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## Recent Developments in International Law: Anti-Terrorism Legislation – Part One: An Overview

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### Cover Page Footnote

J.D., The Florida State University College of Law, 2003; B.S., The Florida State University, 2000. The author would like to thank Rachel Silber, for her unconditional love and support; Amy Avalos, for her friendship and assistance in editing this piece; and Professor Steven Gey, for his encouragement and enthusiastic ideas which will help to shape this series. Any opinions expressed herein are those of the author and do not necessarily reflect the official policy or position of the Journal of Transnational Law & Policy, The Florida State University College of Law, The Florida State University, or any other governmental entity.

# RECENT DEVELOPMENTS IN INTERNATIONAL LAW: ANTI-TERRORISM LEGISLATION – PART ONE: AN OVERVIEW

JOSHUA D. ZELMAN\*

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## I. INTRODUCTION

The effects of terrorism and the risk of future attacks have been the topic of discussion and research for many years.<sup>1</sup> However, at no time in recent history has there been such a perceived need to enact legislation that addresses methods for eradicating terrorism as there is today. The events of September 11th have served as a springboard for radical and far-reaching legislation intended to enable countries to better detect, prevent, prosecute, and, ultimately, put an end to terrorism. With the United States of America playing the role of a powerful lobbyist, many countries have either passed legislation,<sup>2</sup> or are in the

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1. See, e.g., Barry Kelman, *Biological Terrorism: Legal Measures for Preventing Catastrophe*, 24 HARV. J.L. & PUB. POL'Y 417 (2001); Joginder S. Dhillon & Robert I. Smith, *Defensive Information Operations and Domestic Law: Limitation on Government Investigative Techniques*, 50 A.F.L. REV. 135 (2001).

2. For example, legislative acts that have passed in the United States include: The Intelligence Authorization Act for Fiscal Year 2002, H.R. 2883, 107th Cong. (enacted 2001); Air Transportation Safety and System Stabilization Act, H.R. 2926, 107th Cong. (enacted 2001); USA PATRIOT Act of 2001, H.R. 3162, 107th Cong. (enacted 2001);

process of passing legislation,<sup>3</sup> that are intended to combat terrorism.

This article is part one in a two-part series on the anti-terror legislative wildfire that has engulfed governmental bodies the world over. Part I of the series is intended to briefly summarize the formal legislation that has been enacted by countries and international organizations that support the United States in its "War Against Terrorism." Part II of the series will focus on the effects of legislation passed by the United States Congress, especially the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), and analyze the legality of such legislation.<sup>4</sup>

## II. THE ALLIED RESPONSE

In a bold move that would set the stage for his political agenda, President George W. Bush addressed a joint session of Congress on September 20, 2001. In this address, the President

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National Defense Authorization Act for Fiscal Year 2002, S. 1438, 107th Cong. (enacted 2001); Aviation and Transportation Security Act, S. 1447, 107th Cong. (enacted 2001); and Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (enacted 2001). Acts in the United Kingdom include: Anti-terrorism, Crime and Security Bill, 2001, c. 24 (Eng.); and Criminal Justice and Police Act of 2001, c. 16 (Eng.). Acts in Canada include: The Anti-Terrorism Act, ch. 41, 2001-2002 S.C. \_\_ (Can.).

3. Legislative proposals in the United States include: Displaced Workers Relief Act of 2001, H.R. 2946, 107th Cong. (2001); True American Heroes Act, H.R. 3054, 107th Cong. (2001); Terrorism Risk Protection Act, H.R. 3210, 107th Cong. (2001); Anthrax Victims Compensation Act, H.R. 3228, 107th Cong. (2001); Public Health Security and Bioterrorism Response Act of 2001, H.R. 3448, 107th Cong. (2001); Airport and Seaport Terrorism Prevention Act, S. 1429, 107th Cong. (2001); Post Terrorism Mental Health Improvement Act, S. 1729, 107th Cong. (2001); and Economic Security and Recovery Act of 2001, S. 1791, 107th Cong. (2001). Proposals in Canada include: Public Safety Act, H.C. Bill C-42, 37th Parl. (2001).

4. Joshua D. Zelman, *Recent Developments in International Law: Anti-Terrorism Legislation - Part Two: The Impact and Consequences*, 11 J. TRANSNAT'L L. & POL'Y \_\_ (forthcoming Spring 2001).

In the second part of this series, the author will examine issues, such as whether the provisions of the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 are constitutional, especially in light of the U.S. Supreme Court's recent decision in *Zadvydas v. G. Davis*, 533 U.S. \_\_, 121 S.Ct. 2491 (2001). In *Zadvydas*, the issue before the Court was whether the Attorney General was authorized "to detain a removable alien indefinitely beyond the [90-day] removal period or only for a period reasonably necessary to secure the alien's removal." *Id.* at 2495 (emphasis in original).

