THEY WERE UNDER COLONIAL DOMINATION; THEIR TERRITORY WAS UNDER FOREIGN OCCUPATION, DESPITE THE ASSERTIONS OF THE TERRORIST BEGIN; AND THEY WERE SUFFERING UNDER A RACIST RÉGIME. SINCE ZIONISM HAD BEEN RECOGNIZED IN A UNITED NATIONS RESOLUTION AS A FORM OF RACISM. HE WISHED TO EXPRESS HIS GRATITUDE TO THE JUSTICE- AND PEACE-LOVING PEOPLES WHO HAD GIVEN THEIR SUPPORT TO THE STRUGGLES OF ALL PEOPLES FIGHTING FOR SELF-DETERMINATION.

V. PROTECTION OF DIPLOMATS AND HOSTAGES

IN A NUMBER OF AREAS, THE INTERNATIONAL COMMUNITY HAS ADOPTED INTERNATIONAL CONVENTIONS DESIGNED TO COMBAT TERRORISM. TYPICALLY, THESE CONVENTIONS REQUIRE STATES PARTIES TO ENACT LAWS CRIMINALIZING SPECIFIED ACTS, AND OBLIGATE THEM TO EXTRADITE OR PROSECUTE PERSONS SUSPECTED OF ENGAGING IN THE PROHIBITED CONDUCT. THESE CONVENTIONS REFLECT A WELCOME DEGREE OF INTERNATIONAL COOPERATION. ON THE OTHER HAND, THE CONVENTIONS ALSO REFLECT PAINSTAKINGLY NEGOTIATED, FRAGILE COMPROMISES, PAPERING OVER RADICALLY DIFFERENT CONCEPTIONS OF THE PROPRIETY OF TERRORIST CONDUCT.

IN 1973 THE UNITED NATIONS GENERAL ASSEMBLY ADOPTED A CONVENTION FOR THE PROTECTION OF DIPLOMATS, TO WHICH THIRTY-THREE COUNTRIES ARE CURRENTLY PARTIES. THE CONVENTION DEFINES A CLASS OF INTERNATIONALLY PROTECTED PERSONS, REQUIRES STATES TO CRIMINALIZE CERTAIN VIOLENT ACTS DIRECTED AGAINST SUCH PERSONS OR THEIR PROPERTY, AND REQUIRES STATES TO EXTRADITE OR PROSECUTE SUSPECTED OFFENDERS FOUND IN THEIR TERRITORY. THE CONVENTION TEXT IS NON-POLEMICAL, AND ITS COVERAGE IS RELATIVELY COMPREHENSIVE -- NOT SURPRISING WHEN ONE REALIZES THAT IT WAS DRAFTED, NEGOTIATED, AND ADOPTED BY THE CONVENTION'S PRINCIPAL BENEFICIARIES -- DIPLOMATS.

WHAT IS SURPRISING, HOWEVER, IS HOW CLOSE THE NEGOTIATIONS CAME TO BEING DERAILED, AND THE LACK OF UNDERLYING CONSENSUS THAT THE DISCUSSIONS REFLECT.

NEAR THE END OF THE NEGOTIATIONS, A GROUP OF COUNTRIES PROPOSED AN ARTICLE THAT WOULD HAVE MADE THE CONVENTION INAPPLICABLE TO "PEOPLES STRUGGLING AGAINST COLONIALISM, ALIEN DOMINATION, FOREIGN OCCUPATION, RACIAL DISCRIMINATION AND APARTHEID IN THE EXERCISE OF THEIR LEGITIMATE RIGHTS TO SELF-DETERMINATION AND INDEPENDENCE." YOU NOW HAVE SOME IDEA OF WHAT THESE PHRASES MEAN. SOME CLAIMED THE ARTICLE WAS NEEDED TO PREVENT THE CONVENTION FROM BEING USED BY "COLONIAL AND RACIST REGIMES AS A PRETEXT FOR OPPRESSING THE PEOPLES UNDER THEIR DOMINATION EVEN MORE SAVAGELY THAN BEFORE."

