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Preventing, Punishing and Eliminating Terrorism in the Western Hemisphere: A Post-9/11 Inter-American Treaty

Enrique Lagos* Timothy D. Rudy†

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Abstract

Part I of this Article will provide a brief background to the fight against terrorism as seen from an inter-American legal and institutional standpoint. Part II will discuss the more significant details of the Convention and the negotiations in the Permanent Council's Working Group that produced it. In II(A), the authors review the conflicting views among delegates about whether the OAS should have been negotiating a "comprehensive" anti-terrorism treaty (complete with a legal definition of terrorist acts) or follow the suggestion of the United States and adopt a less ambitious treaty providing some "added value" (by incorporating by reference the law-making of previous United Nations ("U.N.") terrorism treaties). In II(B), the authors discuss treaty provisions dedicated to cooperation among hemispheric governments. In II(C), the Article explains treaty provisions on denying terrorists the benefits of asylum, refugee status, and the political offense exception in extradition law. In II(D), the treaty's role as a supplement to other extradition treaties is noted. In II(E), the Article discusses what the treaty says about the money side of terrorism– what the hemisphere will do about tracking money, money laundering, and asset forfeiture. In II(F), the controversy over whether to mention human rights in the Convention is explained. In II(G), the authors discuss treaty provisions on permitting the transfer of prisoners among different countries in the Americas. In the Conclusion, the authors note that the American republics have taken a significant step forward in the codification of international law by negotiating a practical multilateral instrument.

LATIN AMERICA: VIEWS ON CONTEMPORARY ISSUES IN THE REGION

PREVENTING, PUNISHING, AND ELIMINATING TERRORISM IN THE WESTERN HEMISPHERE: A POST-9/11 INTER-AMERICAN TREATY

*Enrique Lagos**
*& Timothy D. Rudy***

INTRODUCTION

After the devastating and deadly terrorist attacks on the United States on September 11, 2001, the community of nations in the Western Hemisphere responded at once. A special session of the General Assembly of the Organization of American States ("OAS") being held in Lima, Peru on that very day "condemn[ed] in the strongest terms the terrorist acts . . . and reiterate[d] the need to strengthen hemispheric cooperation to combat this scourge that has thrown the world and the hemispheric community into mourning."[1] Ten days later, the OAS, acting pursuant to the collective security treaty of the Americas,[2] labeled the attacks on the World Trade Center and the Pentagon as "attacks against all the American [S]tates."[3] That same day,

* Enrique Lagos is the Assistant Secretary for Legal Affairs at the Organization of American States and a Chilean lawyer.

** Timothy D. Rudy is an American lawyer in the Office of the Assistant Secretary.

The opinions and conclusions expressed are those of the authors and do not necessarily represent those of the Organization of American States, its General Secretariat, or its other organs.

1. Press Release, Organization of American States ("OAS"), Statement From the OAS General Assembly (Sept. 11, 2001), *available at* http://www.oas.org/charter/docs/comuni_eng/E_005.htm.

2. Inter-American Treaty of Reciprocal Assistance, Dec. 3, 1948, 21 U.N.T.S. 92, O.A.S.T.S. 8 & 61 [hereinafter Rio Treaty]. The Rio Treaty has been ratified by twenty-three States in the Western Hemisphere, including Argentina, the Bahamas, Bolivia, Brazil, Chile, Colombia, Cuba, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, the United States, Uruguay, and Venezuela. The government of Cuba has not participated in OAS meetings and bodies since the early 1960s.

3. *Terrorist Threat to the Americas*, RC.24/RES.1/01, OAS Doc. OEA/Ser.F/II.24/

the Member States of the OAS, in another meeting, had their foreign ministers decide to take joint action.[4] Later in the year, a special entity of the OAS known as the Inter-American Committee Against Terrorism ("CICTE" under its Spanish initials) was reinvigorated.

By the summer of 2002, Member States of the OAS became one of the first group of nations[5] to adopt an anti-terrorism treaty in the wake of September 11th. During June 2002, OAS General Assembly, foreign ministers of the American States,[6] unanimously adopted by consensus a resolution submitting the text of the proposed Inter-American Convention Against Terrorism ("the Convention") to Member States and urged them to ratify the new treaty "as soon as possible" in accordance with their constitutional procedures.[7] Representatives of thirty of the Member States also signed the treaty that same day.[8]

RC.24/RES.1/01 rev. 1 corr. 1, at operative para. 1 (Sept. 21, 2001) (24th Meeting of Consultation of Ministers of Foreign Affairs) [hereinafter 24th resolution].

4. Thirty-three OAS Member States met at the 23rd Meeting of Consultation of Ministers of Foreign Affairs pursuant to provisions in the OAS Charter and at the urging of the OAS Permanent Council. *See infra* Part I. Dominica did not send a delegation to the meeting and the government of Cuba, of course, did not participate. *See Lista de Participantes*, OAS Doc. OEA/Ser.F/II.23/RC.23/doc.9/01 (Sept. 21, 2001) (Versión Provisional) (original in Spanish).

5. Two other multilateral agreements with anti-terrorism connotations were approved in May 2002. Malaysia, Indonesia, and the Philippines signed a counterterrorism treaty on May 7, 2002 after four months of negotiations. That treaty reportedly covers more areas of cooperation than the new document for the Americas. *See Asian Nations Sign Counterterror Pact*, WASH. POST, May 8, 2002, at A15; *see also* Adam Brown, *Malaysia, Indonesia, Philippines Sign Anti-Terror Draft Accord*, ASSOC. PRESS, Dec. 28, 2001. Also, a security agreement among nineteen NATO countries and Russia, though not a treaty, arguably goes far in promoting anti-terrorism cooperation between formerly hostile governments. *See* Colleen Barry, *NATO Links Itself With Russia: Combating Terror To Be Top Priority*, WASH. POST, May 15, 2002, at A19. A treaty negotiated for the Member States of the former Organization of African Unity (now the African Union) entered into force in September 2002, but was adopted in July 1999 in Algiers, Algeria. *See Africa Adopts Anti-Terrorism Plan*, AG. FR. PRESSE, Sept. 14, 2002.

6. Delegations from thirty-three of the OAS Member States were present at the June 2002 General Assembly session at which the Convention was adopted and signed. *See* Acta de la Primera Sesión, OAS Doc. OEA/Ser.P/AG/ACTA 377/02 (June 3, 2002).

7. Inter-American Convention Against Terrorism, AG/RES. 1840 (XXXII-O/02), OAS Doc. OEA/Ser.P/AG/doc. 4143/02, *compiled in* DECLARATIONS AND RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY AT ITS THIRTY-SECOND REGULAR SESSION 9-10 (June 3, 2002) [hereinafter Convention].

8. Canada, the Dominican Republic, and Trinidad and Tobago were the three delegations unable to sign the treaty in June 2002 after its approval by the OAS General Assembly. The delegation from the Commonwealth of Dominica was absent from this session of the General Assembly. The Dominican Republic signed the treaty on July 16,

Part I of this Article will provide a brief background to the fight against terrorism as seen from an inter-American legal and institutional standpoint. Part II will discuss the more significant details of the Convention and the negotiations in the Permanent Council's Working Group that produced it. In II(A), the authors review the conflicting views among delegates about whether the OAS should have been negotiating a "comprehensive" anti-terrorism treaty (complete with a legal definition of terrorist acts) or follow the suggestion of the United States and adopt a less ambitious treaty providing some "added value" (by incorporating by reference the law-making of previous United Nations ("U.N.") terrorism treaties). In II(B), the authors discuss treaty provisions dedicated to cooperation among hemispheric governments. In II(C), the Article explains treaty provisions on denying terrorists the benefits of asylum, refugee status, and the political offense exception in extradition law. In II(D), the treaty's role as a supplement to other extradition treaties is noted. In II(E), the Article discusses what the treaty says about the money side of terrorism—what the hemisphere will do about tracking money, money laundering, and asset forfeiture. In II(F), the controversy over whether to mention human rights in the Convention is explained. In II(G), the authors discuss treaty provisions on permitting the transfer of prisoners among different countries in the Americas. In the Conclusion, the authors note that the American republics have taken a significant step forward in the codification of international law by negotiating a practical multilateral instrument.

