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THE 1976 TERRORISM AMENDMENT TO THE FOREIGN ASSISTANCE ACT OF 1961*

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AND

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I. BACKGROUND OF THE AMENDMENT

Key to any successful attempt to combat international terrorism is the elimination of sanctuary and safe-haven for terrorists. The United States has pressed consistently for international agreements — the anti-hijacking conventions¹ and the Internationally Protected Persons Convention² being examples — requiring States either to prosecute or extradite international terrorists found within their borders.³ Since its efforts to establish a “basic extradite-or-prosecute obligation”⁴ have not met with general success, the U.S. has had to consider, among other alternatives, various unilateral responses to help curb terrorist activities. One obvious response, drawing upon a wealth of domestic precedents, involves the possible invocation of economic sanctions.

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1. Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sep. 14, 1963, [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768; Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, art. 7, [1971] 2 U.S.T. 1641, T.I.A.S. No. 7192; and Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sep. 23, 1971, art. 7, [1973] 1 U.S.T. 565, T.I.A.S. No. 7570.

2. G.A. Res. 3166, 28 U.N. GAOR Supp. 30, at 146, U.N. Doc. A/9030 (1973), reprinted in 68 AM. J. INT'L L. 383 (1974). See Wood, *The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents*, 23 INT'L & COMP. L.Q. 791 (1974); and Note, *Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons: An Analysis*, 14 VA. J. INT'L L. 703 (1974).

3. Customary international law, at least until recently, probably did not require the prosecution or extradition of such terrorists. See Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 000 (1977).

4. 67 DEF'T STATE BULL. 444 (1972).

Since the enactment in 1962 of the Hickenlooper Amendment,⁵ which proscribed the nationalization of U.S.-owned property without the payment of prompt, adequate, and effective compensation, the U.S. has threatened recipients of economic or military aid with its termination if they engaged in various acts which conflicted with major U.S. foreign policy objectives. Subsequent threats to terminate aid generally have sought to achieve less parochial objectives. In September 1972, for instance, the Department of State held up a loan to Uganda following anti-Jewish statements by President Amin.⁶ Shortly thereafter, President Nixon announced that, as required by statute,⁷ he would discontinue aid to "all countries that willfully contributed to [the U.S.] narcotics problem."⁸ At the same time, in the aftermath of the Munich Olympics tragedy, the Senate, presaging the subject matter of this article, adopted a resolution favoring "the suspension of United States aid to and the imposition of economic and other sanctions against any nation which provides sanctuary for terrorists who have injured or abused citizens or property of one nation in committing illegal or terroristic acts against another nation or the citizens or property thereof."⁹

Four years later, following the determined efforts of Representative Wolff, Congress enacted and the President signed into law Section 620A of the Foreign Assistance Act of 1961 (hereinafter called the "terrorism amendment"), which in effect codifies the policy expressed in the 1972 Senate resolution. In its final form, Section 620A provides that:

(a) Except where the President finds national security to require otherwise, the President shall terminate all assistance under this [Act] any government which aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism and the President may not thereafter furnish assistance to such government until the end of the one year period beginning on the date of such termination, except that if during its period of ineligibility for assistance under this section such government aids or abets, by granting sanctuary from prosecution to, any other individual or group which has committed an act of international terrorism, such government's period of ineligibility shall be extended for an additional year for each such individual or group.

(b) If the President finds that national security justifies a continuation of assis-

5. 22 U.S.C. § 2370(e) (1) (1970), *as amended*, 22 U.S.C. § 2370(e) (1) (Supp. V, 1975).

6. Washington Post, Sep. 15, 1972, at 16, col. 1.

7. 22 U.S.C. § 2291(a) (Supp. V, 1975).