ANOTHER DELEGATE SAID HE COULD NOT FAVOR A CONVENTION THAT WOULD ENSURE THE GOVERNMENTAL AGENTS OF CERTAIN STATES "AGAINST ALL RISKS." THE BRUTAL TRUTH IS THAT THESE DELEGATES WERE ARGUING THAT THE RIGHT OF SELF-DETERMINATION INCLUDED THE RIGHT TO COMMIT VIOLENT ACTS AGAINST DIPLOMATS.

THIS POSITION WAS UNACCEPTABLE TO THE U.S. AS WELL AS OTHERS. IT WAS EVENTUALLY REJECTED, BUT ON A BASIS THAT CASTS A PALL OVER THE WHOLE EXERCISE. WE WERE REQUIRED TO ACQUIESCE IN A GENERAL ASSEMBLY RESOLUTION RECOGNIZING THAT NOTHING IN THE CONVENTION COULD "IN ANY WAY PREJUDICE THE EXERCISE OF THE LEGITIMATE RIGHT TO SELF-DETERMINATION AND INDEPENDENCE . . . BY PEOPLES STRUGGLING AGAINST COLONIZATION, ALIEN DOMINATION, FOREIGN OCCUPATION, RACIAL DISCRIMINATION AND APARTHIED." IN ADDITION, PARAGRAPH 6 OF THE RESOLUTION REQUIRED "THAT THE PRESENT RESOLUTION, WHOSE PROVISIONS ARE RELATED TO THE AMENDED CONVENTION, SHALL ALWAYS BE PUBLISHED TOGETHER WITH IT." WHILE THESE PROVISIONS CANNOT BE CONSIDERED LAW, THEY ARE A CLEAR INDICATION OF WHAT MANY STATES BELIEVE, AND OF THE MUSCLE THOSE STATES WERE ABLE TO DEMONSTRATE IN GETTING THE RESOLUTION ADOPTED AS PART OF A PACKAGE DEAL. THEY PUT US ON NOTICE THAT, IN THE FUTURE, STATES MAY RELY ON THE RESOLUTION TO CIRCUMVENT THE ABSOLUTE OBLIGATIONS OF THE CONVENTION. IN FACT, ONE COUNTRY ACCEDED BUT RESERVED THE RIGHT NOT TO APPLY THE CONVENTION TO NATIONAL LIBERATION MOVEMENTS, AND ANOTHER INDICATED ITS INTENTION TO ACCORD PROTECTED STATUS TO THE

REPRESENTATIVES OF CERTAIN NATIONAL LIBERATION MOVEMENTS, AT LEAST ONE OF WHICH IS AN ORGANIZATION COMMITTED TO THE USE OF TERROR. THEREFORE, EVEN SO SEEMINGLY NEUTRAL AN ISSUE AS THE PROTECTION OF DIPLOMATS FAILED TO ESCAPE THE POLITICAL DIVISIVENESS THAT PERVADES THE WORLD COMMUNITY ON THE APPROPRIATE USE OF TERROR.

THE CONVENTION AGAINST THE TAKING OF HOSTAGES TEACHES SIMILAR LESSONS. THE CONVENTION CRIMINALIZES HOSTAGE TAKING, REQUIRES STATES TO ENACT IMPLEMENTING LEGISLATION, AND IMPOSES AN EXTRADITE-OR-PROSECUTE OBLIGATION. ONE EXTRAORDINARY PROVISION PRECLUDES EXTRADITION WHERE THE SUSPECT IS LIKELY TO BE UNFAIRLY TREATED, THUS PROVIDING A READY EXCUSE FOR REFUSING TO EXTRADITE. BUT THE OBLIGATION TO PROSECUTE REMAINS. ON THE WHOLE, THE CONVENTION ESTABLISHES A USEFUL SCHEME FOR COMBATTING HOSTAGE-TAKING BY TERRORISTS, AND THE SECURITY COUNCIL ON DECEMBER 18, 1985, ADOPTED A RESOLUTION CONDEMNING UNEQUIVOCALLY ALL ACTS OF HOSTAGE-TAKING AND ABDUCTION.

