

**International & Operational Law Department**  
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## **COMBATING TERRORISM**

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REFERENCES

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3. 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 22 UST 1641, TIAS 7192. (Hijacking).
4. 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Aircraft, 24 UST 564, TIAS 7570. (Sabotage).
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6. 1971 Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That are of International Significance, 27 UST 3949, TIAS 8413.
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8. 1979 Convention on the Physical Protection of Nuclear Materials, TIAS 11080.
9. 1979 International Convention Against Taking Hostages, TIAS 11081.
10. 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, TIAS.
11. 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, TIAS.
12. 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, S. Treaty Doc. No. 103-8. This treaty is not yet in force. The Senate has gave its advice and consent in November 1993. The implementing legislation can be found at 18 U.S.C § 841 et. seq.

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15. 10 U.S.C. §§ 371-382, Military Support to Law Enforcement.
16. 14 U.S.C. § 712, U.S. Coast Guard.
17. 18 U.S.C. § 1385, Posse Comitatus.
18. 32 U.S.C. § et seq., National Guard
19. 32 U.S.C. § 112, Drug Interdiction and Counter Drug Activities
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21. 50 U.S.C. §§ 401-441d, National Security Act.
22. 50 U.S.C. § 413, Intelligence Oversight Act of 1980.
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24. 50 U.S.C. §§ 2311-2367, Weapons of Mass Destruction Act of 1996.
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42. DODI, O-2000.16, DoD Combating Terrorism Program Standards.
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44. DODD 3020.36, Assignment of National Security.
45. DODD 3025.1, Military Support to Civil Authorities.
46. DODD 3025.1M, Manual for Civil Emergencies.
47. DODD 3150.5, DoD Response to Improvised Nuclear Device
48. DODD 3150.8, DoD Response to Radiological Incidents
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50. DODD 5100.52M, Nuclear Weapon Accident Response Procedures.
51. DODD 5160.54, DoD Key Asset Protection Plan.
52. DODD C-5210.41M, Nuclear Safety Manual.
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73. AR 500-51, Support to Civilian Law Enforcement.
74. SECNAVINST 5820.7B, Cooperation with Civilian Law Enforcement Officials.
75. OPNAVINST 3440.1C, Navy Civil Emergency Management.
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77. AFI 10-802, Military Support to Civil Authorities.
78. AFI 31-202, Working Dog Program.
79. FM 100-19, Domestic Support Operations.

## **I. HISTORICAL USE OF TERRORISM**

- A. Terrorism can be traced back to the Ancient Greek and Roman Republics. According to its classical definition, the assassination of Julius Caesar on the Ides of March in 44 B.C. was an act of terrorism.<sup>1</sup>
- B. The Zealots-Sicarii, a Jewish group, led a campaign against Roman and Greek occupation forces in Judea. Their technique was to murder individual victims using daggers or swords in an attempt to incite a mass uprising. They later turned to open warfare. Their activities had various unintended consequences such as the destruction of the Jewish Temple and the mass suicide at Masada.
- C. The word “assassin” is a literal translation of the Arab phrase “hashish-eater” or “one addicted to hashish.” From 1090 to 1275, a group of sectarian Moslem fanatics, while under the influence of drugs and motivated by political and religious zeal, spread terror among Christian forces as a result of their unconventional acts of extreme violence. Their objective was to establish a “purified” version of Islam. These Assassins, the Ismalis-Nizari, would stab their victims in broad daylight, which made their escape impossible. Much like today’s modern car bombers, they considered their lives a worthwhile sacrifice.

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<sup>1</sup>See generally, ROBERT A. FRIEDLANDER, TERROR-VIOLENCE, ASPECTS OF SOCIAL CONTROL 7-58 (1983), and JESSICA STERN, THE ULTIMATE TERRORISTS 15-17 (1999). The information in this portion of the outline was primarily taken from these two excellent works on the subject.

- D. During the Sixteenth and Seventeenth Centuries in Europe, assassination became a relatively common ideological and political tool. Citing the Bible as authority, certain radical groups and individuals thought of themselves as the instruments of popular will, authorized to kill tyrannical political leaders that had become the true enemies of the state.
- E. A religiously fanatic group known as the “Thugs” was active in India for over 600 years and well into the 1800’s. Motivated by a desire to provide human sacrifices to the Hindu goddess Kali, they typically robbed, strangled, dismembered and buried their victims. Believing that Kali enjoyed seeing terror in the sacrificial victim’s, the Thugs often attempted to prolong the agony of death to the extent possible.
- F. In America, leaders of the American Revolution believed that the British Government no longer respected certain natural and unalienable rights and therefore had become an illegitimate regime. Although the Revolutionary forces generally tended to comply with the customs of war, guerrilla tactics were employed by some units. Shortly after the Civil War, John Wilkes Booth shot Abraham Lincoln, believing that he was ridding the nation of a tyrant.
- G. The first use of the word “terrorism” occurred during the French Revolution. “Guerrilla” warfare and terrorism became virtually synonymous as Spanish Guerrillas attempted to remove Napoleonic forces from the Iberian Peninsula. The term guerrilla means, “little war.”
- H. “Macedonia for Macedonians” was the cry of the Internal Macedonian Revolutionary Movement (IMRO) in the 1890’s. The IMRO, sponsored by states such as Bulgaria, marked the beginning of 20<sup>th</sup> Century insurgencies that relied on unconventional tactics such as murder, bombings and kidnappings to create terror among the Turkish occupation forces.
- I. Terrorist bands, supported by Bulgaria, Serbia, and Greece operated in the Balkans prior to World War I. The Death Society, also known as the Black Hand, was sponsored by the Serbian Government. On June 28, 1914, the Archduke Franz Ferdinand was assassinated by a young nineteen year old trained by the Black Hand, which set into motion the events leading up to the First World War.
- J. The first international response to terrorism was the 1937 Convention for the Prevention and Punishment of Terrorism. It was promulgated as a result of the assassination of King Alexander of Yugoslavia in 1934. The treaty was ratified by only one state and never came into force.

- K. Until the 1983 attack on the Marine barracks in Beirut, most Americans felt insulated against terrorist attacks. The U.S. Government began establishing programs to deal with terrorism. The bombings of the World Trade Center and the Federal Building in Oklahoma City suddenly caused Americans to realize that it was not just U.S. citizens overseas that were now subject to terror tactics.
- L. On February 23, 1998, Usama Bin Laden, the 17<sup>th</sup> son of a wealthy Saudi Arabian construction magnate, called on all Muslims everywhere to attack U.S. citizens, civilian and military, anywhere in the world. On August 7, 1998, the bombings of two U.S. Embassies located Africa demonstrated Bin Laden's global reach.

## II. WHAT IS TERRORISM?

*“There is another type of warfare--new in its intensity, ancient in its origin -- war by guerrillas, subversives, insurgents, assassins; war by ambush instead of by combat, by infiltration instead of aggression, seeking victory by eroding and exhausting the enemy instead of engaging him...It preys on unrest...”<sup>2</sup>*

- A. There is no generally accepted definition of international or domestic terrorism. However, attempting to define terrorism is not merely an academic exercise.
  - 1. Definitions drive intelligence collection activities, which in turn affects decisions relating to National Security. For example:
    - a. The U.S. State Department and the Central Intelligence Agency are concerned only with international terrorist incidents.
    - b. The FBI collects intelligence related to domestic terrorism.
    - c. No governmental organization collects intelligence on terrorism in both the United States and overseas.
  - 2. Categorizing terrorism as a crime or as an act of aggression impacts on permissible responses.

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<sup>2</sup> John F. Kennedy, Address to the Graduating Class, U.S. Naval Academy, 6 June 1962. *Quoted in* Joint Pub 3-07.2, Joint Tactics, Techniques, and Procedures for Antiterrorism I-1.

- a. If terrorism is a merely a crime rather than an armed attack which would authorize the use of military force, the Department of Justice, FBI, state and local law enforcement would be the appropriate agencies to prevent, deter, and respond to terrorism.
  - b. If terrorism is purely criminal, then military forces, despite their technological know how and ability to manage catastrophic situations, would be limited in how they could respond. This would be so even in cases where Weapons of Mass Destruction (WMD) were used by terrorists and the number of casualties approached the numbers of a “major regional conflict.”
  - c. On the other hand, if terrorism is defined in the international community as an unlawful aggressive act of force, then military forces could be used where authorized by the United Nations Security Council or unilaterally in collective or individual self-defense. This may be true even where terrorist cells, the potential target, are operating in the United States under the control of international organizations or states.
  - d. If terrorism is warfare, then are terrorists entitled to prisoner of war status and combatant immunity for their pre-capture warlike acts?
- B. Disagreements as to the proper definition of terrorism exist even within the United Government.
- 1. Terrorism as a domestic crime, the definition relied on by DOJ, is an act that, “is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct: and is a violation of...” (A laundry list of domestic and international crimes follows).
  - 2. The Department of State (DOS) defines terrorism<sup>3</sup> as, “premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents, usually intended to influence an audience.”

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<sup>3</sup> Patters of Global Terrorism 1999, United States Department of State, p. viii (April 2000), *citing* 22 U.S.C. § 2656f(d).

- a. DOS interprets “non-combatant” to include military personnel who at the time of the incident are unarmed or not on duty. For example, the State Department considers the following to be the victims of terrorism: the 19 airmen killed in the bombing of Khobar Towers in June 1996; COL James Rowe, killed in Manila in April 1989; CPT William Nordeen, US defense attaché killed in Athens in June 1988; the two servicemen killed in the La Belle discotheque bombing in West Berlin in April 1986; and the four off-duty US Embassy Marine guards killed in a café in El Salvador in June 1985.
- b. DOS also considers attacks on military installations or personnel to be terrorism where perpetrated when a state of hostilities does not exist at the site.

3. The Department of Defense Definitions.<sup>4</sup>

- a. Terrorism. “The calculated use of violence or threat of violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.”
- b. Domestic Terrorism. “Terrorism perpetrated by the citizens of one country against fellow countrymen. That includes acts against citizen of a second country when they are in the host country, and not the principal or intended target.”
- c. International (or Transnational) Terrorism. “Terrorism in which planning and execution of the terrorist act transcends national boundaries. In defining international terrorism, the purpose of the act, the nationalities of the victims, or the resolution of the incident are considered. Those acts are usually planned to attract widespread publicity and are designed to focus attention on the existence, cause, or demands of the terrorists.”

- C. Taking into consideration all of the above definitions of terrorism, there appear to be three essential elements:<sup>5</sup>

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<sup>4</sup> DODD 2000.12, DoD Combating Terrorism Program, Encl. 2 (15 Sep 1996).

1. *Violence*, whether actual or threatened;
  2. *Political*, objective, however conceived; and
  3. *An intended audience*, typically though not exclusively a wide one.
- D. International Terrorism can be distinguished from domestic terrorism when it meets one of the following conditions:
1. The target of terrorism is selected from a country other than that of the terrorists themselves;
  2. The commission of terrorism involves crossing national borders; or
  3. Participating members and/or sponsors of terrorist activity are from more than one country.<sup>6</sup>
- E. The Department of Defense further divides terrorism into two categories for the purpose of defining the role of the military.
1. Counterterrorism (CT). Offensive actions against terrorist groups.
  2. Antiterrorism (AT). Defensive protective measures.

### III. THE TERRORIST THREAT

*“The question is not if but where and when a terrorist attack will occur.”*

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<sup>5</sup> ANTHONY CLARK AREND AND ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE, BEYOND THE UN CHARTER PARADIGM 141 (1993).