8. Washington Post, Sep. 19, 1972, at 1, col. 1.

9. S. Con. Res. 100, 92d Cong., 2d Sess., 118 CONG. REC. 32651 (1972).

tance to any government described in subsection (a) of this section, he shall report such finding to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate.¹⁰

While the terrorism amendment bears a superficial resemblance to the Hickenlooper Amendment, it differs from Hickenlooper in two important respects. In the first place, it is not designed to protect only parochial U.S. interests. Rather it is intended to combat, in the words of Mr. Wolff, "a threat . . . to the entire fabric of international harmony."¹¹ Secondly, the terrorism amendment does not seek to elevate a predominately U.S. view to a supposedly international norm in the way that the Hickenlooper Amendment attempted to do. Indeed, in marked contrast to its predecessor, it is an expression of what is, presumably, a truly global outrage at the threat of terrorism.¹²

The latter point requires some expansion if the terrorism amendment is to be understood properly. One of the main arguments against the Hickenlooper Amendment was the fact that it had little practical effect on the problem it purported to address.¹³ Critics pointed out that States which nationalized U.S. property without proper compensation were likely either not to be receiving U.S. aid or, alternatively, to be receiving too little aid to dissuade them from nationalizing. It is somewhat ironic, at first sight, that many of the critics who made this argument against the Hickenlooper Amendment now support a unilateral approach to terrorism which is subject to similar criticism. Indeed, the practical ineffectiveness argument probably is stronger in the case of the terrorism amendment, since in all likelihood States harboring terrorists are less likely to be recipients of U.S. aid than States nationalizing U.S. property. How then, it may be asked, can critics of Hickenlooper support the terrorism amendment?

The answer lies in the difference in the fundamental purposes of the two amendments. Hickenlooper, being patently parochial legislation, of necessity had to stand or fall on its practical effectiveness.¹⁴ Certainly it never was claimed that its presence on the statute books was a way of winning friends for the U.S. in the international community, or of underpinning or fostering an international

10. 22 U.S.C.A. § 2371(a) (b) (Dec. 1976, Part 1).

11. *Hearings on H.R. 11963 Before the House Comm. on International Relations*, 94th Cong., 1st & 2d Sess. 685 (1976) [hereinafter cited as *Hearings*].

12. The UN, for instance, has condemned international terrorism. See G.A. Res. 3034, 27 U.N. GAOR Supp. 30, at 119, U.N. Doc. A/8730 (1972).

13. R. LILLICH, *THE PROTECTION OF FOREIGN INVESTMENT* 140-45 (1965).

14. It fell. See Lillich, *Requiem for Hickenlooper*, 69 AM. J. INT'L. L. 97 (1975).

consensus on the problem to which it was directed. *A contrario sensu*, the immediate practical effectiveness of the terrorism amendment is of only relatively minor concern. What was emphasized in the debates by Mr. Wolff was its potential value as an unequivocal statement by the U.S. of its intention to stand firmly behind, and even actively to advance, the emerging international law norm condemning terrorism:

Perhaps this [amendment] is nothing more than going on record; unfortunately, however, in no piece of legislation that we have had has the United States really gone on record as being opposed to terrorism. It would be one more method, one additional area of voicing our opposition to international anarchy taking place. The fact that you say that it might not stop it, well, without this we have not been able to stop it either.

We should try to do something. We have tried to put amendments before the UN to no avail and it would seem that we are in effect saying that we throw up our hands and we can't do anything against terrorism.¹⁵

This quotation clearly reveals that a major, and perhaps *the* major, impact of the terrorism amendment will be its firm underscoring of the U.S.'s commitment to the anti-terrorism cause. While of course the fact that its practical effect upon other States will be small is to be regretted, the legislation remains a valuable expression of an emerging international law norm.

II. LEGISLATIVE HISTORY OF THE AMENDMENT

In December 1975, Mr. Wolff, who the preceding month had contended that "the U.N. has proven itself to be incapable of dealing with the problem of international terrorism in a meaningful way,"¹⁶ offered a draft amendment to the International Security Assistance and Arms Export Act of 1976.¹⁷ In brief, the amendment contained

15. *Hearings, supra* note 11, at 687.

16. 121 CONG. REC. H11295 (daily ed. Nov. 17, 1975).

17. The text of the draft amendment reads as follows:

Sec. 620A. Prohibition Against Furnishing Assistance to Countries Which Grant Sanctuary to International Terrorists.—(a) Except under extraordinary circumstances, the President shall terminate all assistance under this Act to any government which grants sanctuary from prosecution to any individual or group that has committed an act of international terrorism and may not thereafter furnish assistance to such government until the end of the one year period beginning on the date of such termination, except that if during its period of ineligibility for assistance such country grants sanctuary from prosecution to any other individual or group that has committed an act of international terrorism, such country's period of ineligibility shall be extended for an additional year for each such individual or group.