A REVIEW OF THE NEGOTIATING HISTORY OF THE CONVENTION, HOWEVER, REVEALS THE DEEP DIVISIONS THAT EXIST. AT THE OUTSET, A NUMBER OF COUNTRIES SOUGHT TO EXCLUDE FROM THE CONVENTION HOSTAGE-TAKING BY NATIONAL LIBERATION MOVEMENTS. SOME STATES WANTED, NOT ONLY TO EXEMPT SUCH MOVEMENTS, BUT TO DEFINE HOSTAGE-TAKING TO INCLUDE THE ACT OF SUBJECTING PERSONS TO COLONIALISM, RACISM, OR FOREIGN DOMINATION. IN OTHER WORDS,

ALL THE PEOPLE IN A NATION DETERMINED TO BE RACIST WOULD BE DEEMED HOSTAGES, AND THE GOVERNMENT TO BE HOSTAGE TAKERS.

THESE RADICAL PROPOSALS WERE EVENTUALLY REJECTED. ONCE AGAIN, HOWEVER, A PRICE WAS PAID. ARTICLE 12 OF THE HOSTAGE CONVENTION WAS ADDED TO PROVIDE THAT, TO THE EXTENT THE GENEVA CONVENTIONS AND THE ADDITIONAL PROTOCOLS IMPOSE SUBSTANTIVELY IDENTICAL OBLIGATIONS, THE HOSTAGE CONVENTION WILL NOT APPLY TO THE ARMED CONFLICTS SPECIFIED IN ARTICLE 1 (4) OF PROTOCOL I.

THIS CHANGE DOES NOT, IN OUR VIEW, CREATE A LEGAL GAP IN COVERAGE. ALL INSTANCES OF HOSTAGE-TAKING WILL BE SUBJECT TO AN EXTRADITE-OR-PROSECUTE OBLIGATION UNDER ONE OF THE TWO CONVENTIONS. BUT THE STATES WHICH SOUGHT THIS PROVISION SUCCEEDED IN USING THE HOSTAGE CONVENTION TO ACHIEVE A RHETORICAL AND POLITICAL VICTORY. THEY CAN NOW ARGUE THAT THE STRUCTURE AND LANGUAGE OF ARTICLE 12 REPRESENTS SOME MEASURE OF ACCEPTANCE THAT MEMBERS OF NATIONAL LIBERATION MOVEMENTS ARE COMBATANTS, NOT TERRORISTS. ONE DELEGATE, FOR INSTANCE, EXPRESSED THE VIEW THAT THE COMMITTEE CONSIDERING THE CONVENTION HAD, BY ITS ACTION, "REAFFIRMED . . . THAT THE STRUGGLE OF THE LIBERATION MOVEMENTS WAS LEGAL, THAT IT WAS BASED ON PROVISIONS OF INTERNATIONAL LAW OF WAR AND THAT IT COULD NOT BE CONFUSED WITH THE CRIMINAL ACTIVITY OF IRRESPONSIBLE PERSONS AND TERRORIST GROUPS AND ORGANIZATIONS."

ACCORDINGLY, ALTHOUGH THE LANGUAGE OF ARTICLE DOES NOT CREATE A LEGAL GAP, IT DOES AFFECT THEIR TREATMENT. ONE CONSEQUENCE IS THAT THE PROSECUTION OF HOSTAGE TAKERS FROM "LIBERATION MOVEMENTS" IN COUNTRIES THAT ACCEPT PROTOCOL I AND RECOGNIZE THE GROUPS AS COMBATANTS MAY HAVE TO TAKE THE FORM OF A PROCEEDING FOR BREACH OF THE LAWS OF WAR. IT IS COMICALLY BIZARRE TO SUGGEST THAT PERSONS LIKE ABU ABBAS SHOULD BE TREATED AS WAYWARD SOLDIERS. THAT THE LAWS OF WAR AND THE LAWS AGAINST HOSTAGE-TAKING HAVE BEEN REWRITTEN TO PERMIT THAT RESULT REFLECTS THE STRENGTH OF INFLUENCE TERRORIST ORGANIZATIONS AND THEIR SUPPORTERS NOW WIELD IN INTERNATIONAL LAW.