<sup>6</sup> HENRY HAN, TERRORISM & POLITICAL VIOLENCE: LIMITS & POSSIBILITIES OF CONTROL 69 (1993). The author uses the conjunctive "and" for the three criteria. I believe this disjunctive "or" is more accurate.

- A. According to U.S. Department of State statistics,<sup>7</sup> there were 392 international terrorist attacks during 1999, 273 in 1998 and 304 in 1997. Most targets were businesses and the preferred method was bombing, 186 were used. However, 233 persons were killed and 706 injured compared with the 1998 attacks where 741 individuals were killed and 5,952 were injured. This decrease in numbers of casualties is as a result of a lack of mass casualty attacks in 1999.
1. In 1998, most of these casualties were as a result of the attacks on the U.S. Embassies in Kenya and Tanzania where 291 were killed and about 5,000 injured.
    - a. Twelve U.S. citizens were killed in the bombings.
    - b. Eleven were wounded.
  2. The number of terrorist attacks increased in every region of the world in 1999, except the middle east, where fewer than six attacks occurred.
  3. In Europe, there were dozens of attacks linked to the NATO bombing campaign in Serbia and the capture of Abdullah Ocalan of the Kurdish Workers' Party by Turkish authorities.
  4. In Nigeria, radical youth gangs captured and held for ransom more than three dozen foreign oil workers.
  5. About 52%, or 169, of the attacks were directed against U.S. targets. This was up from last year's figure of 111 attacks or approximately 40% of the total attacks.
    - a. The majority, about 91, were bombings or other attacks against a multinational oil pipeline in Colombia.
    - b. In Greece anti-NATO attacks were frequently directed against American interests.
    - c. In Nigeria and Yemen, U.S. citizens were abducted.

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<sup>7</sup> Patters of Global Terrorism 1999, *supra* note 3, p. 1-3.

- d. Five U.S. citizens were killed in these attacks.
  - (1) The Revolutionary Armed Forces of Colombia (FARC) kidnapped three U.S. citizens working with Native Colombians. Their bodies were found on 4 March.
  - (2) A group of Rwandan Hutu rebels kidnapped and killed two U.S. citizens in the Bwindi Impenetrable National Park in Uganda.
  
- 6. There were no international acts of terrorism in the United States in 1999.
  - a. Most terrorists in the United States are here to:
    - (1) Raise money.
    - (2) Provide communications.
    - (3) Collect intelligence.
    - (4) Obtain weapons.
  
  - b. The openness of American society makes it particularly vulnerable to the above listed acts.
  
- B. On November 4, 1998, indictments for Usama Bin Laden, his military commander, Muhammad Atef, and al-Qaida members Wadith El Hage, Fazul Abdullah Mohhamed, Mohammed Sadeek Odeh, and Mohammed Rashed Daoud al-Owhali were returned before U.S. District Court for the Southern District of New York. Odeh and al-Owhali were turned over to U.S. authorities in Kenya and are now awaiting trial. Mamdouh Mahmud Salim was arrested in Germany and extradited to the U.S. On December 16, 1998, five others were indicted.
  
- C. On May 1999, the U.S. District Court in the Southern District of New York unsealed an indictment against Ali Mohammed, a member of Usama Bin Ladin's al-Qaida terrorist organization, for conspiracy to kill U.S. nationals overseas.

- D. On October 5, 1999, Khalfan Khamis Mohamed, wanted in connection with the US Embassy bombing in Dar Es Salaam Tanzania, was arrested in South Africa in a joint investigation by U.S. and South African authorities.
- E. Three additional persons convicted in the bombings of the World Trade Center in 1993 were sentenced in 1998. In October of 1999, Siddig Ibrahim Siddig Ali was sentenced to eleven years in prison for his role in a plot to bomb New York City Landmarks and to assassinate Egyptian President Hosni Mubarak in 1993.
- F. “A critical factor in understanding terrorism is the importance of the emotional impact of the terrorist act on an audience other than the victim.... Terrorism has become a media event and, as such, a phenomenon of our time.”<sup>8</sup>
- G. The real weapon of terrorism is terror or fear. By hitting weak, vulnerable and sympathetic targets, the terrorist seeks to psychologically multiply the actual damage of an attack as a method of manipulating larger power groups that the terrorist lacks the ability to attack directly or control politically.
  - 1. Terrorists generally lack the military strength to attack an enemy military force or objects directly.
    - a. They must operate in clandestine cells.
    - b. Their weapons, communications, tactics, training and intelligence systems are almost always inferior to organized military forces.
  - 2. Most of their actions, if they occurred during an armed conflict, would constitute war crimes.
    - a. As a general rule, they attack civilians or off duty military forces.
    - b. Terrorists tend to target dual use or purely civilian targets.
    - c. Transnational terrorist often attack targets in countries not directly involved in a conflict with the group or target country.

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<sup>8</sup> Joint Pub 3-07.2, *supra* note 2, p. II-1.

d. Therefore, even if terrorists meet the *Jus ad Bellum*, justness of war, prong, they almost always fail the *Jus in Bello*, justness in war prong of international law.

3. As with most politically motivated groups, terrorists typically have short, intermediate and long term goals. They are either unwilling or unable to achieve these goals through political processes. Terrorists therefore turn to violence as an alternative means of achieving their goals. Terrorism is therefore, is purposeful rather than random violence. Motivations to use violence at a given place and time include:

a. Attract publicity for the group's cause.

b. Demonstrate group's power.

c. Show existing government's lack of power.

d. Exact revenge.

e. Obtain logistical support.

f. Build sympathy by baiting government into overreacting.

#### H. Terrorist Tactics.

1. Assassination.

a. Prominent persons.

(1) The psychological impact on the target audience by killing a prominent person may be significant.

(2) High value in terms of the intimidation of other leaders, judges often the target.

- (3) There is also however significant risk to the terrorist group from the state where a high level leader is targeted by the terrorists.
  - b. Symbolic enemies.
  - c. Traitors and defectors from the group.
- 2. Arson.
  - a. Generally involves low risk to the perpetrator because the perpetrator generally has time to escape.
  - b. Low level technology is required and readily available.
- 3. Bombing.
  - a. The clear weapon of choice, especially the car bomb. Over half of all terrorist acts involve bombs.
  - b. Inexpensive to produce. A bomb like the one used in Oklahoma City can be built for a few thousand dollars.
  - c. Low risk to perpetrator with some detonation devices. (Cannot however overlook the appeal of suicide bombing to some).
    - (1) Can be out of area.
    - (2) Have others unwittingly or wittingly place bomb.
    - (3) Generally leave less evidence leading to an individual or group.
  - d. Attention-getting capacity is very high.
    - (1) Media interest.

- (2) Explosives create a great deal of terror and paranoia.
  - (3) Terrorists seek to instill in the citizenry a belief that the government is powerless to protect them.
- e. Control of casualties through placement and timing.
- 4. Hostage Taking.
  - a. The overt seizure of one or more individuals with the intent of gaining publicity or concessions such as release of prisoners.
  - b. Dramatic. Extremely high media interest.
  - c. Risky to perpetrators.
- 5. Hijacking or skyjacking.
  - a. Spectacular hostage situation. Media worthy.
  - b. Sometimes employed as a means of escape.
  - c. The car bomb of the '60's and '70's.
  - d. Busses, trains, ships and aircraft (most popular).
- 6. Seizure.
  - a. Usually building or object with high public value.
  - b. Risk to perpetrators especially if no innocent lives involved.
- 7. Raids or Attacks on Facilities.

- a. Access to radio or television broadcast media to make a statement.
  - b. Demonstrate the government's inability to secure critical facilities.
  - c. Acquire resources (Banks).
8. Sabotage.
- a. Demonstrates the vulnerability of a government or society to the terrorist group.
  - b. Industrial societies more at risk.
  - c. Utilities, computer networks, communications, and transportation facilities.
    - (1) Disruption of one disrupts all.
    - (2) Immediate public attention.
  - d. Military facilities.
9. Hoaxes.
- a. Groups with established credibility can successfully employ hoax.
  - b. Requires devotion of time and resources by the government to respond to the hoax.
  - c. May cause huge delays or even shut down certain activities.
  - d. Degrades readiness (Crying wolf).
10. Weapons of Mass Destruction (WMD).

11. Environmental Destruction.
  - a. Has not been widely used.
  - b. Dumping hazardous chemicals into city water supply.
  - c. Destruction of oil tanker.
  
12. Use of Technology.
  - a. Car bomb of the 21<sup>st</sup> Century?
  - b. Terrorists can buy a PC for the price of an AK-47.
  - c. Power grids, police and fire services, communications, airport traffic controllers, communications, railways, banks, stock exchanges, can all be attacked.
  - d. Very hard to trace, safety for the perpetrator.
    - (1) Attack routed through numerous servers.
    - (2) In the United States, computer attacks are generally treated as a crime rather than an attack.

I. Terrorism, a Changing Phenomenon.

1. In the 60's, 70's and 80's, terrorism was largely conducted by leftist radicals, with political motives as their driving force.
  - a. Many of these groups were supported, sponsored or even directed by states.
  - b. Even the most brutal of these groups, however, tended to avoid tactics that created mass casualties.

- (1) Mass casualties may have caused the alienation of political sympathizers and potential recruits.
  - (2) Terrorist groups that were willing to kill or injure large numbers of people ran the risk of unfettered reprisal by the state.
  - (3) Increasing number of casualties does not necessarily result in greater influence.
    - (a) Terrorists were generally looking for specific concessions.
    - (b) They were attempting to foment or block political or social change.
    - (c) It is difficult to direct social change with a mass killing.
  - (4) Large casualties may cause dissension within the terrorist organization.
- c. These groups were generally well organized with a command and control structure similar to that of a military or paramilitary organization.
2. Some of the reasons for the changing face of terrorism include.
- a. Disintegration of the Soviet Union and the decline of communism.
    - (1) Changing motives. The spread of international communism is becoming less attractive and therefore leftist terrorist groups are dwindling in number.
    - (2) Fewer groups receiving state support.

- (3) It is easier for the international community to have impact on terrorist groups when the groups are sponsored by states.
    - (a) Diplomatic efforts.
    - (b) States that sponsored terrorism tended to limit and reign in groups to avoid linkage to the group's activities and thereby reduce the possibility of international intervention.
  - b. Religious and ethnic fanaticism on the rise.
  - c. Availability of weapons.
  - d. Proliferation of technologies of mass destruction.
  - e. Increased access to information technologies.
  - f. Acceleration of centralized vital components. As control over critical infrastructure becomes more automated and centralized, terrorists have a greater opportunity for synergistic impact.
3. Although the leftist organizations still exist today, especially in Central and South America, terrorist groups tend to be very loosely organized and radically religious.
  - a. In 1968, a Rand Corporation study, no terrorist groups were classified as religious. In 1994, the Rand Corporation classified one third of the active 49 international terrorist groups as being religiously motivated.<sup>9</sup>

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<sup>9</sup> STERN, *supra* note 1, p. 7.

- b. In 1995, only 25% of terrorist attacks were by religious groups but were responsible for 58% of the deaths.<sup>10</sup> Religious groups seem to be far less concerned with causing mass casualties.
- c. Many groups are ad hoc, often operating on a stand-alone basis, sometimes loosely affiliated under some umbrella organization.
  - (1) World trade Center bombing the result of such a group.
  - (2) Usama Bin Laden and his followers.
  - (3) No central command and control structure.
    - (a) Able to spread the word and incite acts over the Internet.
    - (b) Operate on a global scale.
    - (c) Very hard to track and conduct intelligence operations on.
    - (d) Hard to direct acts against, especially where there is no state sponsorship.
- 4. Terrorist groups are likely more willing to participate in mass casualty activities.<sup>11</sup>
  - a. Religious motivation.
    - (1) Violence as a sacramental act, divinely inspired or required.