(b) If the President determines that extraordinary circumstances exist which justify a continuation of assistance to any government described in subsection (a), he shall re-

two provisions: the first providing that the President should terminate all assistance under the act for a one year period to any country granting sanctuary to international terrorists;¹⁸ and the second permitting the President to continue such assistance if he found that "extraordinary circumstances" existed.¹⁹ A concurrent resolution device,²⁰ by which Congress could overrule this finding without the President's signature, greatly limited his discretion in this regard. The draft amendment differed from the enacted version of the terrorism amendment in two important respects: (1) it lacked the legal phrase "aids and abets,"²¹ but (2) it contained the all-important concurrent resolution device.

Senator Stone introduced a similar draft amendment in the Senate.²² This version provided that the President should terminate all assistance under the act for a one year period to any country aiding or abetting international terrorists except where he found national

port such extraordinary circumstances to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate. Assistance may not be furnished to such government if the Congress, within 30 calendar days of receiving such report, adopts a concurrent resolution stating in effect that it does not find that extraordinary circumstances exist which justify assistance to such government. *Hearings, supra* note 11, at 684-85.

18. A chain of states might run afoul of this proscription in a given case if, after being granted sanctuary in State A, an international terrorist later moved freely to and in States B and C. For a discussion of analogous situations involving active or passive actions giving rise to responsibility on the part of a chain of States, see Lillich & Paxman, note 3 *supra*.

19. See text at and accompanying note 23 *infra*.

20. For a definition of the term concurrent resolution device, see 1 CCH CONG. INDEX (Senate, 94th Cong. 1975-76), at 4 (1976).

21. The Senate later added the phrase. See text at and accompanying notes 24, 25 & 26 *infra*.

22. The text of the draft amendment reads as follows:

Sec. 620A. Prohibition Against Furnishing Assistance to Countries Which Aid or Abet International Terrorists.—

(a) Except where the President finds national security to require otherwise the President shall terminate all assistance under this Act to any Government which aids or abets any individual or group that has committed an act of international terrorism, and may not thereafter furnish assistance to such government until the end of the one year period beginning on the date of such termination, except that if during its period of ineligibility for assistance such country aids or abets any other individual or group that has committed an act of international terrorism such country's period of ineligibility shall be extended for an additional year for each such individual or group.

(b) If the President finds the above circumstances exist which justify a continuation of assistance to any government described in subsection (a), he shall report such circumstances to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate. Assistance may not be furnished to such government if the Congress, within 30 calendar days of receiving such report, adopts a concurrent resolution stating in effect that it does not find that the above circumstances exist which justify assistance to such government. 122 CONG. REC. S1751 (daily ed. Feb. 17, 1976).

security to require otherwise. Presidential discretion again was limited by a concurrent resolution device. In addition to substituting a "national security" for an "extraordinary circumstances" exception,²³ the Senate draft amendment introduced, upon the insistence of Senator Javits,²⁴ the "aids and abets" concept. The importance of this latter variation is twofold. First, by drawing upon the language of the criminal law it underscored the criminal nature of the conduct of States which assist international terrorists. However strong the political overtones may be in a particular terrorist situation — whether from the standpoint of the terrorists' own motivations or from the standpoint of the State in some way involved with them — Senator Javits believed that such overtones should not "decriminalize" the conduct of States assisting terrorists.²⁵ Secondly, by cutting off aid not just when States grant sanctuary from prosecution to international terrorists, but when they aid or abet such terrorists, the Senate draft amendment considerably widened the scope of the proscription, a result clearly intended by Senator Javits if not appreciated by other Congressmen.²⁶

As revised by a conference committee, the terrorism amendment basically followed the Senate model. Indeed the Conference Report states that the committee "*adopted the Senate version* with an amendment to include the House provision by requiring termination of assistance to any country which aids or abets by granting sanctuary

23. The use of the phrase "extraordinary circumstances" in the original House draft was not without precedent. It had been used previously in a 1974 Human Rights Amendment to the Foreign Assistance Act (*see* 22 U.S.C. § 2304[a] [Supp. V, 1975]). The substitution of the phrase "national security" for the phrase "extraordinary circumstances" constitutes an unfortunate change. The use of the latter phrase is more accurate in the terrorism context since, for example, it accounts for the hostage situation, while the former phrase does not unless it is given an exceedingly, if not excessively, broad construction. The substitution of the phrase probably was motivated by the fact that the provisions in 22 U.S.C. § 2370 (1970) concerning the termination of aid included exceptions which were worded in terms of "national security," *e.g.*, "[p]rovided, that the President does not find such action contrary to the national security."