In deciding that an alien may be held beyond the initial 6-month period, the Court held that any such detention beyond that initial period must be supported by evidence that there is a "significant likelihood of removal in the reasonably foreseeable future." *Id.* at 2505. One of the questions that will be examined in the second part of this series is whether section 412 of the USA PATRIOT Act violates the reasonableness requirement promulgated by the Court.

told the world that the United States of America would not rest until she had caught each and every person responsible for the atrocities that transpired on September 11th.<sup>5</sup> He drew a hypothetical “line in the sand,” essentially stating that, “You are either with us, or against us.” President Bush made a promise to the world that evening, that any country that harbored terrorists would find itself a target of the coalition that had now been formed.

Since that day, the government of the United States has appealed to the governments of almost every other country in the world asking for support in the “War on Terrorism.” Additionally, the United Nations has urged its members to freeze the assets of known terrorist organizations, to deny safe haven to terrorists and to those who support terrorists.<sup>6</sup> In most cases, those countries have reacted to these requests with some action, whether through their respective legislative bodies or through their military or police forces, in order to rid their countries of terrorists.

### A. *The United States*

#### 1. *Legislation*

Before the smoke from the fallen twin towers had fully dissipated, the legislative wildfire began in the United States Congress almost immediately.<sup>7</sup> Senate Joint Resolution 23, the Military Force Authorization (“MFA”) bill, was enacted on September 18, 2001.<sup>8</sup> The MFA authorizes the President to use all necessary force against any organization or State found to have been involved in planning or committing the terrorist attacks on the United States. Additionally, such force can be

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5. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited Jan. 15, 2002) [hereinafter Address].

6. S.C. Res. 1373, U.N. SCOR, U.N. Doc. S/RES/1373 (2001).

7. Within one week of the terrorist attacks on September 11, 2001, Congress had enacted S.J. Res. 22 & 23, and H.R. 2882. S.J. Res. 22 (a joint resolution expressing the sense of the Senate and House of Representatives regarding the terrorist attacks launched against the United States on September 11, 2001) and H.R. 2882 (Public Safety Officer Benefits bill) are both beyond the scope of this article, even though they were enacted in response to the attacks. Even more significant, however, are the overwhelming number of bills proposed in response to the attacks. A complete list of the proposed legislation is available online at <http://thomas.loc.gov/home/terrorleg.htm>. Unfortunately, supplying a summary for every piece of legislation would prove too burdensome. Thus, this article is limited to those pieces of legislation believed by the author to be most significant.

8. Pub. L. No. 107-40 [hereinafter the MFA].

utilized against any country that is found to have been a safe haven for such terrorist organizations.<sup>9</sup>

On November 19, 2001, President Bush signed S. 1447, the Aviation and Transportation Security Act ("ASA"), into law.<sup>10</sup> The ASA establishes the Transportation Security Administration,<sup>11</sup> which is responsible for all domestic transportation, including security screening at all airports.<sup>12</sup> The Under Secretary is given the authority to place Federal air marshals on every passenger flight and requires that the Under Secretary place an air marshal on every long-distance flight that is determined to present high security risks.<sup>13</sup> Furthermore, 100% of baggage checked in any U.S. airport must be screened by all airlines and the screeners, who will be subject to a background check along with all other airline workers,<sup>14</sup> must all be U.S. citizens.<sup>15</sup> Most significantly, however, the ASA not only directs the National Institute of Justice to determine the range of less-than-lethal weaponry available to flight deck personnel,<sup>16</sup> it allows pilots to carry firearms.<sup>17</sup>

The single most noteworthy law enacted in response to September 11th has been the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("the Act").<sup>18</sup> The Act makes available the use of military assistance in the enforcement of civil law by giving specific statutory authority to do so as required under the Posse Comitatus Act,<sup>19</sup> by amending section 2332(e) to include emergencies involving other weapons of mass destruction.<sup>20</sup> The Act also authorizes the President to seize the property and funds of foreign nationals suspected of being involved in plotting an attack against the United States.<sup>21</sup>

One of the most important measures provided by the Act is located in Title II. Section 201 adds several terrorism-related offenses to the list of offenses for which expanded interception of

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9. *Id.* § 102.

10. Pub. L. No. 107-71 [hereinafter the ASA].

11. *Id.* § 101; Transportation Security Administration [hereinafter TSA].

12. *Id.*

13. *Id.* § 105.

14. *Id.* § 138.

15. *Id.* § 106.

16. *Id.* § 126.

17. *Id.* § 128.

18. Pub. L. No. 107-56 [hereinafter the Act].

19. 18 U.S.C. 1385, 10 U.S.C. 375 (this amendment affects 18 U.S.C. 2332(e)).