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<sup>10</sup> *Id.* at 8.

<sup>11</sup> *Id.*; RICHARD A. FLAKENRATH, ROBERT D. NEWMAN, AND BRADLEY A. THAYER, AMERICA'S ACHILLES HEEL, NUCLEAR, BIOLOGICAL, AND CHEMICAL TERRORISM AND COVERT ATTACK 179-202 (1998).

- (2) Attempting to recruit only the most dedicated.
  - (3) Only complete and total victory is acceptable, compromise or acquiescence is domination of the ungodly.
  - (4) Targets are typically dehumanized as infidels, satanic or even non-human.
  - (5) Primary purpose of violence is not to obtain political concession, but the fulfillment of a sacred obligation.
  - (6) Believe they are operating consistent with God's law.
    - (a) No regard for the laws of men.
    - (b) Law provides little deterrence to someone who is willing to blow him or herself up while delivering a car bomb.
      - (i) Already involved in a life or death struggle.
      - (ii) Only reason to fear law for such a person, is the realization that the mission will be thwarted if caught.
      - (iii) See the reward being a higher state in the next life.
  - (7) Loss of popular support is of little or no concern. Acting for God not popular opinion.
  - (8) Millennial and Apocalyptic Cults on the rise.
- b. Intensifying Efforts to Rid Southwest Asia of U.S. Presence.
- (1) Religious and political motives one in the same for many Islamic terrorist groups.

- (2) There is no State/Church Distinction. Wish to eradicate secular governments and return Islam to its fundamentalist beliefs.
- (3) There is no recognition of “universal human rights” by such groups.
- (4) Determined to rid Arab lands of corrupting Western, and primarily, U.S. influence.
  - (a) Hold U.S. responsible for poverty and lack of political power.
  - (b) See U.S. as abetting secular government.
- (5) U.S. forces in six moderate Arab countries. None of them are overly happy with this fact.
- (6) The bombing of the offices of the U.S. program manager for security assistance with the Saudi Arabian National Guard 1995, and the attack in 1996 of the Khobar Towers by suspected transitional Shi’ite extremists, appear to have been motivated by groups wanting the U.S. out of the Middle East.<sup>12</sup>

c. Increasing Numbers of Domestic Terrorist Groups.

- (1) Extreme left wing.
- (2) Extreme right wing.

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<sup>12</sup> *Id.* at 190. Although the Saudi government arrested and promptly beheaded four radical Sunni's after they confessed following a prolonged interrogation, U.S. investigators did not have the opportunity to interview the alleged perpetrators of the 1995 incident. The Saudi's have asserted that the Khobar towers incident involved radical Saudi Shi'ite operating out of Lebanon. The F.B.I. has not been able to confirm this assertion and it is possible that the perpetrators were state-sponsored actors from Iran or Iraq.

- (3) Militant animal rights, anti-technology, and conservation groups.
- d. Increasing numbers of “Amateur” Terrorist Groups.
  - (1) McVeigh, Unibomber?
  - (2) Centennial Park during the Atlanta Olympic Games.
  - (3) School shootings and bombings.
  - (4) Random violence for the sake of violence?
- e. Large-Scale Ethnic Wars.
  - (1) Mass casualties, ethnic cleansing is the goal.
  - (2) Mutual fear of one another requires complete annihilation of the other.

#### **IV. INTERNATIONAL RESPONSE TO TERRORISM**

A. *“One man’s terrorism is another man’s patriotism.”*<sup>13</sup>

B. Three questions at the outset should be considered:

1. Is Terrorism unlawful under international law?
2. Can a state legally use military force to respond to terrorism?
3. If force is lawful, how much force can be used?

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<sup>13</sup> HENRY HAN, *supra* note 6, at 7.

- C. Two basic paradigms have developed over time in the international community for handling terrorism. The first treats terrorism as international crime and tends to approach it from a law enforcement standpoint. The second views terrorism as a species of warfare and tends to look to deterrence and the use of military force as the method best suited to combating terrorism. Most countries, including the U.S. follow a hybrid methodology. Consider the handling of Usama Bin Laden. The U.S. has used both military force and law enforcement actions to counter the threat Bin Laden and his organization represent.
- D. Terrorism as form of warfare.
1. Natural law. Many believe that customary and conventional norms include the right of self-determination. Certainly the United States was founded on the notion that individuals have the right to remove governments from power that fail to respect certain unalienable rights. The right of insurgency is arguably affirmed in the second paragraph of the Declaration of Independence of the United States.
  2. *Jus ad Bellum* and terrorism. Many nations do not consider politically motivated acts of violence, especially against colonialism and for national liberation, as being within the scope of terrorism and a violation of international law.
    - a. Proponents of a political question exclusion from the definition consider only those acts motivated by personal gain or acts of violence totally devoid of any political purpose as being unlawful.
    - b. For proponents of such a definition, letter bombs, hijackings of airplanes, kidnappings, attacks on innocent civilians are not considered terrorist acts if committed in furtherance of a “just cause.”
  3. *Jus in Bello* and terrorism. For most however, in defining terrorism out of legitimate warfare, the justness of the cause is irrelevant. The justness of the means becomes the focus. No matter how just the cause may be, if the insurgency fails to satisfy the *Jus in Bello* prong of the law of war, it becomes a terrorist organization, incapable of waging legitimate warfare.

- a. Some have described terrorism as acts that take place in peacetime that would constitute war crimes if they took place in war. Terrorists should no more be able to get away with taking hostages and executing them for political purposes in peacetime than military commanders during war. One commentator described terrorism as bit by bit genocide.
- b. The targets of terrorism tend to be innocent civilians and civilian objects rather than lawful military targets. Sporadic acts of violence, as opposed to continuous and sustained military operations, against military targets during peacetime, would also be considered as terrorism by most.
- c. Terrorist acts may take place during armed conflict but the majority do not.

E. Terrorism as a crime.

- 1. Should terrorism be considered within traditional international criminal norms? Should the traditional criminal law paradigms be applied?
  - a. If it were purely criminal, would the use of force only be authorized during the actual commission of the act itself?
    - (1) Is there such a concept as anticipatory self-defense in criminal law?
    - (2) Would the means used to eradicate terrorists be limited to apprehension followed by trial?
  - b. Are terrorists that are willing to blow themselves up in attacking a target with a car bomb likely to be deterred by criminal law?
    - (1) Terrorists are usually dedicated to some ideological, religious, or political cause.
    - (2) They generally believe what they are doing is right and transcends the criminal law.

2. Should someone that is willing to detonate a weapon of mass destruction in New York City be treated the same in the law as one that kills a 7/11 store clerk for money?
  - a. The World Trade Center bombing resulted in 6 killed, 1,000 injured and an estimated \$500,000,000 in total costs. The longest sentence thus far has been for one of the perpetrators was 240 years.
  - b. Recently a convicted convenience store robber was executed here in Virginia. He stole \$200 and shot and killed two clerks in 1983.

F. Are Terrorist Activities Unlawful Under International Law?

1. Philosophical discussions aside, most terrorist acts are illegal under domestic law and morally and socially repugnant. This does not necessarily mean however that they are automatically unlawful under international law. Although an act may be unlawful under domestic law, thereby granting a state the power to deal domestically with a domestic terror attack, a state should look for an international source of law if it intends to respond internationally.
2. Before a lawful response to an act of terrorism can be formulated, the act itself must be characterized. Lawyers then should endeavor to characterize terrorist acts with as much precision as possible.
3. There are primarily three sources of International Law.
  - a. International treaties or conventional law.
  - b. International custom, as evidence by the practice; and
  - c. The general principles of law recognized by civilized nations.<sup>14</sup>

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<sup>14</sup> Statute of the International Court of Justice, Art. 38, para. 1, secs. a, b, and c.

4. As a general principle of law, virtually all states have outlawed the acts associated with terrorism. For example, murder, kidnapping, assault, maiming, arson, sabotage, and vandalism are illegal in virtually all countries. Therefore, although a treaty banning a certain terrorist act may not exist, the underlying act may fall into the “general principle of law” category. However, because of the political character of terrorism, many states have refused to categorize acts, which would ordinarily be criminal, as criminal if committed by terrorist groups with political motivations.
  
5. As a matter of customary international law, many terrorist acts could be considered unlawful if they fall within one of the previously recognized categories of international crime.
  - a. Piracy.
  
  - b. Slavery.
  
  - c. Hijacking.
  
  - d. Crime against peace, or conducting an aggressive war.
    - (1) Historically has only applied to state actors.
      - (a) Need an international armed conflict.
  
      - (b) State could be charged where a state directs an aggressive terrorist attack.
        - (i) International armed conflict not determined by length or intensity of the conflict, only that states are involved in an armed conflict.
  
        - (ii) The state would have to be involved in the planning and decision to attack.
  
      - (c) Rarely prosecuted.

- (i) Only in war crimes tribunals following WWII.
    - (ii) Not listed in the statutes for the International Criminal Tribunals in Rwanda and the Former Yugoslavia.
    - (iii) Listed as a crime in the International Criminal Court statute but not yet defined.
  - (2) Punishes the instigation of aggressive war, *Jus ad Bellum*, and not improper conduct during the war, *Jus in Bello*.
    - (a) The brutality of the terrorist act would not be criminal, the planning and decision to attack would.
    - (b) The actual perpetrator, unless a high level planner, cannot be guilty of a crime against peace.
- e. Violations of the laws and customs of war.
  - (1) Must have an “armed conflict.”
    - (a) International.
      - (i) State v. State.
      - (ii) Non-state actors sponsored by a state?
      - (iii) If international, all violations of the laws and customs of war apply.
    - (b) Not of an international character.
      - (i) Violations of Common Art. 3 of the Geneva Conventions.

- (ii) Some violations of the laws and customs of war apply. *See ICTY, Tadic*; and the International Criminal Court Statute.
- (2) Single act of terrorism, unless state directed, would generally not rise to the level of an “armed conflict.” Such conduct would be considered a sporadic act of violence, a domestic rather than international crime.
- (3) However, where a state responds to a terrorist act with the military and where the group has committed acts in the past or clearly announces an intention to continue to commit such acts, an “armed conflict” may exist for the purposes of finding the terrorist acts to be war crimes.
  - (a) Most terrorist acts against non-combatants.
  - (b) Non-state actors can be liable for violating Common Art. 3.
- f. Crimes against humanity.
  - (1) Historically, had to be tied to an international armed conflict.
  - (2) Now, the only requirement is that the crime be “widespread and systematic.”
    - (a) A single WMD terrorist act may be widespread but is it systematic?
    - (b) A series of terrorist acts, especially if similar in M.O., i.e. car bomb, may rise to the widespread and systematic level.
- g. Genocide.

- (1) The destruction, whole or in part, of an ethnic, racial or religious group.
- (2) Historically was a subset of crimes against humanity and required an armed conflict.
- (3) Now, a separate crime, similar to crimes against humanity, the destruction must be widespread and systematic.
- (4) If terrorist tactics are used to ethnically cleanse an area during an armed conflict, or where used as part of a larger systematic and widespread attempt to cleanse an area ethnically, an act of terrorism could be prosecuted as an act of genocide.
- (5) Arguably, if a WMD were used to ethnically cleanse a fairly large area, only one such act may constitute the crime of genocide. Destruction, in whole or in part, of an ethnic group is genocide.