I. *OAS EFFORTS AGAINST TERRORISM*

Terrorism did not begin with the al Queda passenger jet suicide hijackers, nor did the nations of the Americas begin addressing terrorism only after September 11, 2001. Terrorism as a political tool is at least a 200-year-old concept.[9]

2002. Trinidad and Tobago signed on October 2, 2002. Canada signed and ratified on December 2, 2002. Antigua and Barbuda was the second State to ratify the treaty on March 27, 2003. El Salvador ratified the treaty on May 8, 2003.

9. *See generally* David Fromkin, *The Strategy of Terrorism*, FOREIGN AFF. 684-90 (July 1975); Alan B. Krueger & Jitka Maleckova, *Does Poverty Cause Terrorism? The Economics and the Education of Suicide Bombers*, NEW REPUBLIC, June 24, 2002, at 27.

A. *Pre-9/11*

The advisability of a new regional convention on terrorism was under study for some time before September 11, 2001. In the mid-1990s, the Inter-American Juridical Committee charged the OAS Secretariat for Legal Affairs with drafting a proposed convention.[10] This draft actually became the "base" document for drafting the Convention when delegates began negotiating in earnest in November 2001.

The OAS General Assembly raised the issue of studying "the necessity and advisability" of a new terrorism treaty during its annual meeting in 1998.[11] Two conferences on terrorism also were held in the Western Hemisphere during the 1990s. The Inter-American Specialized Conference on Terrorism, held in Lima, Peru, in April 1996, led to both the *Declaration of Lima to Prevent, Combat, and Eliminate Terrorism* and the *Plan of Action on Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism.*[12] The Second Inter-American Specialized Conference on Terrorism, held in Mar del Plata, Argentina, in November 1998, led to the *Commitment of Mar del Plata.* That document recommended that the OAS establish the CICTE and advocated a hemispheric anti-terrorism cooperation program.[13]

The CICTE was created in 1999 "for the purpose of promoting cooperation to prevent, combat, and eliminate terrorist acts and activities."[14] Most Member States of the OAS belong to the CICTE, but the committee has only met formally five times since its inception.[15] The CICTE, with its three subcommittees,[16] has

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10. *Preliminary Draft Inter-American Convention For The Prevention And Elimination Of Terrorism*, OAS Doc. OEA/Ser.G/ CP/CAJP-1829/01 corr. 1, at 3 (Oct. 17, 2001) (OAS Committee on Juridical and Political Affairs) (original in Spanish).

11. *See Hemispheric Cooperation To Prevent, Combat, And Eliminate Terrorism*, AG/RES. 1553 (XXVIII-O/98), at para. 5 (June 2, 1998).

12. *See Declaration of Lima To Prevent, Combat, And Eliminate Terrorism*, OAS Doc. OEA/Ser.K/XXXIII.1/CEITE/doc.28/96 rev.1, at 6-8 (Apr. 26, 1996) (Final Report of the Inter-American Specialized Conference on Terrorism) (original in Spanish); *see also id.* at 9-11.

13. *See Commitment of Mar del Plata*, OAS Doc. OEA/Ser.K/XXXIII.2/ CEITE-II/ doc.6/98 rev.1, at para. vii, appendix I (Nov. 24, 1998) (Second Inter-American Specialized Conference on Terrorism) (original in Spanish).

14. *Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism*, AG/RES. 1650 (XXXIX-O/99), 29th Reg. Sess., OAS Doc. OEA/Ser.P/XXIX-0.2/Dec. 7, 1999, vol. 1, at operative para. 3 (OAS General Assembly) (June 7, 1999); Inter-American Committee Against Terrorism Statute art. 1 [hereinafter CICTE Statute].

15. The First Regular Session of the Inter-American Committee Against Terrorism

various items on its agenda ranging from promoting inter-American cooperation in combating terrorism, to providing assistance to Member States requesting aid, and establishing further coordination with other international bodies.[17]

The CICTE may remind observers of the Counter Terrorism Committee ("CTC") of the U.N. Security Council. The CTC was established only in September 2001 when the Security Council adopted Resolution 1373. The Security Council, acting under Chapter VII of the U.N. Charter, decided that every country "shall" suppress the financing of terrorism and refrain from providing any support to terrorists or terrorist entities.[18] The Security Council called on nations to submit reports on their anti-terrorism efforts to the CTC. In turn, the CTC and its experts will review each State's report and facilitate the technical assistance and cooperation needed to assist that country in fighting terrorism.[19]

B. *Post-9/11*

On September 19, 2001, only eight days after the terrorist attacks, signatories of the Rio Treaty[20] and other OAS Member

("CICTE") was held in Miami, Florida on October 28-29, 1999. The First Special Session of the CICTE was held in Washington, D.C. on October 15, 2001, and the Second Special Session was held in Washington, D.C. on November 29, 2001. The Second Regular Session of the CICTE was held in Washington, D.C. on January 28-29, 2002. The Third Regular Session of the CICTE was held in San Salvador, El Salvador, on January 22-24, 2003.

16. The three subcommittees of the CICTE include: Border Control Measures, Financial Control Measures, and the 2002-2003 Work Plan.

17. *See* CICTE Statute, *supra* n.14, art. 15.

18. *See* U.N.S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001) [hereinafter Resolution 1373]. Resolution 1373 also encouraged information exchanges and cooperation efforts among nation States.

19. *See Report of the Policy Working Group on the United Nations and Terrorism*, U.N. SCOR, 57th Sess., Annex 1, Agenda Item 162, at paras. 31 & 32, U.N. Doc. A/57/273-S/2002/875 (2002) [hereinafter U.N. annex].

20. Article 9 of the Rio Treaty defines "aggression" as an:

> a. Unprovoked armed attack by a State against the territory, the people, or the land, sea or air forces of another State;
>
> b. Invasion, by the armed forces of a State, of the territory of an American State, through the trespassing of boundaries demarcated in accordance with a treaty, judicial decision, or arbitral award, or, in the absence of frontiers thus demarcated, invasion affecting a region which is under the effective jurisdiction of another State.

See Rio Treaty, *supra* n.2, art. 9.

States gathered in the Permanent Council[21] of the OAS and formally convened two Meetings of Consultation of Ministers of Foreign Affairs ("MCMFA").[22] The decision to proceed under two different but parallel tracks, one under the Rio Treaty and the other under the OAS Charter provisions mandating Meetings of Consultation for "problems of an urgent nature and of common interest to the American States,"[23] permitted the governments of all the Member States in the Western Hemisphere to sign up for the diplomatic side of the war against terrorism. The request to invoke the Rio Treaty, the collective security pact of the Western Hemisphere, came from the Brazilian government,[24] and the Mexican government requested the meeting of ministers called under the OAS Charter.[25]

The OAS Permanent Council acted when it adopted Resolution 796 and Resolution 797 during a regular meeting on September 19, 2001. In the first resolution, the OAS condemned the attacks of September 11 "as an attack against all the States of the Americas" and formally convened the 23rd Meeting of Consultation of Ministers of Foreign Affairs pursuant to Articles 61 to 65 in Chapter X of the OAS Charter.[26] This resolution also declared that terrorist acts were "an affront to human dignity and the rule of law," "a danger to the peace and security of the

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21. The Permanent Council is defined in Chapter XII of the OAS Charter in Articles 80 through 92 as the organ that routinely meets at the ambassadorial level and handles the bulk of the Organization's routine decision-making. *See* Charter of the Organization of American States, *entered into force* Dec. 13, 1951, 2 U.S.T. 2394, O.A.S.T.S. 1-C & 61 [hereinafter OAS Charter]. The full text of the OAS Charter, as amended by all four protocols now in force, can be found at 33 I.L.M. 989 (1994).