20. The Act, *supra* note 18, § 104.

21. *Id.* § 106.

wire, oral and electronic communication can be obtained pursuant to the Omnibus Crime Control and Safe Streets Act of 1968.<sup>22</sup> Additionally, the Act allows the issuance of a roving wiretap, trap and trace devices, and pen registers when seeking to collect information during a foreign intelligence investigation.<sup>23</sup> Furthermore, the Act, in effect, trumps Federal Rule of Criminal Procedure 6(e), regarding the secrecy of grand jury proceedings, when matters of national security arise.<sup>24</sup>

U.S. banks and financial institutions are also affected by the Act. The Act prohibits the maintenance of correspondent accounts for foreign banks that have no physical presence in any country.<sup>25</sup> The Act also requires that banks and financial institutions report all suspicious activity and the disclosure of banks records of those under investigation for financial crimes related to terrorism.<sup>26</sup> Similar provisions are made for obtaining confidential communication transaction records, financial reports and credit information,<sup>27</sup> when a federal official certifies that such information is relevant to an authorized foreign counterintelligence investigation.<sup>28</sup>

The Northern Border of the United States will also be strengthened as a result of the Act. The Act provides for a significant increase in funding for the INS, Border Patrol and Customs Service to triple the number of personnel in each state located on the Canadian border.<sup>29</sup> Section 403 also authorizes background checks, through the National Criminal Information Files database, of all persons who meet certain identifying characteristics who apply for Visas.<sup>30</sup>

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22. 18 U.S.C. 2510 *et seq.* The Act adds the following offenses to those that qualify as serious crimes: chemical weapons offenses, use of weapons of mass destruction, violent acts of terrorism, financial transactions with countries that sponsor terrorism, and support of terrorists and terrorist organizations. Additionally, the Act expands the definition of "terrorism" to include almost any crime that "involves acts dangerous to human life." The Act, *supra* note 18, § 802.

23. The Act, *supra* note 18, §§ 206-220. This roving warrant applies to e-mail, voicemail, telephone conversations, and obtaining the addresses of Internet sites visited by those under investigation.

24. *Id.* § 203.

25. *Id.* § 313.

26. *Id.* §§ 351-366. Title III incorporated the provisions proposed in H.R. 3004, the Financial Anti-Terrorism Act of 2001, into the Act.

27. *Id.* § 505.

28. H. Rept. 107-236, at 61-62 (2001). Congress has also limited the issuance of Hazmat licenses to those who have passed a criminal background check through the Attorney General, INS, and Interpol. The Act, *supra* note 18, § 1012.

29. The Act, *supra* note 18, §§ 401-405.

30. *Id.* § 403. The section, however, does not specify what those identifying characteristics are.

Under the Act, the Attorney General and the Secretary of State are also authorized to pay rewards to persons who provide information, leading to the arrest and conviction of terrorists.<sup>31</sup> The Attorney General is given the power to pay rewards in the amount of \$250,000 or more to prevent, investigate, or prosecute terrorism.<sup>32</sup> Section 502 expands the limit on rewards payable by the Secretary of State to any amount for information the leads to the arrest of terrorist leaders or that assists in the dissolution of terrorist organizations.<sup>33</sup>

## 2. Executive Orders

September 14, 2001 marked the day that President Bush issued his initial Executive Order in response to the terrorist attacks on September 11th.<sup>34</sup> In Order I, the President called up all ready reserve in the armed forces,<sup>35</sup> including the Coast Guard.<sup>36</sup> With the execution of Order I, President Bush turned to the most obvious means of retaliating against the attackers through sheer military force. On September 24th, President Bush issued his next Executive Order.<sup>37</sup> With Order II, the President recognized that the most significant weapon in any terrorist organization's arsenal is money. Thus, Order II prohibits all financial transactions with any person or entity who has committed, or even supported those who have committed, any acts of terrorism<sup>38</sup> within the United States, or that threaten the security of United States citizens, residents, or economy.<sup>39</sup> Order II criminalizes any act intended to circumvent the prohibitions

31. *Id.* tit. 5.

32. *Id.* § 501.

33. This removes the \$5 million limit previously in place under 22 U.S.C. 2708.

34. Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 14, 2001) (Ordering the Ready Reserve of the Armed Forces to Active Duty) [hereinafter Order I].

35. *Id.* §§ 1-2.

36. *Id.* § 3.

37. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 24, 2001) (on Terrorist Financing: Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism) [hereinafter Order II].

38. Order II defines "terrorism" as:

[A]n activity that—

(i) involves a violent act or an act dangerous to human life, property, or infrastructure; and

(ii) appears to be intended—

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

*Id.* § 3(d).