6. Conventional or Treaty Based Law.

- a. As a result of the numerous terrorist acts of the 1960's and 70's, the international community of states determined that there was a need to criminalize "international terrorism." A number of agreements were entered into outlawing certain specific acts of terrorism. Two such examples are the Hague Convention on Aircraft Skyjacking, and the Montreal Convention on Aircraft Sabotage. However, there is still no comprehensive treaty covering all acts of terrorism.
- b. Most of these treaties cover areas or spaces not traditionally within the territorial control of sovereign states such as international airspace or international waters.
- c. A significant number of these treaties contain provisions that ban enforcement during time of war.

- d. Terrorism that occurs solely within one state is generally immune from the coverage of current international agreements. Prosecution is left to the domestic law of the state involved.
- e. None of these treaties create an enforcement mechanism. Rather, parties agree to criminalize certain terrorist acts domestically and then agree to investigate, “extradite or prosecute” those that violate these treaties.
- f. The United States is a party to more than 100 extradition treaties. Generally, extradition treaties require a state to extradite persons within their jurisdiction when the requesting state demonstrates that the wanted person has been charged or convicted of a crime in the requesting state and had the person done the same in the sending state, it would have been criminal there as well.
- g. Extradition of a terrorist can be difficult.
  - (1) Some states will not extradite if the death penalty is possible.
  - (2) The state may be supporting the terrorist group and unwilling to extradite.
  - (3) If not supporting directly, the state may be acquiescing to the group’s presence out of concern that they may be the next victim if they take action.
  - (4) Some states will not extradite if they believe the terrorist was motivated by political goals. The doctrine of “political offense” varies from state to state. Generally, a “political offense” exists where:
    - (a) The accused is involved in an ongoing conflict;
    - (b) The alleged terrorist act took place as part of the conflict;

- (c) The accused is a member of an organization with a command structure;
  - (d) The accused was acting on orders.
- (5) Some states have excluded certain offense from the political exception doctrine. Murder, kidnapping, hostage taking, and the use of or manufacture of explosives are some examples.
- h. United Nations (UN) and the United Nations Charter.
- (1) In response to the Libya’s initial refusal to extradite two Libyan nationals charged with participation in downing of Pan Am Flight 103 over Lockerbie Scotland, the United Nations Security Council issued Resolution 748 which states in part:  
  
“[I]n accordance with the principle in Article 2, paragraph 4 of the Charter of the United Nations, every state has the duty to refrain organizing, instigating, assisting or participating in terrorist acts in another state or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force.”
  - (2) UN General Assembly resolutions are not binding. However, they are thought to be aspirational. The General Assembly has also resolved that states should refrain from organizing, instigating, assisting, or participating in, or acquiescing to, terrorist acts or groups located within their boundaries.<sup>15</sup>

G. International Law and the Use of Force.

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<sup>15</sup> G.A. Res. 40/61, U.N. GAOR, 40<sup>th</sup> Sess., Supp. No. 53, at 301, U.N. Doc. A/RES/40/61 (1986).

1. In terms of the legality of a military response, should there be any difference between handling a terrorist incident and an aggressive act by a state actor?
  - a. In 1986, Libyan sponsored terrorists bombed a discotheque frequented by American soldiers, two were killed, several others were injured. Once Libyan sponsorship was established, the U.S. ordered carrier based aircraft to strike the Libyan capital of Tripoli.
  - b. In 1993, the U.S. launched Tomahawk missiles at an Iraqi intelligence complex in Baghdad once sponsorship was established between the agency and terrorists that attempted to assassinate former President George Bush.
  - c. The U.S. faced very little international criticism for its recent attacks against Usama Bin Laden facilities in Afghanistan and Sudan, even where the U.S. made no claim of state sponsorship.
2. Non-forcible responses such as diplomacy or economic sanctions are not likely to be effective unless state sponsorship exists to a high degree. Certain non-forcible responses may actually play into the terrorist portrayal of outside governments being the root of the host state's problems.
3. The United Nations (UN).
  - a. Collective state action was to replace unilateral responses to aggression.
  - b. The UN was to be a global organization with a monopoly on the use of force.
4. UN Charter.
  - a. Article 2(3). "All Members shall settle their disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

- b. Article 2(4). “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.”
- (1) Applies to non-member states as a matter of customary international law.
  - (2) Questionable whether applies to non-state actors.
  - (3) Therefore, whether host state violates Article 2(4) often depends on the degree of support provided to the terrorist group. The UNSC voted 10-0-5 to impose economic sanctions against Libya for its refusal to extradite two Libyan nationals alleged to have participated in the downing of Pan Am Flight 103 over Scotland in 1988.
- c. Article 2(7). “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...; but this principle shall not prejudice the application of enforcement measures under Chapter VII.
- (1) Criminal organizations within the territory of a state are typically within the sole province of the state.
  - (2) However, the United Nations Security Council (UNSC) may take action in what appears to be domestic business if there is a threat to international peace and security pursuant to Article 49 of Chapter VII of the Charter.
  - (3) The issue is what happens when the state and the UNSC cannot or will not suppress a terrorist organization?

d. Article 51. “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

(1) Self-defense permitted if there is an armed attack. Does an act of terrorism rise to the level of an armed attack?

(a) The International Court of Justice, in the Case Concerning Military and Paramilitary Activities in and against Nicaragua indicated that dispatching armed bands into another state for a particularly “grave” use of force constitutes an armed attack. However, merely supplying or training non-state paramilitary forces does not constitute an armed attack.<sup>16</sup>

(b) In the Case Concerning United States Diplomatic and Consular Staff in Tehran, the ICJ likened the takeover of the U.S. embassy and its staff to an “armed attack.”<sup>17</sup>

(c) When elements in the Iraqi government directed that President Bush be assassinated in Kuwait in 1993, was that an armed attack as defined by Article 51?

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<sup>16</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27) (Merits).

<sup>17</sup> United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 29, 42 (May 24) (Merits).

- (i) Does the fact that President Bush was a past President make him different than the average American for the purposes of an armed attack?
  - (ii) Is an attack on a former President and attack on the political independence of the United States as is prohibited by Art. 2(4)?
- (2) What level of state sponsorship, if any, must exist before a state's territorial integrity can be breached to respond to an armed attack by terrorists?
  - (a) Some suggest that Art. 2(4) would be gutted unless a requirement for state sponsorship exists.
  - (b) Must there be control by a state over the terrorist agents to constitute an armed attack opening the door to military force in the harboring state's territory?
    - (i) Is such a use of force against a terrorist organization in a host state the same as using force against the host state?
    - (ii) Following the attack on the chemical weapons facility in Sudan allegedly operated by Usama Bin Laden, certain members of the Sudanese government asserted that President Clinton should be indicted as a war criminal by the International Criminal Court for launching an aggressive war against Sudan.
  - (c) Should the severity of the attack alone, not sponsorship, qualify a terrorist attack as an armed attack? A state should be able to defend itself against such an attack whether or not sponsored by a state.

- (3) State Sponsorship, Support and Self-defense.
- (a) Diplomacy with the actual terrorist organization will rarely if ever work.
  - (b) All terrorist activities have some connection or association with a state. Presence in a state either unwilling or unable to disband the group creates a strong presumption of state responsibility.
  - (c) The degree to which terrorists are tolerated, supported or sponsored differs:
    - (i) Terrorist acts by actual state officials, state terrorism;
    - (ii) State employment of unofficial agents for terrorists acts, direct support;
    - (iii) State supply of weapons and explosives;
    - (iv) State provision of Intelligence Support;
    - (v) State supply of logistical and transportation support;
    - (vi) Provision of training (specialized terrorist and basic military training);
    - (vii) State provision of technological assets;
    - (viii) Provision of financial support;
    - (ix) Diplomatic and or rhetorical support;
    - (x) State acquiescence to the presence of terrorists bases; and

- (xi) No support.
  
- (d) Generally speaking, *state sponsorship*, means the state is contributing to the “planning, direction, and control” of terrorist operations. *State support*, consists of the provision of “intelligence, weapons, diplomatic assets, funds or rhetorical endorsement.” And finally, *state toleration*, is a condition where the state neither supports nor sponsors groups within its boundaries but acquiesces to its existence or fails to suppress the organization.<sup>18</sup>
  
- (e) The higher the level of support, the lower the odds of being able to deal with a terrorist through an international law enforcement paradigm.
  
- (f) The U.S. State Department has determined that the following countries actively sponsor terrorism:
  - (i) Cuba.
  
  - (ii) Iran.
  
  - (iii) Iraq.
  
  - (iv) Libya.
  
  - (v) North Korea.
  
  - (vi) Sudan.
  
  - (vii) Syria.
  
- (g) DOS says that Afghanistan is not fully cooperating with U.S. antiterrorism efforts.

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<sup>18</sup> ANTHONY CLARK AREND AND ROBERT J. BECK, *supra* note 5, at 142.

- (4) Factors to consider as to whether a specific terrorist attack has risen to the level of an armed attack.
  - (a) Level of support by the state.
  - (b) Number of attacks.
  - (c) Magnitude of attack.
    - (i) Tactics.
    - (ii) Number threatened by the harm.
    - (iii) Value of the target, President, Nuke Sub.
- (5) Temporal duration
- (6) Promise of future attacks
- (7) Level of action by the state

5. Customary Right of Self-Defense

- a. According to most, customary right not replaced by Article 51 of the Charter.
  - (1) The UN Charter does not adequately address low intensity violence and attacks by non-state actors.
  - (2) States have traditionally defined their right to self-defense to include defense of its military, citizens, commerce, and property from attack even where their territory or political independence is not at risk.
  - (3) May use force to protect essential rights.

- (a) Not limited to defense against an “armed attack.”
  - (b) Any other approach would give states that resort to terrorism a tremendous advantage over democracies that attempt to comply with international rule of law.
- (4) The customary law right of defense recognizes the right of “Anticipatory Self-Defense.”
- (a) States have the right to launch preemptive strikes against a hostile party if attack is imminent.
  - (b) According to the *Caroline Incident*, a widely cited authority dealing with anticipatory self-defense, states may resort to force even where not actually under attack if there is “a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.” It must be proportional, “not unreasonable or excessive.”
- (5) A state has the right to use forcible means to protect itself or its citizens, particularly where the international community or the host state is unwilling or unable to quash terrorism. Since 1945, states have relied on the following measures to respond to terrorism:
- (a) Abduction of suspected terrorists;
  - (b) Aircraft interceptions;
  - (c) Assassinations of particular terrorists;
  - (d) Military strikes against terrorist bases; and

- (e) Military strikes against states allegedly involved in terrorism.<sup>19</sup>
  - (6) A state may invade the sovereign territory of another state to defend itself if the other state has violated international custom by supporting terrorists within its borders.
- b. The issue of timing and self-defense.
- (1) May a state only defend itself against an on-going attack?
  - (2) How quickly after a terrorist incident must a state attack to be construed as self-defense?
  - (3) The closer in time the response is to the attack, the more it looks like self-defense.
    - (a) Some scholars assert that it must be on the spot to meet the “imminence” requirement.
    - (b) Others say for true self-defense to exist, there is a need for both short-term prevention and long term deterrence. Therefore there is no need for an immediate response.
  - (4) Due to the clandestine nature of terrorism, it often takes time to determine who the perpetrator was and whether there was state sponsorship involved.
  - (5) Easier to respond to individual than state/organization
6. Reprisal. The law of reprisal presents an alternative to, and expansion of traditional self-defense theory.