22. The Meeting of Consultation of Ministers of Foreign Affairs is defined in Chapter X of the OAS Charter in Articles 61 through 69 as a high-level consultation mechanism, which meets infrequently "to consider problems of an urgent nature and of common interest to the American States . . ." OAS Charter, *supra* n.21, art. 61.

23. *Id.*

24. *See Note From The Permanent Mission Of Brazil Requesting The Inclusion On the Agenda Of The Permanent Council Of The Item "Convocation Of The Organ Of Consultation Of The Inter-American Treaty Of Reciprocal Assistance, In Accordance With The Pertinent Provisions Of The Treaty And The Charter Of The Organization Of American States,"* OAS Doc. OEA/Ser.G/CP/doc.3517/01 (Sept. 18, 2001) (original in Portuguese).

25. *See Note From The Permanent Mission Of Mexico Requesting The Convocation Of The Meeting Of Consultation Of Ministers Of Foreign Affairs, Pursuant To Article 61 Of The OAS Charter,* OAS Doc. OEA/Ser.G/CP/doc.3515/01 (Sept. 17, 2001) (original in Spanish).

26. *See Convocation of the Twenty-Third Meeting of Consultation of Ministers of Foreign Affairs,* OAS Permanent Council Resolution 796, OAS Doc. OEA/Ser.G/ CP/RES. 796 (1293/01), at operative paras. 1 & 6 (Sept. 19, 2001).

Americas," and a "threat to democracy."[27] The resolution also requested that all governments in the hemisphere "use all necessary and available means to pursue, capture, and punish those responsible" for the September 11 attacks, and to prevent future terrorist incidents.[28] The Permanent Council also urged the Member States of the OAS to join international efforts and to cooperate on an inter-American level to bring the perpetrators to justice.[29] Resolution 796 was based on the inherent right of individual and collective self-defense, as recognized by Article 51 of the U.N. Charter, and Article 2 of the OAS Charter, which states that an "essential purpose" of the OAS is providing for common action in the event of aggression. The Permanent Council said it was convinced that the terrorists relied on a support network "that may have branches within our own Hemisphere." Resolution 796 also took a hard line on the question of State responsibility for harboring terrorists on the territory of a Member State. It said that those governments which "aid, abet or harbor terrorist organizations are responsible for the acts of those terrorists."[30]

In Resolution 797, the Permanent Council acted on Brazil's request and convened the 24th Meeting of Ministers of Foreign Affairs as an Organ of Consultation under the Rio Treaty to consider measures signatories of the pact should take for the common defense and to maintain peace and security in the Hemisphere.[31]

OAS foreign ministers met as the 23rd Meeting of Consultation of Ministers of Foreign Affairs on Friday, September 21, 2001. This was the Meeting of Consultation arising under terms of the OAS Charter. Ministers adopted both a declaration and a resolution. The resolution was based on anti-terrorism resolutions which the General Assembly and the Security Council of the U.N. had adopted on the day after the attacks, especially

27. *Id.* at para. 2.

28. *Id.* at para. 4.

29. *Id.* at para. 5.

30. *Id.* at pmbl.

31. *See Convocation of the Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs to Serve as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance*, OAS Permanent Council Resolution 797, OAS Doc. OEA/Ser.G/CP/RES. 797 (1293/01) at operative para. 1 (Sept. 19, 2001) (original in Portuguese).

General Assembly Resolution 56/1[32] and Security Council Resolution 1368.[33]

This resolution of the 23rd Meeting of Consultation itself "condemn[ed] vigorously" the September 11 attacks and requested that Member States "take effective measures" to prevent the operation of terrorist groups within their territories.[34] In this document, the foreign ministers of the Western Hemisphere also called for improving mutual legal assistance, exchanging information, and strengthening regional and international cooperation to capture, prosecute or extradite, and punish the perpetrators, organizers, and sponsors of the attacks.[35] Of later importance to Convention negotiators, the resolution explicitly stated that combating terrorism should be done under the law with respect for human rights and democratic institutions.[36] Ministers also urged the States of the hemisphere to sign or ratify a recent U.N. treaty, the International Convention for the Suppression of the Financing of Terrorism.[37] To implement this resolution, ministers at the 23rd Meeting of Consultation requested that the OAS Permanent Council quickly convoke a meeting of the CICTE to identify urgent cooperation actions that Member States could undertake in the struggle against terrorism. The ministers also requested that the Permanent Council *prepare a draft terrorism treaty for the hemisphere that the next session of the OAS General Assembly could consider in June 2002.*[38] This initiative was important from a political and practical standpoint because anti-terrorism activities "are carried out through bilateral and multilateral cooperation among national agencies devoted to law enforcement, intelligence and security."[39]

The *Declaration of Solidarity from the House of the Americas* was an expression of solidarity and condolence by the inter-Ameri-

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32. *Report of the Secretary-General on the Work of the Organization*, U.N. GAOR, 56th Sess., Supp. No. 1, U.N. Doc. A/RES/56/1 (2001).

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

34. *Strengthening Hemispheric Cooperation To Prevent, Combat, and Eliminate Terrorism*, OAS Doc. OEA/Ser.F/II.23/RC.23/RES.1/01 rev.1 corr.1, at operative paras. 1, 3 (Sept. 21, 2001) [hereinafter 23rd resolution].

35. *Id.* at operative para. 4.

36. *Id.* at operative para. 5.

37. *Id.* at operative para. 7; *International Convention for the Suppression of the Financing of Terrorism*, G.A. Res. 54/109, U.N. GAOR, 54th Sess., 76th mtg., U.N. Doc. A/RES/54/109 (2000) [hereinafter Financing Treaty].

38. 23rd resolution, *supra* n.34, at operative paras. 8, 9 (emphasis added).

39. U.N. annex, *supra* n.19, at para. 10.

can community to the government and people of the United States. In particular, the ministers attending the 23rd Meeting of Consultation stated that continental solidarity against terrorism stands, in part, on condemning "the abhorrent practice of targeting innocent persons to promote ideological objectives."[40]

Foreign ministers also met that same day as the Organ of Consultation under terms of the 1947 Rio Treaty.[41] The resolution was based on the rights of individual and collective self-defense under the U.N. Charter, the Rio Treaty, and Article 2 of the OAS Charter which states that an "essential purpose" of the Organization is to strengthen peace and security on the continent and to provide for common action in the face of aggression. The terrorist attacks of September 11 were held to be "attacks against all American [S]tates."

Acting pursuant to the collective security treaty "and the principle of continental solidarity," the foreign ministers decided that States Parties to the Rio Treaty "shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American State and to maintain the peace and security of the continent." States Parties also promised to assist and support the United States Government and one another "as appropriate" in regard to the September 11 attacks and to prevent future terrorism.[42] Further, hemispheric nations promised, in this resolution, to use "all legally available measures to pursue, capture, extradite, and punish" persons on their territories who might have been involved in or assisted the September 11 attacks, as well as those who harbored the perpetrators "or may otherwise be involved in terrorist activities."[43]

II. *THE INTER-AMERICAN CONVENTION AGAINST TERRORISM*

A. *Scope of Treaty*

As mentioned above, the Inter-American Convention

40. *Declaration Of Solidarity From The House Of The Americas*, OAS Doc. OEA/Ser.F/II.23/RC.23/DEC.1/01 rev.1, corr.1, at para. 3 (Oct. 18, 2001).

41. 24th resolution, *supra* n.3, at pmbl.

42. *Id.* at operative paras. 1, 3.

43. *Id.* at operative para. 2. This resolution of the foreign ministers also named a committee of Rio Treaty signatories to make further consultations on implementing the Rio Treaty in the war against terrorism. *Id.* at operative para. 6. To the authors' knowledge, that committee met at least once later in 2001 to hear various national reports.