39. *Id.* § 1.



therein and any conspiracy to circumvent such prohibitions.<sup>40</sup> Furthermore, Order II confers upon the Secretary of State the authority to enter into agreements, both formal and informal, with other countries in order to achieve a freeze of all relevant accounts worldwide.<sup>41</sup>

Shortly thereafter, the President issued the Executive Order Establishing the Office of Homeland Security and the Homeland Security Council.<sup>42</sup> President Bush announced this action during his September 20th speech.<sup>43</sup> The purpose of the Office of Homeland Security is to “develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks.”<sup>44</sup> The Director of the Office of Homeland Security is directed to coordinate such efforts with all local, state, and national agencies.<sup>45</sup> The aforementioned “comprehensive national strategy” is to include provisions to detect, prepare for, prevent, protect against, respond to, and recover from any terrorist attack within the United States.<sup>46</sup> Additionally, Order III provides for the establishment of the Homeland Security Council.<sup>47</sup> This Council, made up of the heads of almost every major executive department,<sup>48</sup> is directed to serve as a liaison between the Office of Homeland Security and the President. Essentially, the Council will serve as an adviser to the President on matters of homeland security.

Recognizing the desire of the average citizen to want to do something to help the United States and concern with over how citizens prepare for future attacks, President Bush established the Presidential Task Force on Citizen Preparedness in the War on Terrorism (“Task Force”).<sup>49</sup> The Task Force, co-chaired by the Director of the Office of Homeland Security and the head of the Domestic Policy Council, was given the mission of identifying how Americans can help.<sup>50</sup> Additionally, the Task Force was given the responsibility for determining what steps the average American

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40. *Id.* § 2.

41. *Id.* § 6.

42. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001) [hereinafter Order III].

43. Address, *supra* note 5.

44. Order II, *supra* note 37, § 2.

45. *Id.* §§ 3(b-f).

46. Order III, *supra* note 42.

47. *Id.* § 5.

48. *Id.* § 5(b).

49. Exec. Order No. 13,234, 66 Fed. Reg. 57,355 (Nov. 9, 2001) [hereinafter Order IV].

50. *Id.* § 3.

could take to prepare for any future terrorist attacks.<sup>51</sup> The recommendations made by the Task Force were to be forwarded to the President by December 19, 2001,<sup>52</sup> and the Task Force was to dissolve by January 18, 2002.<sup>53</sup>

In what is probably one of his most controversial orders, President Bush then issued a Military Order on November 13, 2001.<sup>54</sup> Order V authorizes the Department of Defense to detain any "individual subject to this order."<sup>55</sup> Order V provides that such individuals are to be treated humanely and given adequate food, water, and shelter, and be allowed the free exercise of religion.<sup>56</sup> Furthermore, Order V authorizes the trial of such individuals to be conducted by military commissions.<sup>57</sup> The Secretary of Defense is directed to issue rules necessary for the management and completion of such trials.<sup>58</sup> The order provides that these rules should provide for a full and fair hearing,<sup>59</sup> admission of evidence that possesses probative value,<sup>60</sup> and conviction and sentencing upon a vote of two-thirds of the commission members.<sup>61</sup> The one provision that may prove most troublesome, found in section 7, part b, is the prohibition on appeals placed on individuals prosecuted under this order.<sup>62</sup>

51. *Id.*

52. *Id.* § 4. The recommendations have not yet been made public; however, preparedness tips are available at <http://www.fema.gov/library/terrorf.htm>.

53. *Id.* § 5.

54. Detention, Treatment, and Trial of Certain non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Order V].

55. *Id.* § 3. Such person is defined as:

[A]ny individual who is not a United States citizen with respect to whom [the President] determine[s] from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of . . . al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore . . .

(iii) has knowingly harbored one or more individuals described [above] . . . and

(2) it is in the interest of the United States that such individuals be subject to this order.

*Id.* § 2(a).

56. *Id.* § 3.

57. *Id.* § 4.

58. *Id.* (Order V states that the rules should include, but are not limited, to "rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys . . .").

59. *Id.* § 4(c)(2).

60. *Id.* § 4(c)(3).

61. *Id.* §§ 4(c)(6)-(7).

62. *Id.* § 7(b). Order V states that "military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and the individual shall not be privileged to seek

### 3. Regulations

The Department of Justice caused a great uproar among civil liberties groups in December of 2001,<sup>63</sup> when the Attorney General issued Order no. 2529-2001.<sup>64</sup> The rule permits the monitoring of attorney-client communications made between an inmate in the custody of the Department of Justice and their attorney.<sup>65</sup> Such monitoring is authorized when the head of a United States intelligence agency certifies to the Attorney General that there may be “substantial reason to believe that certain inmates who have been involved in terrorist activities will pass messages through their attorneys to individuals on the outside for the purpose of continuing terrorist activities.”<sup>66</sup> The rule requires that both the inmate and attorney be notified when monitoring will occur.<sup>67</sup> In an attempt to maintain the appearance of protecting inmates’ Constitutional rights, the rule provides for the protection of confidential information obtained from inmate-attorney communications, including judicial review of information that the Department seeks to disclose.<sup>68</sup>

any remedy or maintain any proceeding . . . in (i) any court of the United States, (ii) any court of any foreign nation, or (iii) any international tribunal.” *Id.*

63. American Civil Liberties Union, Broad Coalition Calls on Attorney General to Rescind “Unprecedented Frontal Assault” on Attorney-Client Confidentiality (Dec. 20, 2001), available at <http://www.aclu.org/news/2001/n122001a.html>; American Civil Liberties Union, Regarding Eavesdropping on Confidential Attorney-Client Communications (Dec. 20, 2001), available at [http://www.aclu.org/safeandfree/122001\\_comments.pdf](http://www.aclu.org/safeandfree/122001_comments.pdf); National Association of Criminal Defense Lawyers, Comments of the National Association of Criminal Defense Lawyers on the Attorney General’s Order Regarding Monitoring of Confidential Attorney-Client Communications (Dec. 20, 2001), available at <http://www.nacdl.org/public.nsf/freeform/Leg-atclientdoc?opendocument>.