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<sup>19</sup> ANTHONY CLARK AREND AND ROBERT J. BECK, *supra* note 5, at 147.

- a. A reasonable reprisal can be characterized as a deterrent action against a violent breach of international law in the context of a continuing conflict.
- b. Traditionally used as a deterrent to *Jus in Bello* rather than *Jus ad Bellum* breaches of international law.
- c. Similar to anticipatory self-defense, a reprisal must be necessary and proportional.
- d. As a result of the UN Charter, reprisal as a deterrent to unlawful aggression is generally considered improper by the international community.
  - (1) The punitive nature of reprisal does not comport with the provision for the peaceful settlement of disputes. Although self-defense is a unilateral right, punishment is a matter for the international community as a whole.
  - (2) Primary purpose is not unilateral self-defense but deterrence through punishment or even mere revenge.
    - (a) Seeks to force future compliance with the law.
    - (b) Self-defense seeks to protect essential rights such as territorial integrity during the time of an attack.
  - (3) The UN Security Council and states acting pursuant to Art. 51 of the Charter are the contemplated responses to unlawful aggression.
- e. Arguably however, the concept of reprisal does not apply to non-state actors. Reprisal is an intentional violation of international law to deter another from violating international laws. To say that it is even possible to conduct a reprisal against a terrorist is to raise the status of the terrorist to state actor level.

- f. Modern military actions against terrorism blur the lines between self-defense, deterrence, retribution, and punishment. Punishment may be an effective method of deterrence, which then translate to self-defense against continuing or future attacks.
  - (1) Some advocate the use of reasonable and proportional reprisals to terrorism.
  - (2) Terrorism does not fit nicely into the Charter paradigm.
    - (a) The UN Charter was drafted prior to the onslaught of low intensity conflicts.
    - (b) The Charter was intended to regulate states not non-state actors.
  - (3) Advocates of reprisal say we should dispense with labels. Call it what you want, but the authority to conduct defensive armed reprisals, post attack measures short of war, should be authorized under international law.<sup>20</sup>

7. Necessity.

- a. A “state of necessity” is a situation in which the state’s “sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State”.<sup>21</sup>
- b. Advocates of the doctrine of necessity assert that although it is similar to self-defense, it differs in that there is no need to show state sponsorship of the terrorists before military force is used.<sup>22</sup>

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<sup>20</sup> YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* (1988).

<sup>21</sup> International Law Commission, [1980] 2 Y.B. Int'l L. Somm'n 34, U.N. Doc. A/CN.4/Ser.A/1980/Add.1 (pt. 2).

<sup>22</sup> John-Alex Romano, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of State of Necessity*, 87 Geo. L.J. 1023, 1046 (1999).

8. A Response to Terrorism Falling Below the Threshold of Force Envisioned in the Charter.
  - a. Article 2(4) of the Charter prohibits the use or threat of force against the territorial integrity or political independence of another Member state.
  - b. Some scholars suggest that certain counterterrorist activities do not rise to the level of force described and generally prohibited in Art. 2(4).
    - (1) For example, the use of a very small special mission unit to rescue hostages held by a terrorist group does not arguably constitute a threat to the territorial integrity or political independence of a state where the state is failing to suppress terrorist activities within its territory.
    - (2) Even the precise and surgical use of a military weapons system to take out a terrorist chemical weapons facility that the host nation cannot or will not address is arguably not the type of force the drafters intended to restrict.

H. Factors to consider in deciding whether to respond with military force to a terrorist act:

1. The support of the host state;
2. The magnitude of the terrorist act;
3. The locus of the attack;
4. The degree of force to be used.
  - a. Rescue mission.
  - b. Attack on terrorist base.

- c. Interception of aircraft or vessels at sea.
- d. Attacks on state sponsor.
- e. Covert assassination of terrorist leaders.
- f. Overt assassination of terrorist leaders.

I. How much force should be used?

- 1. The response must be proportionate.
  - a. Some assert that the response must not be greater than the actual terrorist act. The “Eye for an Eye” test of proportionality.
  - b. Cumulative Proportionality. Proponents of this methodology argue that a response is proportional as long as it is not greater than the aggregate cumulative affect of the terrorist acts committed by the target group.
  - c. Still others argue that proportionality need not ignore deterrence. Deterrent Proportionality adherents say the response should be proportionate to the potential threat faced by the victim.
- 2. Proper targets.
  - a. The law of war principle of distinction stands for the proposition that an attacker must discriminate between legitimate military targets and civilian objects. Only the terrorists and objects directly linked to the terrorists should be targeted.
    - (1) Should be zealously applied in the context of a self-defense response to terrorism.

- (2) The law of war will not normally apply to counterterrorist attacks as a matter of law. However, as a matter of policy, the U.S. will generally apply the law of war to attacks on terrorists as a matter of policy.
  - (a) The law of war principle of distinction applies to the U.S. in counterterrorist operations by virtue of DODD 5100.77, and CJCSI 5810.01.
    - (i) As a matter of policy, the U.S. applies the law of war in all armed conflicts, however characterized, and the principles and spirit of the law of war in all operations other than war.
    - (ii) The principle of distinction requires attackers to distinguish between military objectives and civilians and civilian objects.
    - (iii) Although terrorists are civilians and the law of war generally protects civilians against being targeted, terrorists clearly forfeit any protection they may have under the law by taking a direct part in hostile acts against another.
  - b. The line between military objectives and civilian objects may become very blurred in counterterrorist activities. The required link between the target and the group may be broader where the state is sponsoring or supporting the terrorist group.

## V. UNITED STATES RESPONSE TO TERRORISM

- A. “It is the policy of the United States to deter, defeat and respond to all terrorist attacks on our territory and against our citizens, or facilities, whether they occur domestically, in international waters or airspace or on foreign territory. The United States regards all such terrorism as a potential threat to national security as well as a criminal act and will apply all appropriate means to combat it. In doing so, the U.S. shall pursue vigorously efforts to deter and preempt, apprehend, and prosecute, or assist other governments to prosecute, individuals who perpetrate or plan to perpetrate such attacks.

We shall work closely with friendly governments in carrying out our counterterrorism policy and will support Allied and friendly governments in combating terrorist threats against them.

Furthermore, the United States shall seek to identify groups of states that sponsor such terrorists, isolate them and extract a heavy price for their actions.

It is the policy of the United States not to make concessions to terrorists.”<sup>23</sup>

- B. Transnational terrorism occurring in the United States is a federal crime by virtue of 18 U.S.C. § 2332b.
1. The statute lists a series of acts that are deemed to be terrorist acts if transnational in nature.
  2. The illegal activity must take place within U.S. territory, territorial seas or airspace.
  3. The death penalty is authorized if the terrorist act results in a death.
- C. It is a federal crime to use a WMD against a U.S. national at home or overseas where such use lacks “lawful authority.” For a domestic violation, use of the WMD must affect interstate commerce. 18 U.S.C. § 2332a. For the purpose of this statute, a WMD includes:

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<sup>23</sup> Unclassified extract from Presidential Decision Directive (PDD) 39, United States Policy on Counterterrorism.

1. Chemical weapons that cause death or serious bodily injury;
2. Weapons involving a disease organism;
3. Any weapons designed to release radiation or radioactivity at a level dangerous to human life; or
4. A “destructive device” which includes;
  - a. Any explosive, incendiary, or poison gas --
    - (1) Bomb.
    - (2) Grenade.
    - (3) Rocket having a propellant charge of more than four ounces.
    - (4) Missile having an explosive or incendiary charge of more than one-quarter ounce.
    - (5) Mine.
    - (6) Device similar to the above 5.
  - b. Firearms and similar weapons (other than a shotgun shell for sporting purposes) with a bore more than one-half inch in diameter. (Does not include devices neither designed nor intended to be used a weapons, for example flare guns) 18 U.S.C. § 921.
5. Punishable by death if death results.

6. In *United States v. McVeigh*, 940 F. Supp. 1571 (D. Colorado 1996), the district court determined that an explosive device placed in a truck designed for use as a weapon against a federal building killing and injuring hundreds of victims was a “destructive device” for the purposes of 18 U.S.C. § 921 and did in fact disrupt interstate commerce as required for a conviction pursuant to 18 U.S.C. § 2332a,
- D. For the purposes of the Foreign Intelligence Surveillance Act (FISA), groups involved in international terrorism or in acts in preparation therefor, are specifically defined as “foreign powers.” Therefore, FISA warrants are available to federal agencies involved in gathering intelligence on groups involved in international terrorism in the United States. Of course, federal agencies involved in law enforcement activities against terrorist groups have all the search and seizure tools available in tradition law enforcement activities as well. 50 U.S.C. § 1801.
  - E. The “Combating Proliferation of Weapons of Mass Destruction Act of 1996,” 50 U.S.C. §§ 2301 et seq, establishes a prevention and response plan for WMD incidents in the United States.
  - F. Title 22, U.S. Code, Foreign Relations and Intercourse, contains numerous laws with regard to relations with states and terrorism. For example:
    1. 22 U.S.C. § 2371, prohibits certain agricultural or Peace Corps assistance to countries that have “repeatedly provided support for acts of international terrorism.”
    2. 22 U.S.C. § 2780, prohibits transactions involving munitions to countries supporting acts of terrorism.
    3. 22 U.S.C. § 2349aa-7, describes the coordination required for terrorism-related assistance to foreign governments combating international terrorism.
    4. The Department of State conducts an “awards” program for countries involved in the prevention of acts of international terrorism, international narcotics trafficking, and other related criminal acts. 22 U.S.C. § 2708.
  - G. Federal Agency Roles in Combating Terrorism.

1. The National Security Council (NSC) formulates U.S. policy for the President on terrorist threats that endanger U.S. interests, including international terrorism. NSC's Coordinating Sub-Group of the Deputies Committee:
  - a. This Committee is comprised of representatives from State, Justice, DoD, CJCS, CIA and FBI.
  - b. The Sub-Group deals with and tries to reach consensus on terrorism policy and operational matters and makes recommendations to the Deputies Committee or through the National Security Advisor to the President.
2. The Department of State (DOS) is the lead federal agency<sup>24</sup> for response to terrorism that takes place outside the United States, other than incidents on US flag vessels in international waters.
  - a. Because of a Memorandum of Understanding between DOS and the Department of Defense (DOD) however, DOD has responsibility for terrorism against the U.S. interests on the Arabian Peninsula.
  - b. Once military force is directed, however, the National Command Authority exercises control of the U.S. military force.
3. The Department of Justice (DOJ) is the lead agency for terrorism within the United States. The FBI is the lead agency within DOJ for operational response to terrorist incidents and is the designated investigative federal agency for terrorism. DOJ is responsible for using all legal means to exclude or remove from the United States, persons who pose a terrorist threat. DOS is the lead for acts not under FBI responsibility.

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<sup>24</sup> *Id.* For a general breakdown on agency responsibilities with regard to combating terrorism, *see generally*, Joint Pub 3-07.2, *supra* note 3.