Against Terrorism originated from a mandate in the resolution of the 23rd Meeting of Consultation of Ministers of Foreign Affairs. The Meeting of Consultation asked the Permanent Council to prepare a draft anti-terrorism treaty for presentation to another meeting of foreign ministers in the summer of 2002.[44] The Committee on Juridical and Political Affairs of the OAS Permanent Council met on October 11, 2001 and discussed the proposed treaty. A Working Group was formed, which then held an organizational meeting on November 14, 2001. Formal negotiations were conducted in sessions of the Working Group during the last week of November 2001, one week in January 2002 and one week in March 2002.[45] Coincidentally, on the very last day of formal negotiations, the diplomats found themselves expressing formal and informal condolences to Peruvian representatives after a car bomb explosion the night before in Lima appeared to be a terrorist attack timed to coincide with an impending visit to that country by the U.S. President.

The resolution of the 23rd Meeting of Consultation did not outline the nature, scope or details of the proposed draft hemispheric anti-terrorism convention. Before negotiations got underway, consensus at the organizational meeting favored a comprehensive treaty for the hemisphere, just as nations were attempting to do at the U.N. talks on an anti-terrorism treaty. The chair of the Working Group stated that he wanted the new OAS treaty to be an "integral" instrument, but that would not foreclose other kinds of text from being submitted for consideration. Representatives of the United States and Canada argued for what one delegate referred to as the "pragmatic and operational" approach and another as a "complementary" approach. They said that an OAS anti-terrorism treaty should focus on producing "added value," and that implementing existing U.N. anti-terrorism treaties and developing cooperative mechanisms among the nation States should be the priorities of this new convention.

In a memoranda[46] circulated to delegations during the negotiations in the Working Group, the U.S. delegation spelled out

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44. 23rd resolution, *supra* n.34, at operative para. 9.

45. *Report by the Chair on the Third Negotiation Meeting Held from March 18-21, 2002*, OAS Doc. OEA/Ser.G/CP/CAJP-1910/02 (Apr. 12, 2002) (original Spanish) [hereinafter Third Report].

46. *See, e.g., Member States' Contributions To And Comments On The Draft Inter-American*

its reasons for preferring a list of already-approved treaties instead of trying to define the concept or crime of "terrorism":

> As a preliminary matter, we note that there already exist a series of 12 international law enforcement conventions addressing aspects of international terrorism.[47] Ten of these conventions, negotiated over the last thirty years at the United Nations or at UN specialized agencies, identify particular offenses that the international community has agreed should be criminalized by Parties and that are appropriate subjects for international law enforcement cooperation. These conventions have resulted from lengthy and often difficult negotiations spanning many negotiating sessions. Because of the inherent difficulties of negotiating a definition of "terrorism" in multinational settings, the Conventions are narrow in scope and carefully drafted . . . The Convention should not attempt to define "terrorism." Efforts in the UN and elsewhere have indicated clearly that efforts to define the term are likely to result in deadlock. The network of UN Conventions have been agreed upon only because they avoid the issue and seek to identify acts that are appropriate for international cooperation regardless of their motivation.[48]

The U.S. delegation said that two other terrorism treaties, the 1963 Convention on Offenses and Certain Other Acts Committed on Board Aircraft[49] and the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection,[50] did not criminalize particular offenses.[51] Ultimately, these two treaties and another inter-American treaty were listed not in the preamble of the Convention, but in the final introductory paragraph of the General Assembly resolution which adopted the Convention.[52]

The approach of the United States also emphasized the law

Convention For The Prevention And Elimination Of Terrorism (United States), OAS Doc. OEA/Ser.G/CP/CAJP-1844/01 add.1 (Nov. 6, 2001) [hereinafter U.S. Comments].

47. Ratification and effective implementation of these twelve treaties is listed as the top recommendation of the Policy Working Group on the United Nations and Terrorism in its August 2002 report. U.N. annex, *supra* n.19, at 14.

48. U.S. Comments, *supra* n.46, at 1-2.

49. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219.

50. Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 726.

51. U.S. Comments, *supra* n.46, at n.1.

52. Convention, *supra* n.7, at 10.

enforcement nature of the proposed treaty, and the compressed time schedule for concluding negotiations, making drawn-out negotiations over definitions a prelude to failure.[53] Interestingly though, diplomats at the time indicated that the comprehensive and pragmatic approaches were very different. The chair of the Working Group characterized the compromise final product "as comprehensive as possible; in other words, that it should cover all those actions that the international community has defined as being 'terrorist acts.'"[54]

Apparently, during the negotiations there was no real consensus on whether or not to define "terrorism" in the convention as a legal concept, or what acts would constitute terrorism.[55] The proposed comprehensive U.N. anti-terrorism treaty had been floundering in New York negotiations on this very issue of how to define terrorism.[56] The definition attempted in the proposed U.N. comprehensive treaty would include, as a terrorist act, violent attacks against private property or public infrastructure with the intent of undermining a nation's economy, intimidating a population, or forcing a country or an international organization to reverse policy.[57]

Governments have attempted to define terrorism in their

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53. *See* U.S. Comments, *supra* n.46, at 2.

54. Speech by Ambassador Miguel Ruíz-Cabañas Izquierdo, Permanent Representative of Mexico to the OAS and Chair of the Working Group to Prepare the Draft Inter-American Convention Against Terrorism before the Committee on Juridical and Political Affairs, OAS Doc. OEA/Ser.G/CP/CAJP-1923/02, at 1 (Apr. 17, 2002) (original in Spanish) [hereinafter Speech].

55. As an example, an alternate representative of a small South American nation was heard to remark as late as the March 18, 2002 meeting of the Working Group, during the final week of negotiating the terrorism convention, that "I would have hoped we had a definition of terrorism by now." (on file with authors).

56. On the difficulty of defining terrorism and terrorists see especially Annex VI regarding the January 2002 consultations on so-called Article 18 of the proposed comprehensive terrorism treaty. *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, U.N. G.A., 57th Sess., Supp. No. 37 (A/57/37), at 19-21 (2002); Colum Lynch, *Islamic Group Blocks Terror Treaty: Nations Demand U.N. Pact Exemption for Anti-Israeli Militants*, WASH. POST, Nov. 10, 2001, at A19 (Organization of the Islamic Conference demanding exemption for national liberation movements). The new president of the U.N. General Assembly said in his opening statement on Sept. 10, 2002, that States should renew their efforts at concluding a general convention against terrorism and finding an acceptable definition of international terrorism. Opening Statement of H.E. Mr. Jan Kavan, President of the 57th Session of the General Assembly (Sept. 16, 2002), *available at* http://www.un.org/ga/president/57/pages/speeches/statement021009.htm.

57. See Lynch, *supra* n.56.

national laws. For example, "international terrorism" is defined in one U.S. federal statute as "violent acts . . . [outside the territorial jurisdiction of the U.S. that] appear to be intended — (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping . . ."[58] Another provision of U.S. law defines "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[59]

Some diplomats accredited to the OAS believed that defining terrorism would be an easier undertaking for them because of the relative homogeneity of the Western Hemisphere and little disagreement over issues of whether or not "freedom fighters" or wars of national liberation were terrorist in nature. This definitional issue continued to arise whenever OAS Working Group negotiators and experts met in formal negotiations. However, the focus of the discussions soon shifted from defining terrorism to whether a group of anti-terrorism treaties, either to be listed in an annex or in one of the first articles of the proposed Convention, should be incorporated by reference into the OAS Convention.

At least four of the delegations submitted draft treaties (Argentina, Chile, Peru, and the United States), and the Working Group frequently used the draft prepared earlier by OAS lawyers as a basis for negotiations. During the second week of formal negotiations the U.S. delegation clarified its text, particularly precedent for one treaty referring to a list or annex of prior treaties on a similar subject. A similar approach had been taken with a recent U.N. treaty — the 1999 International Convention for

58. 18 U.S.C. Sec. 2331(1) (2001) (adding "mass destruction" to assassination and kidnapping in October 2001 amendment); *noted in* Boim v. Quranic Literacy Institute, 127 F. Supp. 2d 1002, 1012 (N.D.Ill. 2001), *aff'd*, 291 F.3d 1000 (7th Cir. 2002); *see also* Flatow v. The Islamic Republic of Iran, 999 F. Supp. 1, 17 (D.D.C. 1998) (reviewing legal definitions of "terrorism" under U.S. federal law); Louis Rene Beres, *The Meaning of Terrorism: Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT'L L. 239 (1995) (pre-September 11 review of difficulties in legally defining "terrorism"). Beres concluded: "If a resort to force is supported by both just cause and just means, the use of force should be recognized as permissible. However, if the use of force lacks either just cause or just means, the use of force should be recognized as terrorism and opposed." *Id.* at 249.