64. National Security, Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062-01 (Oct. 31, 2001) (to be codified at 28 C.F.R. pts. 500-01) This rule skirted the normal methods by which rules are enacted, stating that:

[T]he immediate implementation of this interim rule without public comment is necessary to ensure that the Department is able to respond to current intelligence and law enforcement concerns relating to threats to the national security or risks of terrorism or violent crimes that may arise through the ability of particular inmates to communicate with other persons.

*Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* For cases that the Department of Justice relies in support of this scheme, see *Clark v. United States*, 289 U.S. 1, 15 (1933); *United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975); *United States v. Soudan*, 812 F.2d 920, 927 (5th Cir. 1986); *In re Grand Jury Proceedings*, 87 F.3d 377, 382 (9th Cir. 1996); *cf. Massiah v. United States*, 377 U.S. 201, 207 (1964).

Contrary to the Department’s “efforts” to protect an inmate’s Constitutional rights, the rule allows disclosure of confidential information to investigators and prosecutors, when

## B. European Union<sup>69</sup>

### 1. Community Legislation

Since September 11th, the European Union has adopted numerous pieces of legislation concerning terrorism and the actions being taken in participating in the "War on Terrorism." To assist the reader in understanding the legitimacy of actions taken by the EU, the following is a list of the different types of legislation that can be passed by the EU. There are three types of legislation relevant to our discussion: Regulations, Directives, and Decisions. Regulations are binding on Member States without the need for any national implementing legislation.<sup>70</sup> Directives, including Common Positions, are binding on Member States as to their objectives and time limits, but leave the form and means to the relevant national authority.<sup>71</sup> Decisions are binding only on those Member States to which they expressly apply.<sup>72</sup>

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approved by a federal judge. The rule does not, however, provide the standard by which such disclosures would be authorized.

69. In an effort to be brief, a summary of the legislation of the European Union [hereinafter EU] has been supplied, in lieu of summarizing legislation enacted or being considered by each, independent Member State. Member States of the EU are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. The following countries have also applied for membership: Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, Slovenia, and Turkey.

In *Costa v. ENEL*, 1964 E.C.R. 585, the European Court of Justice held that:

The transfer by the states from their domestic legal systems to the Community legal system of the rights and obligations arising under the Treaty [of Rome] carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. *Id.*

For analysis of the EU's Supremacy Doctrine, see KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001); Christopher Henkel, *Constitutionalism of the European Union: Judicial Legislation and Political Decision-Making by the European Court of Justice*, 19 WIS. INT'L L.J. 153 (2001); *contra* THE CONSTITUTION OF EUROPE: DO THE CLOTHES HAVE AN EMPEROR? AND OTHER ESSAYS ON EUROPEAN INTEGRATION (J.H.H. Weiler ed., 1999). See also Mark Killian Brewer, *The European Union and Legitimacy: Time For a European Constitution*, 34 CORNELL INT'L L.J. 555 (2001) (arguing that the legitimacy of the European Court of Justice's authority remains contingent on the respect of Member States).

70. EU law—Definitions: Secondary Legislation, available at [http://europa.eu.int/eur-lex/en/about/pap/process\\_and\\_players2.html](http://europa.eu.int/eur-lex/en/about/pap/process_and_players2.html).

71. *Id.*

72. *Id.*

*a. Regulations*

Under the auspice of combating terrorism, Council Regulation 2580/2001, on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, was passed on December 27, 2001 by the Council of the European Union.<sup>73</sup> The regulation provides for the freezing of the funds of all persons who participate, knowingly and intentionally, in acts of terrorism or in preparation thereof.<sup>74</sup> The adoption of this regulation recognized the Council Common Position on the application of specific measures to combat terrorism, by defining the term "terrorist act."<sup>75</sup> According to this Council Position, the definition of "terrorist act" encompasses everything from intimidating a population to the commission of acts that cause death or harm to "the fundamental political, constitutional, economic, or social structures of a country . . ."<sup>76</sup>

Article 1 defines the terms relevant to the remainder of the regulation. A significant portion of the article is dedicated to defining the term "financial services," which covers everything commonly referred to as such.<sup>77</sup> The regulation makes it illegal to provide financial services to anyone who meets the criteria provided.<sup>78</sup> This provision also mandates that the Council establish a list, containing the names of people or groups who commit or assist in the commission of acts of terrorism, any entity owned by any such people or groups, and anyone acting on behalf of such persons or groups.<sup>79</sup> Additionally, any attempt to disrupt governmental actions provided for in Article 2 is criminalized.<sup>80</sup> The regulation directs all financial institutions in Member States

73. 2001 O.J. (L 344) 70 [hereinafter Regulation].