- a. When a terrorist incident occurs, the lead official is generally the Special Agent in Charge (SAC) of the field office nearest the incident and is under supervision of the Director of the FBI. The FBI maintains liaison at each governor's office. Because of the presence of concurrent jurisdiction in many cases, the FBI cooperates with state and local law enforcement authorities on a continuing basis.
  - b. In accordance with the Atomic Energy Act of 1954, the FBI is the agency responsible for investigating a threat involving the misuse of a nuclear weapon, special nuclear material, or dangerous radioactive material. For an emergency involving terrorism or terrorist acts involving chemical or biological weapons of mass destruction the FBI also has the lead.
  - c. In these efforts, the FBI cooperates with the Departments of Energy, DOD, the Nuclear Regulatory Commission, and the Environmental Protection Agency as well as several states that have established nuclear, chemical & biological and/or weapons of mass destruction threat emergency response plans.
4. The Department of Energy (DOE). The Department of Energy has important national security responsibilities. The Office of Defense Programs maintains the safety, security and reliability of the U.S. nuclear weapons stockpile, without underground nuclear testing. The Office of Emergency Responses is prepared to respond to any nuclear or radiological accident or incident anywhere in the world. There are seven sub-offices within the Office of Emergency Responses.
  5. The Department of Transportation (DOT) and/or Federal Aviation Administration (FAA) are the federal agencies responsible for responding to terrorist incidents on aircraft in flight within US jurisdiction. The FAA has exclusive responsibility in instances of air piracy for the coordination of law enforcement responses. The FBI maintains procedures, in coordination with the DOS and DOT, to ensure efficient resolution of terrorist hijackings.

6. DOT, through the US Coast Guard (USCG), is responsible for reducing risk of maritime terrorist acts within the territorial seas of the United States. (Twelve nautical miles) The FBI is the lead agency for responding to terrorist attacks within the territorial seas of the United States. The USCG and FBI have an interagency agreements cooperate when coordinating counterterrorism activities. (USCG Commandant Instruction 16202.3a).
7. The Department of the Treasury is responsible for preventing unlawful traffic in firearms and explosives, and by protecting the President and other officials from terrorist attacks.
8. The Director, Central Intelligence is the lead in the Intelligence Community for reducing vulnerabilities through aggressive foreign intelligence collection, analysis, counterintelligence, and covert action in accordance with the National Security Act of 1947 and E.O. 12333.
9. In the event of a terrorist WMD attack, the Federal Emergency Management Agency (FEMA) manages the support provided by other agencies and the coordination with state and local authorities. FEMA relies on the Federal Response Plan to coordinate support for consequence management.
10. DOD is not the lead agency for combating terrorism. It is responsible for protecting its own personnel, bases, ships, deployed forces, equipment, and installations. DOD is also responsible for providing technical assistance or forces when directed by the NCA. DOD has also been designated as the lead federal agency for carrying out a program to train civilian personnel in the federal, state and local governments dealing with WMD.
  - a. DoD Directive 2000.12 now proscribes that the Assistant Secretary of Defense (Special Operations and Low Intensity Conflict - ASD-SO/LIC) has the lead role within the Department of Defense in countering domestic terrorist incidents where U.S. forces may be used.
  - b. The Combating Weapons of Mass Destruction Act of 1996 calls for the military to maintain at least one domestic terrorism rapid response team composed of members of the Armed Forces and employees of DOD with the appropriate expertise.

- c. DOD has technical organizations and tactical unit that can assist the FBI on site in dealing with chemical and biological incidents, such as identification of contaminants, sample collection and analysis, limited decontamination, medical diagnosis and treatment of casualties and render safe procedure for WMD devices.
- d. DOMS will serve as the executive agent for all domestic consequence support. However, the Attorney General, through the FBI, will remain responsible for coordinating:
  - (1) The activities of all Federal agencies assisting in the resolution of the incident and in the administration of justice in the affected areas.
  - (2) These activities with those state and local agencies similarly engaged.

## **VI. THE ROLE OF THE DEPARTMENT OF DEFENSE**

- A. U.S. Armed Forces are prepared, on order, to attack terrorists or states involved in sponsoring terrorism. This is especially true in an asymmetrical attack against the United States, where an enemy uses both terrorist organizations and conventional military forces against targets overseas and or in the United States. Terrorist attacks on critical infrastructure at home may prevent U.S. forces from deploying.
- B. Offensive operations against terrorists are generally referred to Counterterrorism (CT). These special activities are generally within the province of certain Special Operations Forces or Special Mission Units. Defensive measures used to reduce vulnerability of individuals and property to terrorist acts, to include limited response and containment by local military forces are referred to as Antiterrorism (AT). “Every commander, regardless of echelon of command or branch of service, has an inherent responsibility for planning, resourcing, training, exercising, and executing antiterrorism measures for the security of the command.”<sup>25</sup>

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<sup>25</sup> Joint Pub 3-07.2, *supra* note 3, at vii.

- C. DOD is not the lead agency for combating terrorism. DOD is responsible for protecting its own personnel, bases, ships, deployed forces, equipment, and installations. DOD is however requested from time to time to provide various forms of assistance to other federal, state, and local agencies both in the continental United States (CONUS) and overseas (OCONUS).
- D. Limits to Military Support to Civil Authorities. The fundamental restrictions on the use of the military in domestic law enforcement are contained in the Posse Comitatus Act (PCA), 18 U.S.C. § 1385 which prohibits the use of Army and Air Force personnel to execute the civil laws of the United States. The law has been extended to the Navy and Marine Corps as a matter of policy. Similarly, although the PCA does not apply overseas as a matter of law, it has been extended to overseas operations by policy. DODD 5525.5.
1. The primary prohibition of the PCA is against direct military involvement in law enforcement activities. Terrorist activities are criminal. Moreover, because DOJ and the FBI are the lead agencies for acts of terrorism in the United States, the PCA impacts on DOD's participation in combating terrorism in the United States.
  2. Members of the National Guard or reserve components, when not in a Federal Service in a "Title 10 Status," are not within the coverage of the PCA. This makes reserve component personnel particularly well suited for use against terrorism in the United States.
  3. There are however, numerous specific exceptions to the PCA where members of the U.S. Armed Forces can perform law enforcement type roles.
- E. Constitutional Exceptions. The President, based on his inherent authority as the Executive, has the authority to use the military in cases of emergency and to protect federal functions and property. Military commanders, by extension of this authority, may respond in such cases as well (Immediate Response Authority). In the case of civil disturbances, which may result from a terrorist act, military commanders may rely on this authority, which is contained in DoD Directive 3025.12.

1. Generally, to cope with domestic emergencies and to protect public safety an Emergency Rule has evolved: When the calamity or extreme emergency renders it dangerous to wait for instructions from the proper military department, a commander may take whatever action the circumstances reasonably justify. However, the commander must comply with the following:
  - a. Report the military response to higher headquarters, e.g. in the Army, the Director of Military Support (DOMS) at HQDA, DCSOPS should be contacted.
  - b. Document all facts and surrounding circumstances to meet any subsequent challenge of impropriety.
  - c. Retain military response under the military chain of command.
  - d. Limit military involvement to the minimum demanded by necessity.
  - e. Emergency situations include, but are not limited to, the following:
    - (1) Providing civilian or mixed civilian and military fire-fighting assistance where base fire departments have mutual aid agreements with nearby civilian communities.
    - (2) Providing emergency explosion ordnance disposal (EOD) service.
    - (3) Using military working dog (MWD) teams in an emergency to aid in locating lost persons (humanitarian acts) or explosive devices (domestic emergencies).

F. Statutory Exceptions.

1. Federal Primary Responsibility. 42 U.S.C. § 5191(b).

- a. President may declare an emergency (not a major disaster) regarding a situation for which the primary responsibility for response rests with the United States because the emergency involves a subject area which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.
    - b. This authority was exercised for the first time following the bombing of the Murrah Federal Building in Oklahoma City, OK, on April 19, 1995. One week later, the President declared a major disaster under the provisions of 42 U.S.C. § 5170.
  2. President's Emergency 10-day Authority. 42 U.S.C. § 5170(c). May use DOD for work "essential for the preservation of life and property."
  3. Presidential Declaration of a Major Disaster. 42 U.S.C. § 5170.
    - a. Must be at the request of the Governor.
    - b. Must find federal assistance is required, beyond the ability of the state to handle.
  4. Presidential Declaration of an Emergency. 42 U.S.C. § 5191(a).
    - a. Must be at the request of the Governor.
    - b. Must find that it is beyond the state's ability to handle.
- G. 10 U.S.C. §§ 331-334 is the primary statutory exception pertinent to terrorism scenarios. A terrorist incident may well qualify as a civil disturbance. Triggering these statutes permits the active component to take on law enforcement function, subject to the policy considerations discussed in the preceding section. Federalization of the National Guard, in such a case, will not affect the Guard's functioning as they would, obviously, not be excepted from the PCA as well. There are generally three scenarios where federal troops can be used in civil disturbances:
1. An insurrection within a state where the Governor requests assistance.

2. A rebellion which makes it impracticable to enforce the laws of the United States (federal law).
  3. Any insurrection or domestic violence which:
    - a. Opposes or obstructs federal law; or
    - b. Hinders the execution of State law so that the people are deprived of their Constitutional rights, and the State is unwilling to protect those rights.
- H. Statutory exceptions, in addition to some lesser known statutes, that contain exceptions to the PCA:
1. To assist the Department of Justice in cases of offenses against the President, Vice President, members of Congress, the Cabinet, a Supreme Court Justice, or an “internationally protected person.” 18 U.S.C. §§ 351, 1116, 1751.
  2. To assist the Department of Justice in enforcing 18 U.S.C. § 831, dealing with prohibited transactions involving nuclear materials. This statute specifically authorizes the use of DoD assets to conduct arrests and searches and seizures with respect to violations of the statute in cases of “emergency,” as defined by the statute.
  3. 18 U.S.C. § 382 allows DoD to assist the Department of Justice in enforcing 18 U.S.C. § 175 & 2332, during an emergency situation involving chemical or biological weapons of mass destruction. DoD support in WMD situations also appears in 50 U.S.C. §§ 2311- 2367, Weapons of Mass Destruction Act of 1996. These statutes specifically authorize the use of DoD assets and in very limited situations provide authorization for DoD to arrest, search and seize.

- I. Vicarious Liability. Commanders at all echelons should be aware of the legal principle of vicarious liability in planning and implementing antiterrorist measures. This principle imposes indirect Legal responsibility upon commanders for the acts of subordinates or agents. For example, willful failure on the part of the commander or a subordinate to maintain a trained and ready reaction force as required by regulation, could be construed as an act taking the commander out of the protected position found in being an employee of the Federal Government; thus making the commander subject to a civil suit by any hostages injured. Civil or criminal personal liability may result from unlawful acts, negligence, or failure to comply with statutory guidance by subordinates or agents.
  1. With the increasing number of civilian contract personnel on military installations and the sophistication of terrorist organizations, commanders should pay particular attention to meeting regulatory requirements and operating within the scope of their authority.
  2. The legal principle of vicarious liability, long established in the civilian community, has only recently applied to the military community. In this right, the command legal adviser has become increasingly important to the commander in planning, training and operational phases of the antiterrorist program.
- J. Jurisdiction of Federal Property. In determining whether a Federal or state law is violated, it is necessary to look not only to the substance of the offense but to where the offense occurs. In many cases, the location of the offense will determine whether the state or Federal Government will have jurisdiction to investigate and prosecute violations. There are four categories of Federal territorial jurisdiction: exclusive, concurrent, partial, and proprietary.
  1. Exclusive jurisdiction means that the Federal Government has received, by whatever method, all of the authority of the state, with no reservations made to the state except the right to serve criminal and civil process. In territory that is under the exclusive jurisdiction of the United States, a state has no authority to investigate or prosecute violations of state law. The Assimilative Crimes Act, 18 U.S.C. § 13, however, allows the Federal Government to investigate and prosecute violations of state law that occur within the special maritime and territorial jurisdiction of the United States.