59. 22 U.S.C. Sec. 2656(d)(2).

the Suppression of the Financing of Terrorism.[60] The scope of the Convention that negotiators finally agreed on was also suggested in a legal study prepared for the OAS Committee on Juridical and Political Affairs in 1996.[61] Not all the Member States of the OAS have ratified all the U.N. treaties on terrorism listed in this new hemispheric Convention. This fact may explain the reluctance of some of the delegates to embrace the annex or list approach of the United States.

Delegates completed Article 3 of the Convention before completing Article 2 as one way to solve their difficulties. One version of Article 3 required that States Parties "*shall ratify, accept, approve, or accede* to the international conventions relating to terrorism listed in Article 2,"[62] but that wording was modified during the last week of negotiations to read: "[e]ach [S]tate [P]arty . . . *shall endeavor to become a party* to the international instruments listed in Article 2."[63] A proposal on including future treaties in Article 2 was dropped in the last week of formal negotiations. It was not until the last day of formal negotiations that the delegates could agree to the proper wording for the *chapeau* of Article 2. Terrorism and the U.N. treaties were tied together with these words: "For purposes of this Convention, 'offenses' means the offenses established in the international instruments listed below." One Caribbean government agreed to this compromise

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60. Financing Treaty, *supra* n.37, art. 2(1), annex.

61. Concluding a discussion of significant factors defining terrorism in accordance with legal writings, OAS lawyers wrote that:

> [B]ecause of the ideological charge implicit in the treatment of the subject, it would seem more advisable to seek a definition of "terrorist acts" or of "terrorist actions" rather than of "terrorism" in general. This in consideration of the fact that there is a great deal of reluctance to designate certain groups as "terrorist organizations" when they are seeking to demand certain rights, especially when these have been recognized by the international community. To attempt a qualification of "terrorist acts" would lessen the ideological charge inherent in the discussions, help to attain consensus with respect to a general definition of terrorism and would not hamper punishment and condemnation of certain acts, regardless of the entity, organization, or actors that perpetrate or directly or indirectly, support them.

See Legal Aspects of Terrorism: Contributions to International Legal Writings, Comparative Study of the Principal International Agreements in the Field, and Treatment of the Topic Within the International Law Commission of the United Nations, OAS Doc. OAS/Ser.G/CP/CAJP-1069/96, at 11 (Feb. 21, 1996) (prepared for the Working Group on Terrorism of the Committee on Juridical and Political Affairs) (original in Spanish).

62. *The Non-Paper of the Chair*, OAS Doc. OEA/Ser.G/CP/CAJP-1888/02, at art. 3(1) (Mar. 12, 2002) (emphasis added) (original in Spanish) [hereinafter Non-Paper].

63. Convention, *supra* n.7, art. 3 (emphasis added).

if a Convention provision permitting governments, which had not yet ratified some of the treaties, to opt out of applying them, be moved from a final provision in the Convention to the second paragraph of Article 2.

Indeed, Caribbean governments at first appeared to have some difficulty with the approach and text that the U.S. delegation advocated. Some of the island States of Caribbean Community ("CARICOM") had signed or ratified few of the U.N. terrorism treaties before the inter-American negotiation got underway.[64] Furthermore, the intended scope of the proposed Convention for some CARICOM diplomats extended beyond a law enforcement treaty regime. Caribbean diplomats were interested to include the "economic viability of States" within the subject matter of the treaty. One of the Caribbean representatives, for example, told his colleagues that the next act of terrorism might be directed at a small State, that terrorists might try to eliminate one small State after another, and that terrorism was a threat to the nation State system.[65]

During the last week of formal talks, a few delegates considered replacing a list of treaties with an annex of criminal offenses, but on the last day of formal negotiations the list of ten U.N. treaties first proposed by the United States was finally accepted without addition as the definition section of the treaty.[66]

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64. *See* Winston Anderson, *Special Security Concerns of the Small Island States and the Fight Against Terrorism: CICTE and the Inter-American Convention Against Terrorism*, at Table 2 (outline prepared for The New OAS Legal Agenda and the Caribbean Region seminar sponsored by the OAS and the University of the West Indies' Caribbean Law Institute Center at Nassau, The Bahamas, Sept. 17 and 18, 2002).

65. Remarks of Ambassador Lionel Hurst, Permanent Representative of Antigua and Barbuda during a Working Group session on Nov. 28, 2001 (on file with authors). Two proposed articles on economic and humanitarian assistance ultimately were tabled as inappropriate or impractical in a binding treaty, although humanitarian cooperation is mentioned in the preamble of the Convention.

66. *See* Convention, *supra* n.7, art. 2. The ten treaties listed in Article 2 of the Inter-American Convention Against Terrorism include: Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 106; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 178; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* Dec. 14, 1973, 1035 U.N.T.S. 168; International Convention Against the Taking of Hostages, *adopted* Dec. 17, 1979, 1316 U.N.T.S. 206; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 1987; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *done* Mar. 10, 1988, 1678 U.N.T.S. 222; Protocol for the Suppres-

In referring to this list elsewhere in the Convention, drafters used the formula "offense[s] established in the international instruments listed in Article 2"[67] (much as the drafters of the 1999 U.N. financing convention did with the formula "[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex."[68]).

The negotiators at the OAS completed their formal work on the treaty approximately six months before a U.S. national security strategy was published. That document implicitly suggested a broader scope and definition of "terrorism" than the U.S. delegation pursued in the inter-American negotiation. For example, the national security strategy document strongly suggested that the United States would consider terrorism a universal crime ("in the same light as slavery, piracy, or genocide"[69]), and at another place defined terrorism as "premeditated, politically motivated violence perpetrated against innocents."[70] But the White House document also said that the U.S. government was going to work with international institutions, such as the OAS, the Summit of the Americas process, and the Defense Ministerial of the Americas, to defuse regional conflicts in the Americas.[71]

B. *Cooperation*

At the dawn of the 21st century, there were no significant differences in goals or purposes between the United States and its sister Latin American republics, according to OAS Secretary General, Cesar Gaviria. The highest OAS official said that this lack of substantive conflict was based on the fact that democracy was now the main goal of all the Member States of the OAS.[72] Cooperation among the nations of the Americas is perhaps the

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sion of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, *done* Mar. 10, 1988, 1678 U.N.T.S. 304; International Convention for the Suppression of Terrorist Bombings, *opened for signature* Jan. 12, 1998, 37 I.L.M. 248; Financing Treaty, *supra* n.37.

67. *See, e.g.*, Convention, *supra* n.7, arts. 4(1)(c), 5(1), 6(1), 8, 9, 10(1), 11, 12, 13.

68. Financing Treaty, *supra* n.37, art. 2(1)(a).

69. President George W. Bush, *The National Security Strategy of the United States of America* 6 (Sept. 2002), *available at* http://www.whitehouse.gov [hereinafter National security strategy].

70. *Id.* at 5.

71. *Id.* at 3 of cover letter, 10 of report.

72. OAS Secretary General Cesar Gaviria, Speech at Harvard University's David Rockefeller Center for Latin American Studies (Nov. 15, 2001) (videotape of speech on file with authors).

highlight of the Inter-American Convention Against Terrorism. Cooperation is considered vitally necessary in the struggle against terrorism. U.S. Secretary of State, Colin Powell, told the Council of the Americas before the Convention was signed that "our challenge is to work with all of our partners in the hemisphere to weave our cooperation against terrorism into the very fabric of our relations and into our institutions. We must ensure that such cooperation becomes part of the normal way that we do business here in the hemisphere."[73] The Convention attempts to make cooperation a normal and routine practice in the Western Hemisphere.