74. *Id.*

75. 2001 O.J. (L 344) 93 [hereinafter Common Position I].

76. *Id.* arts. 1, 3(iii).

77. Regulation, *supra* note 73, art. 1.

78. *Id.* art. 2.

79. *Id.* art. 2(3). In part, this provision states:

The Council, acting by unanimity, shall establish . . . such list [that] shall consist of:

(i) natural persons committing, or attempting to commit, participating in or facilitating the commission of any act of terrorism;

(ii) legal persons, groups or entities committing, or attempting to commit, participating in or facilitating the commission of acts of terrorism;

(iii) legal persons, groups or entities owned or controlled by one or more natural or legal persons, groups or entities referred to [above].

*Id.* at 72.

80. *Id.* art. 3.

to provide information about the accounts of those who are on the list provided for in Article 2.<sup>81</sup> In an attempt to be humane, the regulation also allows Member States to authorize specific amounts of money from frozen accounts to be unfrozen in order to support basic human needs of account holders and their families.<sup>82</sup>

*b. Directives*

The Council Common Position on combating terrorism furthermore, criminalizes any act that is found to assist a terrorist or terrorist group was adopted on December 27, 2001.<sup>83</sup> This includes provisions for freezing the funds of persons and entities that commit or assist others in committing terrorist acts.<sup>84</sup> Common Position II mandates that all Member States take measures to suppress any form of support of terrorism and prevent those who support terrorism from remaining within the borders of Member States.<sup>85</sup> Other mandates contained in Common Position II are that Members States are to assist each other in measures taken to comply with this Position,<sup>86</sup> Member States are to assist third parties in combating terrorism,<sup>87</sup> Member States are to become parties to international conventions and treaties relating to terrorism,<sup>88</sup> and that they are to fully

81. *Id.* art. 4.

82. *Id.* arts. 5, 6.

83. 2001 (L 344) 90 [hereinafter Common Position II].

84. *Id.* arts. 2, 3.

85. *Id.* arts. 4-8.

86. *Id.* art. 9.

87. *Id.* art. 12.

88. *Id.* art. 14. This provision requires that Member States become signatories of the following international convention and protocols: Convention on Offenses and Certain Other Offenses Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219; Convention on the Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Personnel, Dec. 14, 1973, 1035 U.N.T.S. 167; European Convention for the Suppression of Terrorism, Jan. 27, 1977, 90 E.T.S. 3; Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Materials, Mar. 3, 1980, 1456 U.N.T.S. 101 (codified in the United States at 18 U.S.C. § 831 and 22 U.S.C. § 4831); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, supplementary to the Convention of September 23, 1971, Feb. 24, 1988, S. Treaty Doc. No. 100-19; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms on the Continental Shelf, Mar. 10, 1988, 27 I.L.M. 685; Convention on the Making of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 721; UN Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, U.N. Doc. A/RES/52/164 (1998); UN Convention for the Suppression of Financing of Terrorism, Dec. 9, 1999, U.N. Doc. A/54/109 (1999).

implement the conventions related to terrorism and the United Nations Security Council Resolutions 1269 (1999) and 1368(2001).<sup>89</sup>

### *c. Decisions*

Council Decision 2001/927/EC, establishes the list of persons, groups and entities to which Regulation 2580/2001 applies.<sup>90</sup> The authority under which this Decision is decided is Article 2(3) of Regulation 2580/2001.<sup>91</sup> The list includes such notorious groups as Hamas-Izz al-Din al-Qassem, a known terrorist wing of Hamas, and the Palestinian Islamic Jihad.<sup>92</sup>

## *2. Proposed Legislation*

The proposal for Regulation of the European Parliament and of the Council on establishing common rules in the field of civil aviation was presented to the European Parliament on October 10, 2001.<sup>93</sup> This proposal recognizes the risk that terrorism presents to countries due to the freedom of travel enjoyed by most of the civilized world. The explanatory memorandum, which precedes the proposal, highlights the following areas of concern: control of access to sensitive areas of airports and aircraft, control of passengers and the hand luggage, control and monitoring of hold luggage, control of cargo and mail, training of ground staff, and classification of weapons that should be prohibited from being brought into sensitive areas, including on board aircraft.<sup>94</sup> The proposal also provides for the establishment of a staff of multinational experts to test the measures implemented by the Member States.<sup>95</sup> Such task force will, according to the drafters' estimates, be able to audit seventy to eighty airports annually, making up approximately twenty percent of the EU airports.<sup>96</sup> The purpose for this regulation would be for the establishment and enforcement of common standards for security measures and

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89. Common Position II, *supra* note 83, art. 15.