24. "[T]he phrase 'aids or abets' is a phrase of the well-established criminal law, has been construed very often, and therefore is not an uncertain phrase to be construed in the first instance for this particular amendment. . . ." 122 CONG. REC. S1753 (daily ed. Feb. 17, 1976).

25. It should be noted that, while the phrase "aids or abets" represents a well-defined legal concept in U.S. domestic law, its status in international law is less clear. There is some precedent, however, as to what the phrase might mean in the context of state responsibility for injuries to aliens. *See* Lillich & Paxman, note 3 *supra*.

26. "'Aid or abet,' to a criminal, whether he is a local criminal or an international criminal, is a very well-known term. It requires some intent, it requires some concealment or coverup. In other words, it does not matter whether they give him up or not. That is only a question of whether they are aiding or abetting him after the commission of his crime. The crime is what is the essential point." 122 CONG. REC. S1755 (daily ed. Feb. 17, 1976). *Compare with* text at and accompanying notes 24 & 25 *supra*.

from prosecution to any individual or group that has committed an act of international terrorism."²⁷ The italicized portion of the above quotation, however, is undercut considerably by what follows. While the revised amendment did contain "aid and abet" terminology, this language was linked solely to the granting of sanctuary.²⁸ Thus in effect the narrow proscription of the original House version prevailed.²⁹

On May 7, 1976, President Ford vetoed the International Security Assistance and Arms Export Control Act of 1976, which contained the above terrorism amendment. The President's opposition centered upon several provisions which he deemed violative of the constitutional separation of powers.³⁰ Although the terrorism amendment was not mentioned specifically, it, like the provisions the President did single out, contained the concurrent resolution device. For example, in his veto message the President cited the human rights provision, a provision parallel to the terrorism amendment.³¹ He characterized it as an "unwise restriction seriously inhibiting [his] ability to implement a coherent and consistent foreign policy."³² He considered such provisions to be "awkward and ineffective device[s]" which were, in effect, "simple legalistic tests" which ignored complex policy considerations.³³

Prior to the President's veto, Executive Branch opposition to further limitations on the President's discretion in the foreign policymaking area already had become apparent. This opposition, however, reflected the confusion mentioned earlier concerning the dual purposes of the legislation: on the one hand, it purported to be a practical "weapon" against terrorism, and, on the other hand, its real value, arguably, came from its being a norm-generating expression of shared U.S. and international community policy. The Department of State, in its evaluation of the terrorism amendment, principally criticized the first purpose and generally discounted the importance of the second. In a series of five "talking points," it argued that:

[1] Denying or terminating development and security assistance under the FAA will not necessarily deter a country from granting sanctuary to terrorists.

27. H.R. REP. NO. 1013, 94th Cong., 2d Sess. 69-70 (1976) (emphasis added).

28. The revised amendment required the President to terminate aid to any State "which aids or abets, *by granting sanctuary from prosecution to*, any individual or group which has committed an act of international terrorism. . . ." *Id.* at 30 (emphasis added).

29. Compare with text at and accompanying note 26 *supra*.

30. Press Release from the Office of the White House Press Secretary, May 7, 1976, at 1.

31. *Id.* at 3.

32. *Id.*

33. *Id.*

[2] There may be cases where transfer to a safe haven in another country is arranged for terrorists in order to avert the slaughter of hostages. This amendment would jeopardize this humane alternative.

[3] This amendment could jeopardize our efforts to achieve a peaceful solution in the Middle East and unfairly punish nations that are not in a position to control the activities of terrorists who use their territory as a sanctuary.

[4] There is no universally-accepted definition of "international terrorism." The term has been used with widely differing intents and meanings — usually with a political objective in mind. Thus one can imagine situations wherein the amendment, if adopted, could adversely affect a country that has been victimized by terrorist operations.