2. Concurrent jurisdiction means that the United States and the state each have the right to exercise the same authority over the land, including the right to prosecute for crimes. In territory that is under the concurrent jurisdiction of the United States and a state, both sovereigns have the authority to investigate or prosecute violations of Federal and state law respectively. In addition, the Federal Government may prosecute violations of state law under the Assimilative Crimes Act.
  3. Partial jurisdiction refers to territory where the U.S. exercises some authority and the state exercises some authority beyond the right to serve criminal and civil process, usually the right to tax private parties. In territory that is under the partial jurisdiction of the United States, a state has no authority to investigate or prosecute violations of state law, unless that authority is expressly reserved. The Federal Government may, however, prosecute violations of state law under the Assimilate Crimes Act.
  4. Proprietary jurisdiction means that the United States has acquired an interest in, or title to, property but has no legislative jurisdiction over it. In territory that is under the proprietary jurisdiction of the United States, the United States has the authority to investigate and prosecute non-territory-based Federal offenses committed on such property, such as assault on a Federal officer. This authority does not extend to investigations and prosecution of violations of state laws under the Assimilative Crimes Act and Federal Crimes Act of 1970. The state has the authority to investigate and prosecute violations of state law that occur on such territory.
- K. Federal Authority. Several Federal criminal statutes apply to terrorist activities committed in the U.S. or against U.S. nationals or interests abroad. Some deal with conduct that is peculiar to terrorism, for example, 18 U.S.C. § 2332 prohibiting murder or assault of U.S. nationals overseas, when the AG certifies that the crime was intended to coerce, intimidate, or retaliate against a civilian population. Other federal statutes prescribe conduct that is a crime for anyone but in which a terrorist may engage to accomplice his purposes, for example, 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities, 18 U.S.C. § 1203 (hostage taking), and 49 U.S.C. § 46502 (aircraft piracy).
1. The Assimilative Crimes Act, finally, will allow the Federal Government to investigate and prosecute violations of state law regarding terrorist acts or threats that occur within the exclusive concurrent, or partial jurisdiction of the United States, thereby giving the Federal Government investigative and prosecutorial jurisdiction over a wide range of criminal acts.

2. Once a violation of Federal law occurs, the investigative and law enforcement resources of the FBI and other Federal enforcement agencies become available, and prosecution for the offense may proceed through the Office of the United States Attorney.
- L. Federal and State Concurrent Authority. In some cases, terrorist acts may be violations of state law as well as Federal Law. In the situation, both state and Federal enforcement authorities have power under their respective criminal codes to investigate the offense and to institute criminal proceedings. If a terrorist act is a violation of both Federal and state law, then the Federal Government can either act or defer to the state authorities depending on the nature of the incident and the capabilities of local authorities.
1. Even where the Federal Government defers to state authorities, it can provide law enforcement assistance and support to local authorities on request.
  2. The choice between Federal or state action is made by the prosecuting authority. However, successive prosecutions are possible even where Federal and state law proscribes essentially the same offense, without contravening the Fifth Amendment prohibition against double jeopardy. (Recall Federal and state prosecutions re: Oklahoma City Bombing) Two relevant factors regarding law enforcement responsibility for a given incident are:
    - a. The capability and willingness of state or Federal authorities to act.
    - b. The importance of the state or Federal interest sought to be protected under the criminal statute.
- M. PDD-39 directs federal agencies to ensure that the people and facilities under their jurisdiction are protected against terrorism. This applies to DoD facilities both abroad and in the U.S. In response to a Downing Assessment Task Force recommendation concerning the Khobar Towers bombing, DoD and the DOS are reviewing their responsibilities to protect U.S. military and personnel assigned overseas.
- N. Incidents involving U.S. military installations. Although the FBI has primary law enforcement responsibility for terrorist incidents in the United States (including its possessions and territories), installation commanders are responsible for maintaining law and order on military installations.

1. Contingency plans should address the use of security force to isolate, contain, and neutralize a terrorist incident within the capability of installation resources.
  2. In the United States, installation commanders will provide the initial and immediate response to any incident occurring on military installations to isolate and contain the incident. The FBI will take the following steps:
    - a. The senior FBI official will establish liaison with the command center at the installation. If the FBI assumes jurisdiction, the FBI official will coordinate the use of FBI assets to assist in resolving the situation; e.g., hostage rescue team, public affairs assets.
    - b. If the FBI assumes jurisdiction, the Attorney General will assume primary responsibility for coordinating the Federal law enforcement response.
    - c. If the FBI declines jurisdiction, the senior military commander will take action to resolve the incident.
    - d. Even if the FBI assumes jurisdiction, the military commander will take immediate actions as dictated by the situation to prevent loss of life or to mitigate property damage before the FBI response force arrives.
    - e. In all case, command of military elements remains within military channels.
    - f. Response plans with the FBI and Service agencies should be exercised annually at the installation and base level to ensure the plans remain appropriate.
- O. Incidents overseas involving U.S. personnel or installations. For foreign incidents, the installation commander's responsibilities are the same as for domestic incidents—with the added requirement to notify the host nation and DoS.

1. Notification to DOS is made at the combatant commander level. In all AOR's, existing contingency plans provide guidance to the installation commander regarding notification procedures. DOS has the primary responsibility for dealing with terrorism involving Americans abroad.
2. The installation's response is also subject to agreements established with the host nation. Such agreements, notwithstanding, the Standing Rules of Engagement (CJCS Instruction 3121.01, para 1.d.), make it clear that the commander retains the inherent right and obligation of self-defense even in such situations.
3. The response to off-installation foreign incident is the sole responsibility of the host nation. U.S. military assistance, if any, depends on the applicable status-of-forces agreement (SOFA) or memorandum of understanding (MOU) and coordination through the U.S. embassy in that country.
  - a. Military forces will not be provided to host-nation authorities without a directive from the Department of Defense that has been coordinated with DoS.
  - b. The degree of DoS interest and the involvement of U.S. military forces depend on the incident site, nature of the incident, extent of foreign government involvement, and the overall threat to U.S. security.

## **VII. WEAPONS OF MASS DESTRUCTION (WMD).**

- A. For the purposes of International Terrorism,<sup>26</sup> a Weapon of Mass Destruction is “any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of.”
  1. Toxic or poisonous chemicals or their precursors;
  2. A disease organism; or

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<sup>26</sup> Weapons of Mass Destruction are defined differently in various sections of the United States Code. For example, Weapons of Mass Destruction include certain conventional explosive devices, depending on their makeup and size, in 18 U.S.C. §§ 921, 2332a.

3. Radiation or radioactivity.<sup>27</sup>
  - B. Nuclear weapons release vast amounts of kinetic energy through either fission, splitting the nuclei of elements, or through fission and fusion, which is the combining of hydrogen nuclei. First generation fission bombs were used on Japan by the United States toward the end of World War II. Fusion bombs require much greater technology and the ability to generate heat nearly the equivalent of the sun. Not all radiological weapons require a nuclear explosion to be effective. Radiological or “dirty bombs” can be constructed using conventional explosive to disperse radiological elements.
  - C. Biological weapons disseminate pathogenic microorganisms or biologically produced toxins, which may cause human, animal and or plant life illness or death. Normal diseases begin in small pockets and spread through natural processes. A biological WMD generally involves concentrated amounts delivered by an aerosol spray or introduced in a water supply. An attack, for example, on American stockyards with biological weapons could be significant.
  - D. Chemical weapons are extremely lethal and generally come in one of four types:
    1. Choking agents, which damage lung tissue.
      - a. Chlorine.
      - b. Phosgene.
    2. Blood agents, which block the use of transport of oxygen.
      - a. Hydrogen cyanide.
    3. Vesicant agents, which cause burns and damage to tissue, especially the skin, nose, eyes and lungs.
      - a. Mustard gas.

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<sup>27</sup> Title 50, War and National Defense, Chapter 40, Defense Against Weapons of Mass Destruction, Subchapter I, Domestic Preparedness, Section 2311. (50 U.S.C. § 3211)

4. Nerve agents, which disable a crucial enzyme in the nervous system.
    - a. Tabun.
    - b. Sarin.
    - c. VX.
  5. An attack on an industrial chemical plant with a conventional car bomb may lead to the same results as the actual use of a chemical weapon.
- E. The possibility of terrorists using WMD has increased in recent years.
1. The technology and required materials to construct a WMD is becoming increasingly available. The technology for WMD is more than 50 years old. If a terrorist can acquire a Personal Computer, most of the technology is available right off the Internet. The technology needed for battlefield WMD is far more sophisticated than that needed for terrorist WMD's.
  2. Many of the raw materials needed for a WMD are readily available from commercial sources. Acquiring a small number of improvised devices would arguably be much easier than creating and maintaining the type of arsenal needed for state nuclear programs. This also translates into less of a signature and greater difficulty in detection. Weapons that would be too small in terms of power, or too unstable for battlefield use, may be suitable for terrorists.
  3. The disintegration of the former Soviet Union has increased the possibility of WMD's, or the materials needed to construct a device, making their way to states or non-state actors that have not previously had the ability to construct WMD. The factors leading to possible acquisition of nuclear weapons or fissile material by terrorist groups include:
    - a. Disruption of command and control systems.
    - b. Deficiencies in accountability for and security of weapons and fissile materials.

- (1) Soviets did not tend to guard facilities, they tended to guard their population. Soviet Union tended to protect facilities by preventing citizens from moving about.
  - (2) Very poor security and accountability exists. Some weapons have been stored in gym type lockers with bicycle locks and no security systems. The U.S. government has been lending expert advice in the area of weapons security.
- c. Economic hardships.
- (1) Governments need money, plenty of stock is available.
  - (2) Scientists need jobs.
- d. Significant gaps in border control among the states of the former Soviet Union.
- e. Increase in organized crime and corruption.
- f. Potential for increase in the proliferation of WMD and related materials.
4. Many states possess WMD.<sup>28</sup> The U.S. government has identified North Korea, Iraq, and Libya as hostile states that sponsor terrorism and have WMD and are developing others. This means that certain terrorist organizations clearly have the wherewithal to acquire WMD or WMD materials from or for and in behalf of states acting as proxies.
- a. The following states claim to possess nuclear weapons:

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<sup>28</sup> The information relied on for this paragraph in the outline comes from various media reports following the recent nuclear weapons tests by Pakistan and India and FLAKENRATH, NEWMAN, and THAYER, *supra* note 11 at 64, *citing* U.S. Congress, Office of Technology Assessment, *Proliferation of Weapons of Mass Destruction: Assessing the Risks* p. 80-82 (August 1993); Dep't of Defense, *Proliferation: Threat and Response* (November 1997); GORDON M. BURCK AND CHARLES C. FLOWERRE, *INTERNATIONAL HANDBOOK ON CHEMICAL WEAPONS PROLIFERATION* 164-65 (1991).