VI. STATE-SPONSORED TERRORISM

WE SHOULD HARDLY BE SURPRISED THAT STATE SUPPORT FOR TERRORISM IS WIDESPREAD. IT HAS LARGELY BEEN THE REPRESENTATIVES OF STATES, AFTER ALL, THAT HAVE WRITTEN AND REWRITTEN INTERNATIONAL LAW SO THAT IT LEGITIMIZES AND PROTECTS TERRORIST ACTIVITIES. THE DISTINGUISHING FEATURE OF INTERNATIONAL TERRORISM IS, IN FACT, ITS POLITICAL CHARACTER. FOR SOME GROUPS, TERRORISM IS THEIR CHOSEN METHOD TO ADVANCE POLITICAL AIMS. FOR SOME STATES, TERRORISTS ARE A BRANCH OF THEIR ARMED FORCES -- FUNDED, BASED, TRAINED AND USED AS A SPECIAL FORM OF MILITARY UNIT. AS A RESULT, INTERNATIONAL

TERRORISM TODAY HAS BECOME AN ASPECT OF INTERNATIONAL POLITICS.

NATIONS SUCH AS LIBYA AND IRAN USE TERROR TO ADVANCE THEIR INTERESTS JUST AS OTHER NATIONS PREVIOUSLY HAVE USED DIPLOMACY AND CONVENTIONAL FORCE. THE SOVIET UNION AND OTHER COMMUNIST STATES SUPPORT SUCH NATIONS FOR THEIR OWN GEOPOLITICAL REASONS.

OUR RESPONSE TO THEIR CHALLENGE MUST BE CONSISTENT WITH INTERNATIONAL LAW. UNDER THE U.N. CHARTER, JUST AS UNDER CUSTOMARY INTERNATIONAL LAW, VICTIMS OF TERRORISM ARE NOT POWERLESS TO DEFEND THEMSELVES. THE CHARTER ALLOWS US TO ACT AFFIRMATIVELY AGAINST TERRORIST ATTACKERS AND THE STATES THAT SUPPORT THEM.

THIS PRINCIPLE IS WELL-ESTABLISHED. IT IS REFLECTED IN THE CHARTER'S REAFFIRMATION OF THE INHERENT RIGHT TO USE FORCE IN INDIVIDUAL OR COLLECTIVE SELF-DEFENSE AGAINST ARMED ATTACK. SINCE THE DAYS OF JAMES MADISON, THE UNITED STATES HAS REPEATEDLY AND LAWFULLY ACTED AGAINST ARMED BANDS THAT ATTACKED AMERICANS AND THEN FLED, SEEKING SANCTUARY IN NEIGHBORING STATES UNWILLING OR POWERLESS TO PREVENT OR PUNISH THEIR ACTS. WITH THE ACQUIESCENCE OF THE HARBORING STATE, AS IN THE CASE OF OUR OPERATIONS AGAINST PANCHO VILLA'S TERRORIST ATTACKS IN THE EARLY PART OF THIS CENTURY, OR WITHOUT SUCH PERMISSION, AS IN THE CASE OF ANDREW JACKSON'S ACTIONS TO STOP ATTACKS FROM SPANISH FLORIDA, THE UNITED STATES HAS USED ITS FORCES TO BRING

AN END TO TERRORIST ATTACKS ON AMERICAN CITIZENS AND INTERESTS.

OTHER STATES CONFRONTED WITH SUCH ATTACKS HAVE DEFENDED THEMSELVES WITH FORCE. IN THE CELEBRATED CASE OF THE CAROLINE, THE BRITISH PUSHED OVER NIAGARA FALLS A SHIP WITH SOME MEMBERS OF AN ARMED BAND OF NEW YORKERS WHO WERE IN THE PROCESS OF SUPPORTING AN INSURRECTION IN CANADA. WHILE THE AMERICAN GOVERNMENT THOUGHT THE BRITISH HAD ACTED HARSHLY, BOTH GOVERNMENTS AGREED ON THE LAW: THE USE OF FORCE IN SELF-DEFENSE IS APPROPRIATE SO LONG AS IT IS NECESSARY AND PROPORTIONAL. THE INTERNATIONAL COURT OF JUSTICE RECOGNIZED THIS PRINCIPLE IN THE CORFU CHANNEL CASE, WHERE BRITAIN HAD SWEPT MINES FROM THE CHANNEL AFTER SUFFERING DAMAGE TO ITS SHIPS. IN HOLDING ALBANIA LIABLE FOR THE DAMAGES, THE COURT REAFFIRMED THE "WELL-RECOGNIZED" PRINCIPLE THAT EVERY STATE HAS AN OBLIGATION "NOT TO ALLOW KNOWINGLY ITS TERRITORY TO BE USED FOR ACTS CONTRARY TO THE RIGHTS OF OTHER STATES."