[5] The problem of terrorism is addressed effectively and comprehensively in a multilateral context. Unilateral threats of aid termination could slow acceptance of cooperative efforts such as the anti-hijacking conventions.³⁴

In Congress, opponents of the terrorism amendment stressed three major points. First, they emphasized the fact that States which had granted sanctuary to terrorists in the past did not receive U.S. aid and thus were immune from the amendment's thrust.³⁵ Secondly, they asserted that the amendment placed undue emphasis upon a single factor in complex State-to-State relations.³⁶ Finally, they pointed out that the lack of any definition of "international terrorism" created potential problems.³⁷ All three arguments, of course, are found in the Department of State's five "talking points." They ultimately failed to prevail in Congress, which reenacted the terrorism amendment, minus the concurrent resolution device, that now graces the statute books as Section 620A of the Foreign Assistance Act of 1961.³⁸

III. AN ASSESSMENT OF THE OPPOSITION TO THE AMENDMENT

The three arguments mentioned in the final paragraph of the preceding section bear closer examination than they were given either by the Department of State or by Congress. The first one simply reflects the confusion mentioned twice above over the dual purposes of the terrorism amendment, a point that need not be repeated again in detail. Suffice it to say that the amendment may have long-range value even if its immediate effectiveness proves to be zero.

In response to the second argument, it might be asked which is the more important factor in determining U.S. foreign policy: a consider-

34. See U.S. DEP'T OF STATE, Termination of Assistance to Countries Giving Sanctuary to International Terrorists, 1976 (unpublished).

35. *Hearings*, *supra* note 11, at 686.

36. *Id.* at 687.

37. 122 CONG. REC. S1754 (daily ed. Feb. 17, 1976).

38. See text at note 10 *supra*.

ation of complex State-to-State relations in a given case or a firm general stand behind the emerging international law norm condemning international terrorism. Presidential flexibility in the conduct of foreign relations is an important consideration, admittedly, and of course it is not necessarily incompatible with a firm stand against international terrorism. Such flexibility, though, should not extend to the point where the President engages in a consistent pattern of trading concessions to criminals either for short-run objectives (e.g., freeing of hostages) or long-run advantages (e.g., the maintenance of "friendly relations" with an oil-exporting State). The problem of terrorism is too important for it to be treated as just another factor in the diplomatic decision-making process. Surely the time has come to reconsider the unofficial U.S. position of what might be called "negotiable disapproval" vis-à-vis terrorists. The terrorism amendment reflects Congress' desire for such reconsideration, while at the same time acknowledging the realities of international life by providing a "national security" exception for use in the hard case.

The third objection raised against the amendment, both by the Department of State and by various members of Congress, concerns the amendment's failure to define the operative term "international terrorism." Curiously, this objection, voiced chiefly by Senator Abourezk, embraced two diametrically opposite points of view. One was that the concept of terrorism is too vague to constitute a standard for judging certain behavior as criminal; the other was that, on the contrary, the amendment is drawn with overly-great precision, so that it very skillfully exempts Israeli military operations from its ambit.³⁹

Regarding the first point, Mr. Wolff acknowledged that:

there is no widely accepted international definition of terrorism. I would suggest, however, that the language contained in . . . the U.S. draft to the United Nations on the "Convention for the Prevention or Punishment of Certain Acts of International Terrorism" provides a basis for further consideration.

This act, of course, would have to meet the other tests, but in the end, I fear that the definitions of international terrorism are similar to Supreme Court Justice Potter Stewart's comment on obscenity when he said "I know it when I see it."⁴⁰

It may be that, as unsatisfactory as this solution to the problem appears at first blush, it would create less difficulty than might be imagined in determining whether or not a given incident constitutes ter-

39. 122 CONG. REC. S1754-55 (daily ed. Feb. 17, 1976).

40. *Hearings*, *supra* note 11, at 685. Cf. Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 U. AKRON L. REV. 380 (1974).

rorism. Critics of the amendment are correct, to be sure, when they assert that criminal statutes should not be overly vague as to the type of activity that is being proscribed.⁴¹ Yet can one say that the words "international terrorism" are not, in and of themselves, just as clear as any purported definition or restatement of them would be? Such was the belief of the U.S. delegation to the UN in 1972 when it submitted its draft Convention for the Prevention or Punishment of Certain Acts of International Terrorism,⁴² which focused on operative acts and purposely left the term undefined. Criticism of this approach has not been lacking, both within and without the UN, but it should be noted that the critics themselves have not met with conspicuous success in their own attempts to frame a fixed definition for so fluid an offense.⁴³