90. 2001 (L 344) 83 [hereinafter Decision].

91. Common Position II, *supra* note 83, art. 2.

92. Decision, *supra* note 90, art. 1.

93. EUR. PARL. DOC. (COM 2001) 575. Information on other steps being taken by the EU to protect itself is available in the Communication from the Commission to the Council and the European Parliament: Civil Protection—State of Preventive Alert Against Possible Emergencies, (COM 2001) 707.

94. *Id.* ¶ 21.

95. *Id.* ¶¶ 24-26.

96. *Id.* ¶ 25.

the technical equipment used in airports.<sup>97</sup> The text of the regulation itself is merely a guide to the Annex attached. The Annex contains the express requirements of measures to be taken by Member States.<sup>98</sup> Furthermore, the regulation would provide for routine monitoring by each Member State and the multinational task force mentioned above.<sup>99</sup>

### C. United Nations

#### 1. General Assembly

On September 12, 2001, the United Nations' General Assembly adopted Resolution 56/1, condemning the attacks against the United States.<sup>100</sup> The resolution urges for international cooperation to bring to justice those who were involved in the attacks.<sup>101</sup> Additionally, the resolution encourages international cooperation in holding accountable anyone who harbors those responsible for the attacks.<sup>102</sup>

In an attempt to open up international dialogue on the topic of terrorism, the United Nations held a debate from October 1st through October 5th at its headquarters in New York City.<sup>103</sup> The purpose of this debate was to discuss a comprehensive convention on international terrorism.<sup>104</sup> Furthermore, the debate was a forum in which all Member States were encouraged to ratify, and

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97. 2001/0234(COD) art. 1.

98. *Id.* art. 4. The regulation, however, also expressly states that Member States are to use the security measures provided as a minimum and, at each States' discretion, may apply more stringent standards. *Id.* art. 6.

99. *Id.* arts. 5, 7-8.

100. Condemnation of Terrorist Attacks in the United States of America, G.A. Res. 1, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/L.1 (2001).

101. *Id.*

102. *Id.*

103. General Assembly: Debate on Measures to Eliminate International Terrorism, U.N. GAOR, 56th Sess., 12th mtg., U.N. Doc. A/56/PV.12 - 22d mtg., U.N. Doc. A/56/PV.22 (2001). Transcripts of prepared statements are available at <http://www.un.org/terrorism/list011001.html>.

104. *Id.* In 1996, the General Assembly adopted the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 210, U.N. GAOR, 51st Sess., 88th mtg., U.N. Doc. A/RES/51/210 (1996). In this declaration, the General Assembly established an Ad Hoc Committee whose mission was to address ways in which to further the United Nations' efforts to eliminate international terrorism. Since that time, the Ad Hoc Committee has met to develop such comprehensive convention and the debate, *supra* note 103, was a forum for that Committee to ascertain the opinions of the various Member States, especially in the aftermath of the September 11th attacks.



act upon, any convention or protocol pertaining to international terrorism to which any Member had not yet become a party.<sup>105</sup>

## 2. Security Council

The U.N. Security Council accompanied the General Assembly in issuing a condemnation of the attacks perpetrated on the United States.<sup>106</sup> The Security Council also called upon the Member States to implement relevant anti-terrorist conventions.<sup>107</sup> Most importantly, however, was the Council's recognition of a State's inherent right to collective and individual self-defense.<sup>108</sup>

Shortly thereafter, the Security Council adopted measures commanding Member States to respond according to its resolution.<sup>109</sup> The resolution requires that Members freeze all assets of terrorists and terrorist organization.<sup>110</sup> Additionally, it forbids Members from sponsoring or supporting any individual or group involved in terrorist acts.<sup>111</sup> Furthermore, all Members are instructed to do everything within their collective powers to bring those responsible for terrorist acts to justice.<sup>112</sup> Lastly, the resolution establishes a Committee of the Security Council, whose job is to ensure implementation of this resolution.<sup>113</sup>

## D. NATO

The North Atlantic Treaty Organization ("NATO") was formed in 1949 to provide for the collective safety and support of the Allied States.<sup>114</sup> On September 11, 2001, the North Atlantic

105. *Id.* For a list of the conventions and protocols to which this applies, see Common Position II, *supra* note 83, annex.

106. S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001).

107. *Id.* (the resolution took particular note of Resolution 1269 (1999) which requests that Member States cooperate with each other in order to prevent and protect against terrorist attacks).

108. *Id.* Such right is provided in U.N. CHARTER ch. 7, which allows the use of military force in maintaining and restoring "international peace and security". *Id.*

109. S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001).

110. *Id.* ¶ 1.

111. *Id.* ¶ 2.