At least a third of the Working Group's time was devoted to the cooperation articles in the treaty.[74] The chair of the Working Group set aside one week in January 2002 for this part of the formal negotiations. At least five articles are devoted to one form of cooperation between and among hemispheric governments. The Convention attempts to further cooperation in the areas of border controls (Article 7), law enforcement (Article 8), mutual legal assistance (Article 9), training (Article 16), technical cooperation (Article 17), and consultations (Article 18).

The States Parties to the Convention promise to "promote cooperation and the exchange of information in order to improve" border and customs measures related to detecting and preventing the movement of terrorists, arms trafficking "or other materials intended to support terrorist activities."[75] Signatories also undertake to improve their controls over travel and identity documents. The Convention specifically provides that border control cooperation in the hemisphere will not derogate from any international agreements related to the norms of free movement of peoples and commerce.[76] During negotiations, the delegates failed to endorse a more detailed article on border controls because, in the words of one diplomat, the enumerated measures read more "like an Action Plan" for the CICTE than a

73. U.S. Secretary of State Colin L. Powell, *Remarks at the Annual Conference of the Council of the Americas, Washington, D.C.* (May 6, 2002), *available at* http://www.state.gov/secretary/rm/2002/9950.htm.

74. During four days in January 2002 the Working Group of the OAS Permanent Council worked almost exclusively on the cooperation articles of the Convention.

75. Convention, *supra* n.7, art. 7.

76. *Id.* U.S. President Bush specified in his recently published national security strategy that "[B]order controls will not just stop terrorists, but improve the efficient movement of legitimate traffic." National security strategy, *supra* n.69, at 7 of report.

treaty provision. The final provision adopted, developed by a subgroup including Canada, Mexico, Peru, the United States, and Venezuela, tracks the border controls section of the mandatory U.N. Security Council resolution.[77]

Regarding cooperation among law enforcement authorities, the nations promise "to enhance the effectiveness of law enforcement action to combat" terrorist offenses outlined in the U.N. terrorism treaties listed in Article 2. Establishing and maintaining channels of communication between "competent authorities" in the affected countries is emphasized.[78] To some extent, this provision relies on the spirit of the International Convention for the Suppression of the Financing of Terrorism, especially Article 12 on mutual legal assistance, and the U.N. Convention Against Transnational Organized Crime, also known as the 2000 Palermo Convention.[79] The final language of this provision of the inter-American treaty built on these two international instruments and replaced a draft text from the consolidation of the Peruvian and Argentine texts on "police cooperation."

The key to mutual legal assistance is the "expeditious assistance" of the requested State to the requesting State, regardless of whether the countries in question have separate bilateral mutual legal assistance treaties. This assistance and cooperation is directed to "the prevention, investigation, and prosecution" of terrorist offenses outlined in the leading international terrorism conventions.[80] This provision is very similar to Article 12 of the International Convention for the Suppression of the Financing of Terrorism, which directs that States Parties "shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in Article 2."[81]

A Convention article on training simply requires that the signatory States "shall promote technical cooperation and train-

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77. Resolution 1373, *supra* n.18, at operative para. (2)(g) (all countries shall "[p]revent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.").

78. Convention, *supra* n.7, art. 8.

79. U.N. Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, 40 I.L.M. 353 (2001) [hereinafter Organized Crime Convention].

80. Convention, *supra* n.7, art. 9.

81. Financing Treaty, *supra* n.37, art. 12.

ing programs" at various national, bilateral, subregional and hemispheric levels to strengthen those institutions deployed in the fight against terrorism.[82] The parties elsewhere "encourage the broadest cooperation" on terrorism issues with the OAS and its various entities, most especially the CICTE.[83] However, a proposal to make the CICTE the official "follow-up mechanism" to the Convention did not gain assent. Rather than employ a formal mechanism as they did with the Inter-American Convention Against Corruption,[84] OAS States opted for flexibility and promised periodic meetings devoted to implementing the treaty and exchanging information and experiences on preventing and punishing terrorism.[85] After ten States ratify the Convention, the OAS Secretary General is directed to convene a formal meeting of consultation among the States Parties.[86] Any nation which ratifies the Convention can request an OAS entity "to facilitate" these consultations and to assist signatories in implementing the Convention.[87] That provision may be of particular importance to CARICOM countries. A recent study by a law professor at the University of the West Indies concluded that many island States in the Caribbean "will require assistance from the international community to adequately reconfigure their legal systems to match the requirements of the evolving international legal regime against terror" because of their deficits in technical resources and economic infrastructure.[88]

C. *Asylum*

The Inter-American Convention Against Terrorism prohibits governments in the Western Hemisphere from granting asylum or refugee status to those suspected of having committed terrorist crimes. The Convention also will prevent the use of the political offense exception when formal requests for extradition

82. Convention, *supra* n.7, art. 16.

83. *Id.* art. 17.

84. Inter-American Convention Against Corruption, *adopted* Mar. 29, 1996, Inter-American Treaties Series I, vol.2, OEA/Ser.A/ST1/2 (SEPF), 35 I.L.M. 724 (1996).

85. Convention, *supra* n.7, art. 18.

86. *Id.* art. 18(2). The Convention will enter into force thirty days after six States ratify the treaty and deposit their instruments of ratification with the OAS. *Id.* art. 22(1).

87. *Id.* art. 18(3).

88. Anderson, *supra* n.64, at 7, Table 3 (containing an "unscientific" listing of CARICOM members' "Legislative Implementation of Anti-Terrorism Conventions").

or mutual legal assistance are pending and the underlying crime was previously classified as a terrorist crime in the U.N. terrorism treaties listed in Article 2. The inapplicability of the political offense exception is found in Article 11, the denial of refugee status to terrorists in Article 12, and the denial of asylum to terrorists in Article 13.

Granting asylum has been a noteworthy practice in the diplomatic history of Latin America. Some of the negotiators in the Working Group appeared reluctant to approve provisions denying both asylum and refugee status to those suspected of terrorism, or at least were reluctant to do so in the same treaty article if their national laws treated asylum and refugees differently. Asylum is a State prerogative: the "shelter, security, protection" of foreign nationals.[89] Refugee status, on the other hand, is a personal condition.

The Convention provision on refugee status in Article 12 is in line with Article 1(F) of the 1951 U.N. Convention Relating to the Status of Refugees. That provision said that the international refugee convention would not apply where there existed "serious reasons" for considering that certain persons had committed war crimes, or a serious non-political crime outside the nation of refuge, or were "guilty of acts contrary to the purposes and principles of the United Nations."[90] The inter-American treaty retains this "serious reasons" standard in Article 12.

However, the treaty provision concerning asylum in Article 13 uses a slightly different standard. Delegates decided that States of the hemisphere should not grant asylum "to any person in respect of whom there are *reasonable grounds to believe* that he or she has committed an offense" listed in the U.N. terrorism treaties.[91] The different standard apparently arose because some delegates wanted a "well-grounded proof" or "well-founded evidence" standard that required some evidence or a presumption of innocence.

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89. BLACK'S LAW DICTIONARY 114 (5th ed. 1979) (defining "asylum" as the right of a foreign country to offer an asylum to fugitives from other countries). There is no corresponding right on the part of the alien to claim asylum. This right of asylum has been voluntarily limited by most countries by treaties providing for the extradition of fugitive criminals.

90. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, art. 1(F), 189 U.N.T.S. 150.

91. Convention, *supra* n.7, art. 13.

The political offense exception rule adopted in Article 11 of the Convention is also similar to Article 11 of the International Convention for the Suppression of Terrorist Bombings,[92] Article 14 of the International Convention for the Suppression of the Financing of Terrorism,[93] and a mandatory U.N. Security Council resolution.