- (1) China, France, India, Pakistan, Russia, United Kingdom, United States.
  - (2) Although it has never declared itself a nuclear power, Israel is suspected of possessing nuclear WMD.
  - (3) Iran, Iraq, Libya, and North Korea are all suspected of attempting to acquire or develop nuclear weapons.
- b. India, Russia, and the United States have declared that they have chemical weapons. (All scheduled to destroy these weapons as signatories to the Chemical Weapons Convention).
  - c. China, Cuba, Egypt, Iran, Iraq, Israel, Libya, Myanmar, North Korea, Pakistan, Syria, Taiwan, Yemen, and the former Yugoslavia are all suspected of having chemical weapons programs. In 1997, Secretary of Defense, William Cohen, put the number at about 30 in terms of countries with suspected chemical weapons programs.<sup>29</sup>
  - d. China, Egypt, Iran, Iraq, Israel, North Korea, Russia, South Korea, Syria, Taiwan, and Vietnam are suspected of possessing biological weapons. Libya is believed to be attempting to acquire biological weapons.
  - e. Many other states have had or have pursued development of WMD but have now abandoned or reversed their programs.
5. Because of the apparent increased willingness on the part of terrorists to cause mass casualties, WMD are becoming more attractive to terrorists. This means that not only are military targets at risk to a WMD attack, civilian and dual use targets are becoming even more vulnerable.
    - a. Religious fanaticism.
    - b. Psychological impact of a small WMD is more terrifying than conventional weapons even if the actual results are not.

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<sup>29</sup> STERN, *supra* note 1, p. 49.

- (1) Reaction to a WMD may be more catastrophic than the detonation itself.
    - (2) Media coverage of the use of even a small WMD will certainly be intense.
  - c. Merely by possessing WMD, terrorists may obtain the results without actually using a WMD.
6. Facilities required for the production of chemical or biological WMD are much more difficult to detect than radiological WMD facilities. The availability of the materials necessary to construct chemical and biological WMD is greater. The cost of these types of weapons is much less than nuclear devices as well.
  7. Covert or unconventional means of delivery of WMD include cargo ships, passenger aircraft, commercial and private vehicles and vessels. Many times WMD cargo is routed through several commercial carriers through multiple destinations making it very hard to detect, intercept, or trace to the source if intercepted. WMD can be delivered in ways that are “virtually indistinguishable from the normal background of civilian traffic and commerce, making detection likely only after the weapon has been detonated or the harmful agent released.”<sup>30</sup> Terrorists WMD would likely be of a smaller size than that of a state created WMD and therefore the delivery systems need not be as large or as detectable. A nuclear device carried in a backpack across the U.S. Mexican border may be of little value to a state but of significant value to a terrorist group.

F. Potential Damage.

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<sup>30</sup> FLAKENRATH, NEWMAN AND THAYER, *supra* note 11, at 100.

1. A small, by military standards, one-kiloton nuclear device detonated in New York at the Empire State Building would “ignite a fireball 300 feet in diameter that would demolish the Empire state Building and the 20,000 people that work there, leaving in its place a crater 120 feet wide. Much of the building, and everyone in it would be vaporized by the intense heat... Buildings within 600 feet would collapse, as would the underground infrastructure of subways, wiring, and pipes. Gas mains would rupture, causing widespread fires...” The death toll could reach as high as 200,000.<sup>31</sup>
  
2. The fallout from “Dirty Bombs.” If a homemade terrorist nuclear device failed to reach nuclear detonation, the results of nuclear contamination may still be significant. Or, if a conventional device were laced with radiological materials, the fallout effects would similar to that of a nuclear device. If a Dirty Bomb with six pounds of plutonium exploded in Washington D.C., an estimated 45,000 people would have to remain inside for an undetermined period of time.
  
3. In March of 1995, five members of the Aum Shinrikyo cult boarded subway trains in Tokyo Japan. Each carried two plastic containers of sarin nerve gas and an umbrella to puncture the containers at the proper time. Once the plastic containers were punctured, the five terrorists ran from the trains and subway. Ultimately, 12 people died, some suffered permanent disability, and 5,000 became ill. The attack completely filled Tokyo area hospitals with the victims. This was the first known use of a WMD by a terrorist group.
  - a. Aum allegedly attempted to attack the Japanese parliament in 1990 with botulinum toxin aerosol.
  
  - b. In 1993, the cult attempted to attack the wedding of the crown prince in a similar manner.
  
  - c. Later that month, followers allegedly attempted to spray anthrax spores from the roof of a building in Tokyo.

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<sup>31</sup> STERN, *supra* note 1, at 1,2.

- d. Although none of these attacks resulted in casualties, it is also believed that the cult experimented with mustard gas, cyanide, and VX. The group was actually successful in procuring a Russian made military helicopter and was considering attempting to purchase nuclear devices and enriched uranium in Russia.
  - e. During subsequent police raids, the group used biological and chemical weapons during the raids. After the arrest of Asahara, the Aum leader, additional attacks using WMD were attempted but failed.
- G. How real is the risk? There is a great deal of debate as to how real the threat of the use of WMD by terrorists actually is. Some argue that use of WMD is imminent and certain, while others point to numerous problems for terrorist groups actually wanting to use WMD.
- H. To date, the total damage inflicted by WMD is very low in comparison to the damage inflicted by conventional means. One in 400 Americans are injured each year lying in bed, one in a 1,000,000 suffered lethal injuries in the bath or shower, 1 in 1,100 died as a result of injuries or illnesses at work. Having cereal and milk for breakfast subjects one to a risk of exposure to toxins found in grains and milk products.<sup>32</sup> In fact, on average, more Americans die each year from deer accidents, lightning strikes, or peanut allergies than from attacks by terrorists.<sup>33</sup>
- 1. Other than the Aum Shinrikyo sarin incident, there have not been any other uses of WMD by terrorist groups. There is almost no evidence that traditional terrorists groups such as Hezbollah or the Irish Republican Army have attempted to acquire WMD.
  - 2. Mass destruction is possible without weapons of mass destruction.
  - 3. WMD can be very expensive in comparison to conventional weapons. For a few thousand dollars, you can create a bomb like one used to destroy the Federal Building in Oklahoma City.
  - 4. The acquisition and use of WMD possesses additional risks to terrorists.

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<sup>32</sup> *Id.* at 32-33.

<sup>33</sup> John Mueller and Karl Mueller, *Sanctions of Mass Destruction*, 78 FOREIGN AFFAIRS 43 (JUNE 1999).

- a. Difficult to manage, deploy and control.
  - b. Health risks to the terrorists.
  - c. Greater risk of detection.
  - d. State response to terrorist use of WMD likely to be overwhelming.
5. Questionable effectiveness compared to conventional weapons.
- a. Biological Weapons.
    - (1) To produce mass casualties, biological weapons need to be dispersed in dense low altitude aerosol clouds.
    - (2) Generally need aircraft.
    - (3) Explosive methods of dispersal tend to kill the microorganisms. In fact, biological agents are extremely susceptible to destruction by the environment. Temperature, wind, and water are all elements that may destroy the lethality of biological agents.
    - (4) Except for Anthrax, long term storage in a warhead is virtually impossible.
    - (5) Even if refrigerated, very limited shelf life.
    - (6) Unless wind and weather conditions are particularly suitable, very hard to ensure intended target is hit and can spread back on the attacker.
    - (7) The effects are often hard to predict, usually gradual, and susceptible to counter measures.
  - b. Chemical Weapons.

- (1) Virtually incapable of killing large numbers of people in open areas unless massive quantities are used. For a one kilometer square in an open area, it would take an estimated 300 heavy artillery shells or seven 500 pound bombs, neither of which are typically within a terrorist's arsenal.<sup>34</sup>
- (2) According to one congressional study, a ton of sarin gas perfectly disseminated over a heavily populated area would produce between 3,000 and 8,000 deaths. If there were a moderate wind of if the sun were out, the number would be a tenth as great.<sup>35</sup>

c. Nuclear Weapons.

- (1) Although a small nuclear detonation or use of a dirty bomb could produce massive casualties, obtaining the material is still believed to be difficult.
- (2) Extremely hard to manage technologically speaking.
- (3) Need some type of delivery system.

## VIII. HOMELAND DEFENSE INIATIVE (HDI)

- A. Due to the increased availability of WMD and the increased threat of terrorist acts at home and abroad, the U.S. Government and its agencies are taking a closer look at how the United States can best protect itself against both traditional and terrorist attacks.
- B. Agencies such as DOJ, DOD, Department of Energy (DOE), the Intelligence Community, Federal Emergency Management Agency (FEMA), Department of the Treasury, Department of Transportation (DOT), Department of Health and Human Services (DHHS), Environmental Protection Agency (EPA), and the Federal Aviation Administration, are working together on a project referred to as the Homeland Defense Initiative (HDI).

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<sup>34</sup> *Id.* at 46.

<sup>35</sup> *Id.* at 47.

- C. HDI is an integrated and coordinated plan to defend against and respond to attacks against the United States homeland. For the purposes of HDI, attacks include terrorist acts, information warfare, ballistic missile attacks, transnational threats, attacks on critical infrastructure and WMD incidents.
1. HDI participants are working to strengthen the federal, state and local governments' ability to defend the United States territory and citizens from attack, to coordinate crisis and response management of WMD incidents, and to protect critical assets including critical infrastructure and cyber-based systems.
  2. HDI may be extended to counterdrug, disaster relief, migrant operations and civil disobedience operations.
- D. With the exception of defending against direct attack, providing direct attack deterrence, and protecting critical national defense assets, DOD's role in HDI primarily involves providing military forces in support of civilian federal, state, and local agencies.
1. However, a simultaneous domestic terrorist attack on critical infrastructure during overseas operations could have a significantly negative affect on the ability of the United States to commit the strategic reserve.
  2. Attacks on domestic roadways, airports, communications systems, electrical power plants, and computer networks, would, in many cases, delay or prevent the deployment of United States combat power.
  3. Although domestic terrorism is generally viewed as criminal activity, the ramifications of such an attack directly impact force projection capabilities as well as raising force protection issues. This is especially true where the terrorism is state sponsored or where WMD are involved.
- E. The nature of a WMD attack places a burden on the local response community that it may not be able to bear. Conversely, DoD may need the assistance of civilian assets in the event of an attack on or near a military installation. DOD is postured to support local, state and federal government agencies in planning for and responding to domestic emergencies.

1. Active Duty, National Guard, and Reserve forces possess expertise, trained manpower, and equipment that can support response to chemical, biological, radiological attacks at DOD installations and in civilian communities.
  2. Expert and capable response organizations like Explosive Ordnance Disposal teams, the Army's Technical Escort Unit, and the Marine Corps Chemical Biological Incident Response Force have been involved in the development of response plans and procedures.
- F. For the purpose of HDI, a definition of WMD may include "any weapon or device that has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of toxic or poisonous chemicals or their precursors; a disease organism; or radiation or radioactivity. Actions with respect to a WMD incident can be divided into two tracks.
1. Crisis Management is the actions taken to prevent WMD attacks, activities taken against the perpetrators and efforts to combat the civil unrest that may follow.
    - a. Crisis management is within the purview of local, state and federal law enforcement. Within the federal government, the FBI is the lead agency.
    - b. DoD support in this area is generally provided through the Military Support to Civil Authority and Military Assistance for Civil Disturbances.
    - c. When directed by the NCA, certain Special Operations Forces provide assistance to civilian law enforcement involved in crisis management.
  2. Consequence Management on the other hand is those activities taken in response to reduce or limit the effects of a WMD incident on the population and environment. FEMA is generally the lead agency in Consequence Management operations. DOD expertise and technology is particularly valuable in the area of consequence management.

3. When directed by the NCA, USCINCCOM, through FORSCOM, establishes and deploys a Response Task Force{ XE “Response Task Force” } (RTF) to the designated Joint Operations Area (JOA) to support the Lead Federal Agency (LFA) in crisis and consequence management during a WMD incident. There are two RTF’s under FORSCOM’s control; RTF West, composed of Fifth U.S. Army assets, and RTF East, First U.S. Army forces.
  
4. Below is a chart depicting the makeup of an RTF broken down by function and element. The RTF is task organized depending on the crisis:

## **IX. CONCLUSION**