AS SECRETARY OF STATE SHULTZ HAS SAID, IN THE FIGHT AGAINST TERRORISM AS IN THE STRUGGLE TO DETER AGGRESSION AND WAR,

> "THE LAW IS ON OUR SIDE AND IT IS UP TO US TO USE IT TO ITS MAXIMUM EXTENT. . . . [A] STATE WHICH SUPPORTS TERRORIST OR SUBVERSIVE ATTACKS AGAINST ANOTHER STATE, OR WHICH SUPPORTS OR ENCOURAGES TERRORIST PLANNING AND OTHER ACTIVITIES WITHIN ITS OWN TERRITORY, IS RESPONSIBLE FOR SUCH ATTACKS.

SUCH CONDUCT CAN AMOUNT TO AN ONGOING ARMED AGGRESSION AGAINST THE OTHER STATE UNDER INTERNATIONAL LAW."

SOME PUBLIC OFFICIALS AND INTERNATIONAL LAW EXPERTS HAVE QUESTIONED THE PREMISE THAT HARBORING AND SUPPORTING TERRORISTS WHO ATTACK A NATION IS A FORM OF AGGRESSION. OTHERS SUGGEST THAT NO FORCE MAY BE USED AGAINST SUCH A STATE UNDER THE U.N. CHARTER. STRONG LEGAL SUPPORT EXISTS FOR THE U.S. POSITION ON THESE ISSUES, HOWEVER, AS REFLECTED IN SEVERAL U.N. RESOLUTIONS AND UNIVERSALLY RECOGNIZED PRINCIPLES OF CONSPIRACY AND AGENCY LAW. HERE, AS IN OTHER AREAS, STATES AND INDIVIDUALS OPPOSED IN PRINCIPLE TO U.S. POLICIES OR TO THE USE OF FORCE ARE USING LAW AS A MASK FOR THEIR POLITICAL VIEWS. ONE NEED ONLY RECALL HOW, DURING OUR UNPOPULAR WAR IN VIETNAM, MANY SCHOLARS AND OFFICIALS CONTENDED THAT AN UNDECLARED WAR WAS ILLEGAL, DESPITE OVERWHELMING AUTHORITY TO THE CONTRARY.

LAW CAN MAKE CLEAR THAT STATE SUPPORTED TERRORISM IS ILLICIT, AND MAY THUS SERVE TO DETER IT. BUT NATIONS DO NOT SURRENDER SERIOUSLY-HELD AMBITIONS TO EXPAND THEIR POWER AND INFLUENCE SIMPLY BECAUSE THE LAW IS AGAINST THEM. QADHAFI, KHOMEINI, AND THE COMMUNISTS ULTIMATELY SCORN OUR VALUES AND EXPLOIT OUR HUMANITARIAN INHIBITIONS. WE CANNOT EXPECT LEGAL ARGUMENT ALONE TO PROTECT US.

NOR WILL WE ENHANCE THE PROSPECT FOR PEACEFUL SETTLEMENT OF

OUR DISPUTES WITH SUCH STATES BY PROMISING TO ABJURE FORCE OR BY UNREALISTICALLY LIMITING OUR FLEXIBILITY. HOWEVER RELUCTANT WE ARE AS A PEOPLE TO USE FORCE WE MUST AVOID OVERESTIMATING THE LIMITS OF OUR TOLERANCE, AND PERHAPS CAUSING OUR ADVERSARIES TO DO SO AS WELL. SIGNALLING A LACK OF RESOLVE TO DEFEND OUR FUNDAMENTAL INTERESTS INVITES RECKLESS ACTIVITY. RATHER, WE MUST SIGNAL THROUGH WORDS AND DEEDS THAT THE ALTERNATIVE TO TERMINATION OF STATE SPONSORSHIP OF TERRORISM IS CONFRONTATION AND ACTION, COVERT OR OVERT, IN SELF-DEFENSE. THE POLICEMAN IS AN APT PROTECTION AGAINST INDIVIDUAL CRIMINALS; BUT NATIONAL SELF-DEFENSE IS THE ONLY PROTECTION AGAINST THE CRIMINAL STATE.