112. *Id.*

113. *Id.* ¶ 6. The mission of the Counter-Terrorism Committee has been expanded in Resolution 1377 (2001). The Committee is now responsible for the preparation of model laws for Member States and to explore the available technological, financial, legislative, and/or regulatory assistance programs; the purpose of which is to assist Members, especially those who may not have the necessary resources, in implementing Resolution 1373.

114. The North Atlantic Treaty ("Treaty of Washington") (1949) [hereinafter the Treaty of Washington].

Council met and issued a statement.<sup>115</sup> In no uncertain terms, the Council, and the NATO nations, condemned the barbaric acts committed against a member state.<sup>116</sup> The Council also joined so many others and pledged its support and assistance to the United States.<sup>117</sup> Lastly, the Council gave a warning to those who committed the attacks, stating that, “[o]ur message to those who perpetrated these unspeakable crimes is equally clear: you will not get away with it.”<sup>118</sup>

The following day, the North Atlantic Council met again and issued a second statement.<sup>119</sup> In this historic announcement, the Council revealed that if it was determined that the attack was committed from abroad against the United States, then they would invoke Article 5 of the Washington Treaty.<sup>120</sup> Prior to this statement, Article 5 has never been invoked.<sup>121</sup> Article 5 provides, in relevant part, that:

The Parties agree that an armed attack against one or more of them . . . shall be considered an attack against them all and . . . each of them . . . will assist the Party or Parties so attacked by . . . such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.<sup>122</sup>

After being provided with evidence gathered by the United States government, the Council formally confirmed its invocation of Article 5 on October 2, 2001.<sup>123</sup>

Shortly thereafter, on October 4, 2001, the Council issued a statement outlining the action that would be taken to operationalize the powers granted under Article 5.<sup>124</sup> In this

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115. Council Statement, N. Atlantic Council, NATO Doc. No. PR/CP 122 (Sept. 11, 2001), available at <http://www.nato.int/docu/pr/2001/p01-122e.htm>.

116. *Id.*

117. *Id.*

118. *Id.*

119. Council Statement, N. Atlantic Council, NATO Doc. No. PR 124 (Sept. 12, 2001), available at <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

120. *Id.* Article 5 of the Washington Treaty provides for the right of collective self-defense upon any attack from abroad committed against a member state. *Id.*

121. *Id.*

122. Treaty of Washington, *supra* note 114, art. V (a description of what an invocation of article 5 means is available at <http://www.nato.int/terrorism/five/htm>).

123. Security General Lord Robertson, Invocation of Article 5 Confirmed (Oct. 2, 2001), available at <http://www.nato.int/docu/update/2001/1001/e1002a.htm>.

124. Statement to the Press by Secretary General Lord Robertson (Oct. 4, 2001), available at <http://www.nato.int/docu/speech/2001/s011004b.htm>.

statement, Lord Robertson announced that eight measures would be taken to assist in the campaign against terrorism.<sup>125</sup> More specifically, these measures were:

1. [E]nhance intelligence sharing and co-operation (sic), both bilaterally and in the appropriate NATO bodies, relating to the threats posed by terrorism and the actions to be taken against it;
2. provide, individually or collectively, as appropriate and according to their capabilities, assistance to Allies and other states which are or may be subject to increased terrorist threats as a result of their support for the campaign against terrorism;
3. take necessary measures to provide increased security for facilities of the United States and other Allies on their territory;
4. backfill selected Allied assets in NATO's area of responsibility that are required to directly support operations against terrorism;
5. provide blanket overflight clearance for the United States and other Allies' aircraft, in accordance with the necessary air traffic arrangements and national procedures, for military flights related to operations against terrorism;
6. provide access for the United States and other Allies to ports and airfields on the territory of NATO nations for operations against terrorism, including refuelling (sic), in accordance with national procedures;
7. that the Alliance is ready to deploy elements of its Standing Naval Forces to the Eastern Mediterranean in order to provide a NATO presence and demonstrate resolve; and
8. that the Alliance is similarly ready to deploy elements of its NATO Airborne Early Warning force to support operations against terrorism.<sup>126</sup>

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125. *Id.*

126. *Id.* NATO has issued numerous press releases detailing its commitment to the operation against terrorism. Two of these statements are available at <http://www.nato.int/docu/pr/2001/p01-159e.htm> and <http://www.nato.int/docu/pr/2001/p01-173e.htm>.

### III. CONCLUSION

Governments worldwide have been enacting legislation, seemingly in reaction to the events of September 11th. For the most part, governments are given broad powers to fight terrorism. The incidental effects of these laws on average citizens are still not certain. However, should we question if the only objectives of these laws are aimed at terrorism? Are these laws also intended to erode civil liberties, the very essence of democratic societies? Will the new laws, especially those in the United States, be utilized by law enforcement in investigations other than those concerning terrorism? Will the United States use the Act<sup>127</sup> to violate rights of citizens, and non-citizens, guaranteed by the Constitution?

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127. The Act, *supra* note 18.