The second point emphasizes the fact that military operations, which can be viewed as State terrorism, do not fall within the amendment. This exclusion has the effect, critics of the amendment have argued, of giving covert approval to such events as Israeli Air Force raids on villages and refugee camps in southern Lebanon. In Senator Abourezk's view, for instance, the amendment is not aimed at all varieties of international terrorism, but only at one limited type of such terrorism, a type which would cover many acts committed by Palestinian freedom fighters driven to desperation by a generation of mistreatment at Israeli (and also U.S.) hands.⁴⁴

This last argument comes as a reprise to persons who have watched the UN vacillate on the terrorism issue since 1972. One should attack the causes, and not simply the manifestations, of terrorism, the argument at the UN has run. It reflects the fallacious viewpoint that, if one piece of remedial legislation does not accomplish everything to be desired, then it should not be enacted, even if it admittedly might solve part of the problem.

41. 122 CONG. REC. S1754 (daily ed. Feb. 17, 1976).

42. U.N. Doc. A/C.6/L.850 (1972), reprinted in 11 INT'L LEGAL MATERIALS 1382 (1972).

43. Leaving the term undefined in the amendment allows the U.S. to take into account, in the words of Senator Stone, "the evolving and emerging pattern of criminal activities" that may be characterized as "international terrorism." 122 CONG. REC. S1754 (daily ed. Feb. 17, 1976).

44. *Id.* at S1755:

If you were sincere in wanting to stop terrorism [. . .] you would put a stop to Israel's dropping bombs in southern Lebanon on the civilian population and, especially, with American cluster bombs and with American airplanes and American financing. That is the way to stop terrorism, to do it everywhere and not just in one part of the world.

It would seem to me this is a very, very cynical amendment, one designed to continue the terrorism [in the Middle East] and not to put a stop to it for a fact.

No one disputes that State terrorism is a serious problem and that it certainly deserves more adequate scrutiny and condemnation than it has received to date. The fact is, though, that there already exists a large body of conventional international law regulating State terrorism in the armed conflict context.⁴⁵ Additionally, there already exists a substantial and developing body of customary international law governing the responsibility of States for terrorist activities which they either initially sponsor or subsequently assist in accessory-after-the-fact fashion.⁴⁶ Moreover, another provision in the Foreign Assistance Act of 1961, as amended, requires the termination of U.S. aid to States which utilize terror against their own citizens,⁴⁷ the same sanction device found in the terrorism amendment.⁴⁸ Finally, there is no dispute that the underlying causes of terrorism should be studied and then eliminated. The recognition of this fact, however, does not mean that one should stand idly by while terrorist outrages continue. No one today would contend seriously that the U.S. should limit itself to studying the causes and alleviating the impact of racism, all the time foregoing the opportunity to pass laws against racial discrimination. The same reasoning applies in the terrorism field.

One additional response should be made at this point about the Department of State's fifth talking point.⁴⁹ It is true that multilateral, as opposed to unilateral, action against terrorism is the preferable course of action. If the Department is correct in its assertion that the terrorism amendment "could slow acceptance of cooperative efforts such as the anti-hijacking conventions," then the amendment would indeed lose much of its *raison d'être* as an effort at promoting inter-

45. See Convention with Respect to the Law and Customs of War on Land, Jul. 29, 1899, 32 Stat. 1803 (1902), T.S. No. 403; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (1909), T.S. No. 539; 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; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 3 U.S.T. 3516, T.I.A.S. No. 3365. For a discussion of the evolution of international law norms regarding terrorism, see Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment, and Cooperative Action*, 5 GA. J. INTL & COMP. L. 431 (1975).

46. See Lillich & Paxman, note 3 *supra*.

47. 22 U.S.C. § 2304(a) (Supp. V, 1975).

48. *Hearings*, *supra* note 11, at 686 (Mr. Wolff):

A further point I would like to make is that this amendment can be considered a corollary to the human rights amendment approved by this committee last year. My amendment is directed toward terrorism created by individuals or groups.

Last year's amendment was directed toward terror by states. Thus, with the inclusion of my amendment, we will have an even-handed approach to the problem of terrorism and avoid an accusation that we are concentrating on but one form, an accusation that has hindered past U.S. attempts to curb terrorism.