VII. CONCLUSION

THIS SURVEY SHOWS THAT WE CANNOT REASONABLY EXPECT THE LAW, AS PRESENTLY FORMULATED, EFFECTIVELY TO REPRESS INTERNATIONAL TERRORISM. INTERNATIONAL TERRORISM IS STILL SUPPORTED BY MANY NATIONS AS A LEGITIMATE MEANS OF STRUGGLE AGAINST REGIMES DEEMED BY THEM TO BE COLONIAL, ALIEN, OR RACIST. MOST NATIONS REFUSE TO EXTRADITE FOR "POLITICAL" CRIMES, AND MANY FAIL TO ABIDE BY THE INTERNATIONAL CONVENTIONS CALLING FOR EXTRADITION OR PROSECUTION. PIRACY COULD BE AN EXCELLENT VEHICLE FOR REPRESSING SEIZURES OF VESSELS AND AIRCRAFT. INSTEAD, ITS SCOPE HAS BEEN REDUCED IN RECENT CONVENTIONS TO EXCLUDE POLITICAL ACTS. THE LAWS OF WAR SERVE IN GENERAL, THROUGH

APOLITICAL RULES AND STANDARDS, TO PROTECT NONCOMBATANTS AND ADVANCE OTHER HUMANITARIAN GOALS. BUT PROTOCOL 1 WAS USED TO OBTAIN COMBATANT STATUS FOR TERRORIST ORGANIZATIONS. WE HAVE OBTAINED CONVENTIONS WHICH EXTEND PROTECTION TO DIPLOMATS AND MAKE CRIMINAL THE TAKING OF HOSTAGES. BUT IN THE PROCESS OF ADOPTING THOSE CONVENTIONS MANY NATIONS MADE CLEAR THAT THEY SUPPORT THE LEGALITY OF ATTACKING DIPLOMATS IN WARS OF NATIONAL LIBERATION, AND HAVE NO INTENTION OF TREATING HOSTAGE-TAKING BY FAVORED GROUPS AS CRIMINAL. IN VIRTUALLY EVERY SUBJECT, THE LAW HAS BEEN SYSTEMATICALLY AND INTENTIONALLY FASHIONED TO GIVE SPECIAL TREATMENT TO, OR TO LEAVE UNREGULATED, THOSE ACTIVITIES THAT CAUSE AND ARE THE SOURCE OF MOST ACTS OF TERROR.

THE NOTIONS AND VALUES THAT HAVE UNDERMINED THE UTILITY OF INTERNATIONAL LAW IN CONTROLLING TERRORISM ARE FUNDAMENTALLY IRRESPONSIBLE. THEY MAKE LAW SERVE TERRORISTS. THESE CONCEPTS ARE REJECTED BY ALL NATIONS AS BASES UPON WHICH TO GOVERN THEMSELVES. OUR COURTS, FOR EXAMPLE, HAVE REPEATEDLY REJECTED DEFENSES IN CRIMINAL PROSECUTIONS BASED ON THE RIGHT TO SELF-DETERMINATION, OR TO CONDUCT A WAR OF LIBERATION, OR ON THE LAWS OF WAR, OR BECAUSE OF OTHER ALLEGEDLY LEGITIMATE CAUSES. WE DO NOT EVEN TAKE THESE CONTENTIONS SERIOUSLY, AND WE SHOULD NOT. ANY NATION THAT DID SO WOULD SOON BE LIVING IN THE SAME MORAL CHAOS DOMESTICALLY IN WHICH THE LAW HAS LEFT THE INTERNATIONAL COMMUNITY.