Articles 11, 12 and 13 of the new Convention also help governments in the Western Hemisphere fulfill their duties under U.N. Security Council Resolution 1373, which called upon all nations to "ensur[e] that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts; . . . [and] that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists."[94]

The duty of *nonrefoulement* is not mentioned in the inter-American Convention. *Nonrefoulement* is the duty under international law not to return a refugee to a country where he or she might face persecution. However, the 1951 Refugee Convention states that a person cannot benefit from this duty when he or she reasonably can be suspected "as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[95]

D. *Extradition*

The Inter-American Convention Against Terrorism could be a mechanism for extradition between American nations for certain criminals accused of crimes such as money-laundering in support of terrorists. Extradition between two States generally rests upon a bilateral treaty, and, except for alleged war crimes, crimes against humanity and crimes against peace, in the absence of a treaty, "surrender of an alleged criminal cannot be demanded as of right."[96]

Article 11 on the denial of the political offense exception

92. International Convention for the Suppression of Terrorist Bombings, *supra* n.66, art. 11

93. Financing Treaty, *supra* n.37, art. 14.

94. Resolution 1373, *supra* n.18, at operative paras. 3(f), 3(g).

95. Convention Relating to the Status of Refugees, *supra* n.90, art. 33.

96. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 318 (5th ed. 1998).

specifically notes that none of the international terrorism offenses found in the U.N. anti-terrorism treaties listed in Article 2 qualify as a political offense "[f]or the purposes of extradition or mutual legal assistance." Article 9 on mutual legal assistance provides for "expeditious mutual legal assistance" among Convention signatories on terrorism matters, and, "[i]n the absence of such agreements, [S]tates [P]arties shall afford one another expeditious assistance in accordance with their domestic law."

The promise of expeditious assistance probably does not extend beyond mutual legal assistance, however. Specific provisions on extradition in lieu of a bilateral extradition treaty are found, for example, in Article 9(2) of the International Convention for the Suppression of Terrorist Bombings,[97] and in Article 11(2) of the International Convention for the Suppression of the Financing of Terrorism,[98] but are not repeated in the Inter-American Convention Against Terrorism.

E. *Financing, Money Laundering, and Asset Forfeiture*

The Inter-American Convention Against Terrorism includes articles binding governments in the Western Hemisphere to take measures to thwart groups financing terrorists, to align their money laundering legislation with other international terrorism treaties, and to develop programs to confiscate or forfeit funds or proceeds generated from terrorism offenses outlawed in the major international terrorism treaties. Articles 4, 5 and 6 of the Convention reflect the decisions taken by the U.N. Security Council in September 2001 in Resolution 1373 wherein States were directed to "[f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts"; to freeze funds and assets of entities directly or indirectly controlled by terrorists; and to "[p]rohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission

97. International Convention for the Suppression Of Terrorist Bombings, *supra* n.66, art. 9(2).

98. Financing Treaty, *supra* n.37, art. 11(2).

of terrorist acts."[99]

These three money provisions originated from a U.S. draft treaty. The lead U.S. negotiator told his colleagues they were based on Article 18 of the International Convention for the Suppression of the Financing of Terrorism. The final versions of Articles 4, 5 and 6 also rest on the U.N. Convention Against Transnational Organized Crime[100] and the Inter-American Drug Abuse Control Commission's ("CICAD" under its Spanish initials) Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses.[101]

This section of the Convention was drafted with the assistance of the CICAD to improve the possible harmonization of the Convention with other international organizations and instruments. During the discussion of this section, several delegations expressed the need to clarify the concepts of money laundering and predicate offenses. For the representatives of some Member States, the possibility of extraterritorial jurisdiction to reach the assets of criminals and proceeds of crimes committed in other jurisdictions was troubling.

Ratifying States undertake major promises to prevent, combat and eradicate the financing of terrorism.[102] The Convention's provision on financing measures, Article 4, uses broader language and is less specific than Article 18 of the International Convention for the Suppression of the Financing of Terrorism. Nations in the Western Hemisphere, if they have not already done so, undertake to set up a "legal and regulatory regime" to attack terrorist financing and to work cooperatively with other nations and institutions. This regulatory regime must include comprehensive national regulation of banks, other financial institutions "and other entities deemed particularly susceptible to being used for the financing of terrorist activities." Customer identification, and the reporting by financial institutions to their governments of suspicious or unusual financial transactions are

99. Resolution 1373, *supra* n.18, at operative para. 1(c), 1(d).

100. Organized Crime Convention, *supra* n.79.

101. Inter-American Drug Abuse Control Commission, *Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses* (1998), *available at* http://www.cicad.oas.org/en/legal_development/legal-regulations-money.htm.

102. Convention, *supra* n.7, arts. 4, 5, 6.

emphasized in the Convention.[103] The regulatory regime must also include measures to monitor cross-border transfers of cash, "bearer negotiable instruments, and other appropriate movements of value" that will not interfere with lawful capital markets.[104] Also, the domestic regulatory regime must provide for the ability of national counter-terrorism officials to cooperate and work at the national and international levels, including the setting up of a financial intelligence unit in each signatory State. A financial intelligence unit will "serve as a national center for the collection, analysis, and dissemination of pertinent money laundering and terrorist financing information."[105] The Convention also mandates that these national anti-terrorism financial units use as guidelines certain recommendations promulgated by specialized international and regional entities, such as the Caribbean Financial Action Task Force.[106]

States Parties agree to use the necessary domestic measures to identify, freeze, or permit the seizure, forfeiture or confiscation of funds, assets, and proceeds "used to facilitate, or used or intended to finance" the terrorist crimes outlined in the U.N. terrorism treaties. The Convention even requires that these asset forfeiture measures apply to terrorist crimes that were committed outside the territorial jurisdiction of the individual State, freezing or seizing funds or proceeds found within its territory.[107]

Treaty signatories specifically agree that the terrorist offenses defined in the ten U.N. terrorism treaties will also become "predicate offenses" to the ratifying State's money laundering laws. The Convention also provides that these money laundering predicate offenses are not limited to the territorial jurisdiction of the ratifying State, but can and will include terrorist offenses committed elsewhere in the hemisphere.[108]

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103. *Id.* art. 4(1)(a).

104. *Id.* art. 4(1)(b).

105. *Id.* art. 4(1)(c).

106. *Id.* art. 4(2). The Financial Action Task Force on Money-laundering, for example, is "an intergovernmental organization created by the Group of Seven industrialized countries but now comprising 28 [M]ember [S]tates, [which] plays a leading role in setting standards and effecting the necessary changes in national legislation on terrorist financing." U.N. annex, *supra* n.19, at para. 45.

107. Convention, *supra* n.7, art. 5.

108. *Id.* art. 6.

F. *Human Rights*

Human rights were one of the most controversial topics during the formal negotiations for a new treaty against terrorism in the Western Hemisphere. The OAS Secretary General noted, at about the same time formal negotiations were getting underway, that all terrorism measures "run the risk of empowering the State at the expense of human rights."[109] In his view, however, "so many eyes" were looking over the shoulders of government actors that he doubted that there would be many excesses in the war against terrorism.[110] A U.N. working group noted after the inter-American treaty was signed that protecting human rights was "an essential concern" in anti-terrorism efforts: "Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful of international human rights obligations."[111]

When the negotiations on the Convention began, every Member State of the OAS had a democratic government. On September 11, 2001, OAS foreign ministers were meeting to formally adopt the Inter-American Democratic Charter.[112] Chapter II of the Democratic Charter (a total of four articles) is entitled "Democracy and Human Rights" and "respect for human rights and fundamental freedoms" is defined as an essential element of representative democracy elsewhere in the document.[113] On the other hand, not every nation in the hemisphere has ratified the OAS human rights instruments.[114]

In the OAS Working Group, much discussion was devoted to whether it was prudent to include some specific mention of the importance of human rights within the Convention. Peru, after its experience with Sendero Luminoso terrorism and the

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109. Gaviria, *supra* n.72.

110. *Id.*

111. U.N. annex, *supra* n.19, at 2.

112. Inter-American Democratic Charter, 28th Spec. Sess., OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01) (OAS General Assembly) (Sept. 11, 2001).

113. *Id.* arts. 3, 7, 8, 9, 10.