49. See text at note 34 *supra*.

national law. As a matter of fact, however, the Department's fear in this regard is largely groundless, for the lamentable reason that the anti-hijacking conventions mentioned are not achieving universal adherence; States harboring hijackers naturally having little motivation to ratify them. Moreover, those conventions cover only one facet of terrorist activities. As for multilateral action against terrorism in general, there is little possibility of any effective action being taken in the foreseeable future.⁵⁰ In any event, the problem of terrorism is too urgent for the U.S. simply to sit and wait for international agreement to materialize.

IV. THE EFFECTIVENESS OF THE AMENDMENT

Having analyzed the arguments advanced against the substance of the terrorism amendment and found them wanting, one still is left with the problem of whether the particular version of the amendment enacted is the preferable one. In this regard, a strong case can be made for the House draft amendment originally presented by Mr. Wolff, as opposed to the legislation which finally became law. The major difference between the two bills, it will be recalled, was the presence in the former, and the absence in the latter, of the concurrent resolution device.

This difference has an important bearing on the effectiveness of the legislation, although not in the way that normally is supposed. Lawyers especially find it virtually impossible to resist engaging in what often become artificial and theoretical debates about Executive and Legislative Branch prerogatives in the foreign policy area. On the part of the Executive Branch, there is a "knee jerk" unwillingness to accept any limitation on the President's foreign policymaking powers. The implication is not just that the President is in a better position to formulate U.S. policy in regard to matters such as international terrorism, but actually that he is in the only effective position to do so. In evaluating the terrorism amendment, the Executive Branch apparently was prepared to accept only legislation which left the President's discretion relatively unfettered.

50. The UN General Assembly recently established a 35-member committee to draft an international convention prohibiting the taking of hostages. N.Y. Times, Dec. 16, 1976, at 3, col. 3. The committee is to begin work in August 1977 and complete a draft text in time for submission to the next session of the General Assembly in September. *Id.*, Dec. 10, 1976 §A, at 12, col. 1. What kind of convention will emerge from the committee and what its reception will be in the General Assembly are matters of speculation. Even if the effort is unexpectedly successful, however, the convention will proscribe only the taking of hostages and not terrorist acts in general.

As fascinating as such debates are from an academic standpoint, they nonetheless seem to miss the real issue at stake, which is just how firm and unequivocal a statement the U.S. is willing to make to the world community on the subject of international terrorism. The congressional debates, significantly, yield little evidence that great practical differences would ensue depending upon whether the President or Congress had the ultimate power to decide on cut-offs of U.S. aid under the amendment. The important point, though, is not that Congress would make better, or even different, substantive decisions in this area than the President. It is that if Congress were to have been given the ultimate decisionmaking power, then that bestowal of power would have been perceived by other countries, rightly or wrongly, as reflecting an especially forthright stand against terrorism.

The theory behind this last point is that any issue that is lifted out of the workings of day-to-day professional diplomacy and placed in the hands of the public at large (through the medium of the Congress) is one about which the public is particularly concerned. In one sense, it is true that the step might be viewed as being a regressive one, tying the President's hands in his direction of U.S. foreign policy. In another and more vital sense, though, it would be a progressive step in that U.S. concern over terrorism would be viewed as being a widespread public concern, rather than merely another of many factors in the diplomatic decision-making process; the international norm-generating capacity of the amendment thereby would have become all the greater. The strength of the original House draft amendment thus lay not in its reliance on the wisdom of Congress rather than that of the President *per se*, but rather in the forcefulness of its condemnation of international terrorism.

Nevertheless, despite the dropping of the concurrent resolution device, Mr. Wolff and the supporters of the original House amendment have achieved a meaningful compromise. At the worst, their efforts to combat and condemn international terrorism will prove futile, serving only as a vent for congressional frustrations. At best, the amendment will deter some States from granting sanctuary and also will contribute, incrementally, to the continuing development of an international law norm condemning terrorism. "Perhaps this is nothing more than going on record," Mr. Wolff realistically acknowledged, in remarks already quoted above, adding pointedly:

[U]nfortunately, however, in no piece of legislation that we have had has the United States really gone on record as being opposed to terrorism. It would be one more method, one additional area of voicing our opposition to international

anarchy taking place. The fact that you say that it might not stop it, well, without this we have not been able to stop it either.⁵¹

It is difficult to differ with this sober assessment of the 1976 terrorism amendment.

51. See text at note 15 *supra*.