THE FAILURE OF INTERNATIONAL LAW TO CONTROL TERRORISM IS A MATTER OF GRAVE ETHICAL AND STRATEGIC CONCERN. WE ARE IN DANGER OF LOSING OUR PATIENCE. TO AN EXTENT, IMPATIENCE WITH INJUSTICE IS HEALTHY. BUT IMPATIENCE MAY LEAD TO MORE PRIMITIVE AND DANGEROUS ACTIONS THAN COOPERATION AMONG SOVEREIGN STATES. THESE DANGERS ARE ESPECIALLY HEIGHTENED IN CONNECTION WITH TERRORISM THAT IS STATE-SUPPORTED. IF WE ARE FORCED TO ASSERT OUR RIGHT OF SELF-DEFENSE, FURTHER ESCALATIONS OF TERRORIST VIOLENCE MAY RESULT, ULTIMATELY LEADING TO CONVENTIONAL MILITARY ACTIONS. THE COSTS OF TERRORIST LAWLESSNESS COULD BE GRAVE INDEED.

TO FOCUS ON THE CAUSES OF MISERY, INJUSTICE, AND VIOLENCE IS AN ESSENTIAL ASPECT OF ANY PROPER LEGAL REGIME. BUT A JUST CAUSE CANNOT EXCUSE INDISCRIMINATE KILLING, OR THE PERSECUTION OF ANY RACIAL, NATIONAL, OR RELIGIOUS GROUP. IN ANY EVENT, WE ALL KNOW THAT TERRORISTS KILL AND MAIM PEOPLE FOR PLENTY OF REASONS OTHER THAN A STRONG SENSE OF INJUSTICE. THEY KILL FOR MONEY, FOR POWER, FOR FAME, OR FOR FUN -- FOR THE PLEASURE OF KILLING THOSE THEY HATE. THE NOTION THAT TERRORISTS ARE ACTIVE IN THE MIDEAST BECAUSE THE STATES INVOLVED WILL NOT DEAL WITH THE PALESTINIAN PROBLEM IS ESPECIALLY PERNICIOUS. TERRORISM INCREASES EVERY TIME PROGRESS IS MADE IN THE SEARCH FOR PEACE. THE RECENT MURDER OF THE PRO-PLO PALESTINIAN MAYOR OF NABLUS CAUSED GRIEF AND DEPRESSION IN THE WEST BANK, IN JORDAN, IN EGYPT, AMONG THE PLO, AND THROUGHOUT THE HIGHEST LEVELS OF

AMERICAN GOVERNMENT. HIS APPOINTMENT WAS AN IMPORTANT STEP TOWARD PALESTINIAN SELF RULE. WERE HIS TERRORIST ASSASSINS TRYING TO ADVANCE OR TO DISRUPT THE CAUSE OF PEACE?

WE CANNOT GIVE UP ON LAW, HOWEVER FRUSTRATED WE MAY FEEL BY ITS ABUSE. IN FACT, WHAT I HAVE SAID TODAY IS THAT LAW HAS NOT REALLY BEEN USED TO COUNTER TERRORISM; IT IS VERY MUCH IN THE SERVICE OF THOSE WHO EMBRACE POLITICAL VIOLENCE. WE MUST WORK FOR A BROADER UNDERSTANDING AMONG PEOPLE AS WELL AS GOVERNMENTS TO BRING ABOUT A SHIFT IN THE OBJECTS WHICH LAW IS DESIGNED TO SERVE. IF WE SUCCEED IN SHIFTING THE AIMS OF INTERNATIONAL LAW, WE CAN THEN GIVE IT A FAIR CHANCE TO WORK. IF WE FAIL TO SHIFT THOSE AIMS, WE MUST CONTINUE WITH LIKE-MINDED NATIONS TO ARTICULATE AND ABIDE BY RULES THAT REFLECT OUR OWN MORAL AND POLITICAL VALUES. WE MUST REMAIN TRUE TO THESE VALUES, EVEN WHEN WE ARE FORCED TO USE OUR STRENGTH. ONLY THEN CAN WE ULTIMATELY SUCCEED IN BRINGING LAW BACK TO THE UNAMBIVALENT SERVICE OF HUMANITY.