114. *See, e.g.*, American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (*entered into force* July 18, 1978). OAS Member States that have yet to ratify or accede to the American Convention on Human Rights include: Antigua and Barbuda, the Bahamas, Belize, Canada, Cuba, Guyana, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and the United States of America.

authoritarian government of Alberto Fujimori, wanted the Convention to specifically mention respect for human rights in the fight against terrorism. In Peru's draft convention, human rights were given prominent mention in the second article. Indeed, the Working Group began debating the subject on the first two days of formal negotiations, but finally agreed to bracket the language until a later time. The English-language translation of Peru's human rights article in its first suggested treaty draft read:

> Actions and cooperation among [S]tates to combat terrorism pursuant to this Convention shall take place in the framework of full respect for human rights and, in particular, the American Convention on Human Rights, as well as respect for the sovereignty of [S]tates, the principle of nonintervention, and the enjoyment of the rights and performance of the duties of [S]tates embodied in the Charter of the Organization of American States. In meeting the commitments assumed in this Convention, the States Parties must refrain from taking any discriminatory measures based on race, ethnic or national origin, nationality, religion, or culture.[115]

Many countries, however, viewed the Convention as a law enforcement treaty. As early as the first day of formal negotiations, one delegate said his government could not join any consensus on Peru's proposed human rights article and that it was unnecessary in as much as inter-American affairs should always be guided by the OAS Charter and respect for human rights. Representatives of this delegation said both in November 2001 and January 2002, that their government did not want to agree to a convention that undermined the efficiency of the fight against terrorism.[116] Costa Rica, the site of the headquarters of the Inter-American Court of Human Rights, joined Peru and others in highlighting the need for including a human rights plank. Failure to do so would represent "moving backwards," some diplomats said. During negotiations at least three nongovernmental organizations met with the chair of the Working Group to urge the insertion of a human rights plank. Other

115. *Contributions and Comments By Member States on the Draft Inter-American Convention on the Prevention and Elimination of Terrorism (Peru)*, OAS Doc. OEA/Ser.G/CP/CAJP–1844/01 corr. 1 (Nov. 14, 2001) (original in Spanish).

116. Remarks of representatives from the delegation of Ecuador during Working Group sessions on Nov. 26, 2001 and Jan. 25, 2002 (on file with authors).

delegations said the proposed human rights article contained a listing of too many principles and needed to be abridged. Still others wanted to limit the reference to "core" or "essential" human rights. And some delegations favored mentioning human rights in only one substantive article instead of within several articles and the preamble. The same delegation noted above that spoke against including a human rights article in the body of the Convention, however, also tried on more than one occasion to have the treaty refer to terrorism as a crime against humanity.[117]

Those in favor of a human rights article often noted that the foreign ministers of the hemisphere had endorsed their position in paragraphs 5 and 6 of the resolution adopted at the 23rd Meeting of Consultation. In it, the ministers "[r]eaffirm[ed] that actions to combat terrorism must be undertaken with full respect for the law, human rights, and democratic institutions in order to preserve the rule of law, liberties, and democratic values in the Hemisphere."[118]

Delegations compromised on the penultimate night of the Working Group negotiations and limited any mention of human rights to one substantive article in the text. That human rights article reads as follows:

> 1. The measures carried out by the [S]tates [P]arties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms.
> 2. Nothing in this Convention shall be interpreted as affecting other rights and obligations of [S]tates and individuals under international law, in particular the Charter of the United Nations, the Charter of the Organization of American States, international humanitarian law, international human rights law, and international refugee law.
> 3. Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treat-

117. Remarks of an alternate representative of Ecuador during the Working Group session of Nov. 28, 2001 (on file with authors). At least three delegations argued that terrorism should have been deemed a crime against humanity. Their argument was supported, in part, by a thirty-year-old resolution of the OAS Permanent Council, which condemned acts of terrorism as crimes against humanity. *See Action Condemning Acts of Terrorism and the Kidnapping of Persons*, OAS Doc. CP/RES.5 (7/70) (May 15, 1970) (especially condemning the crimes of kidnapping and related extortion).

118. 23rd resolution, *supra* n.34, at operative para. 5.

> ment, including the enjoyment of all rights and guarantees in conformity with the law of the [S]tate in the territory of which that person is present and under applicable provisions of international law.[119]

Indeed, the next day the delegates declined to add to the preamble of the Convention a paragraph with the human rights theme.

G. *Prisoner Transfer*

An article in the Inter-American Convention Against Terrorism permits, but does not require, the transfer of a prisoner incarcerated in the territory of one State Party to the territory of another State Party "for purposes of identification, testimony or otherwise providing assistance for the investigation or prosecution of [terrorist] offenses" defined in the roster of terrorism treaties found in Article 2 of the Convention. Such a prisoner transfer will depend on two conditions, however. The detainee has to give consent and both States must agree to the transfer, subject to appropriate conditions.[120] This provision closely resembles similar language in more recent U.N. treaties — Article 16 of the International Convention for the Suppression of the Financing of Terrorism and Article 13 of the International Convention for the Suppression of Terrorist Bombings.

Prisoner transfer posed a number of difficulties for one delegation, raising legal questions under its national constitution, which prohibits the extradition of nationals. In the end, the issue of prisoner transfers was separated out from the article on other issues of mutual legal assistance. The Convention provision makes prisoner transfers permissive rather than mandatory, but the authors are unaware of any proposal that would have made prisoner transfers mandatory.

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119. Convention, *supra* n.7, art. 15. However, Article 14 on non-discrimination in rendering mutual legal assistance arguably extends human rights protections. Article 14 reads:

> None of the provisions of this Convention shall be interpreted as imposing an obligation to provide mutual legal assistance if the requested [S]tate [P]arty has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, or political opinion, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Id. art. 14.

120. *Id.* art. 10(1).

The Convention thus permits bilateral prisoner transfers to be undertaken without formal extradition procedures or the ratification of a separate treaty. The Convention requires that the prisoner receive credit on his or her original sentence for his or her time spent incarcerated in the second country,[121] and provides that the detainee in question cannot be prosecuted or detained or otherwise restricted by the receiving State for prior acts or convictions unless the sending State has agreed.[122] Under the Convention, the receiving State with a prisoner transfer has "the authority and obligation" to keep the transferred detainee in custody and to return him or her without delay to the sending State without the sending State needing to file extradition papers for the return of its prisoner.[123]

CONCLUSION

Within nine months after the terrorist attacks on the United States, almost every nation in the Western Hemisphere had signed the Inter-American Convention Against Terrorism, committing the countries of the region to combat terrorism under international law. This treaty was a direct response to the atrocities of September 11, 2001.

Foreign ministers from throughout the region met several times in high-level conferences after those horrible events, and one of the decisions they took was that the OAS should draft a new anti-terrorism treaty for the hemisphere. Pursuant to this objective, and after consecutive and persistent negotiations in a special Working Group, on June 3, 2002, at the 32nd OAS General Assembly held in Barbados, Member States became one of the first group of States to adopt an anti-terrorism treaty after September 11.

The Convention may not have been as comprehensive as some delegations initially planned, because it did not attempt the difficult legal and political task of defining "terrorism." However, hemispheric negotiators adopted a flexible workable instrument for both civil and common law countries that cites as punishable offenses those outlawed previously in ten U.N. anti-terrorism treaties already completed.

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121. *Id.* art. 10(2)(d).
122. *Id.* art. 10(3).
123. *Id.* art. 10(2)(a),(b), (c).

The new OAS anti-terrorism treaty is up-to-date and should facilitate and promote cooperation in preventing and combating terrorism despite differences in legal systems found in the Americas. Also, the treaty extends the realm and duty of cooperation to areas not previously covered, such as improving border controls and financial oversight in order to prevent terrorists from crossing borders as well as engaging in the money laundering which facilitates terrorist funding.[124] In these and other respects, the Convention's provisions will permit the American republics to fulfill a State's anti-terrorism duties, which the U.N. Security Council enjoined on all countries.

124. Speech, *supra* n.54, at 2.