

**LEGITIMATE USE OF
MILITARY FORCE
AGAINST
STATE-SPONSORED
INTERNATIONAL TERRORISM**



Lt Col Richard J. Erickson

LEGITIMATE USE OF MILITARY FORCE AGAINST STATE- SPONSORED INTERNATIONAL TERRORISM

by

RICHARD J. ERICKSON, LT COL. USAF
Research Fellow
Airpower Research Institute

Winner of the Air Force Historical Foundation's
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FOREWORD

A military response has been a viable option for combating international terrorism in the past and it will continue to be an option in the future. Possible military actions range from rescuing hostages to neutralizing terrorist camps and making direct strikes against targets verified as the infrastructure for state-sponsored training and support complexes of terrorist groups.

The military response is part of a larger strategy that seeks to maximize the risk of punishment for terrorists and their sponsors and supporters while minimizing their potential rewards. In this context military action must be consistent with international law. If states decide that all means are justified, then those acting to preserve the rule of law in the face of the terrorist threat will become indistinguishable from the evil they seek to undo.

Colonel Erickson's study presents an overview of international law directed at the issue of managing international terrorism. This study is thought provoking and provides the decisionmaker with a useful tool. Of particular note is the checklist provided in appendix A that summarizes chapters 4-6.

It behooves everyone dedicated to achieving a world free from terror to learn more of this phenomenon and how we can deal with it. Colonel Erickson's study, for the first time and in one place, makes available a general survey of international law concerning this subject. I highly recommend his study.

ROBERT W. NORRIS
Major General, USAF
The Judge Advocate General, USAF

ABOUT THE AUTHOR

Lt Col Richard J. Erickson was The Judge Advocate General, Headquarters United States Air Force, sponsored research fellow to the Airpower Research Institute (ARI), Air University Center for Aerospace Doctrine, Research, and Education (AUCADRE) for 1986-87.

Colonel Erickson graduated from Florida State University with a bachelor of arts (honors) in international relations and speech in 1964 and a master of arts in government in 1965. He was awarded his doctor of jurisprudence (cum laude) from the University of Michigan in 1970 and his doctor of philosophy in foreign affairs from the University of Virginia in 1971. His professional military education includes the Judge Advocate Staff Officer Course, Staff Judge Advocate Course, Squadron Officer School, Air Command and Staff College, Industrial College of the Armed Forces (National Security Management Course), Naval War College (International Law Course), and Air War College. He also attended the 1977 Public International Law Course at the Hague Academy of International Law and the 1985 Law of War Course at the San Reino Institute for International Humanitarian Law.

Colonel Erickson entered the United States Air Force in 1971 with initial assignment to the legal staff of Headquarters Air University, Maxwell Air Force Base, Alabama. From 1973-75, he served as a faculty instructor in international law and editor in chief, *The Air Force Law Review*, at the Judge Advocate General School, US Air Force, also located at Maxwell Air Force Base. Thereafter, he served in numerous international law assignments at Headquarters United States Air Forces in-Europe (USAFE), and Headquarters United States Air Force. Before arriving at AUCADRE, he served as staff judge advocate, 7206th Air Base Group, Hellenikon Air Base, Greece, and as the senior US Defense Department attorney there.

He is a member of the bar of the state of Michigan. Colonel Erickson is also a member of the American Bar Association, American Society of International Law, American Branch of the International Law Association of Brussels, and the Federal Bar Association. He is author of *International Law and the Revolutionary State*, published by Oceana Publications in 1972, and numerous articles and other publications. He authored the initial draft of AFP 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*.

Colonel Erickson is married to the former Joan Kathryn Harmony of New London, Ohio. They have one daughter, Karen.

PREFACE

I thank Maj Gen Robert W. Norris, The Judge Advocate General, Headquarters United States Air Force, for the opportunity to research the subject of international law within the context of legitimating military force as an option in response to international terrorism. The study of the capacity of international law to meet the challenge of terrorism has been inadequate. In this study, I explore the full capacity of international law in this regard.

I would be remiss if I did not also express my appreciation to General Norris for his unwavering support and encouragement and for the valuable assistance provided to me by his staff. In particular, I thank Col Nolan Sklute, executive to The Judge Advocate General, and Col Robert Hitt, chief, International Law Division, Headquarters United States Air Force. I am grateful to several of Colonel Hitt's staff: Will Carroll, Lt Col Philip Meek, Lt Col Dennis Yoder, and Maj Thomas Tudor.

This study would not have been possible without the support of the Air University Center for Aerospace Doctrine, Research, and Education (AUCADRE). My thanks to Dr Lawrence Grinter, who as my research adviser, provided immeasurable and professional guidance and assistance. I am indebted also to Tom Lobenstein who served as my editor. Special thanks are due Dr Stephen Sloan, former senior research fellow, AUCADRE; Dr James Winkates, Air War College; Col Richard Porter, US Department of State, Office of Counter-terrorism; Lt Col Joe Ryan and the members of seminar five of the Air War College class of 1987; and Jane Gibish, bibliographer, Air University Library.

Most of all, I thank my wife, Joan, and my daughter, Karen, for reasons only they know.

RICHARD J. ERICKSON, Lt Col, USAF
Research Fellow
Airpower Research Institute

INTRODUCTION

THE RELEVANCE OF INTERNATIONAL LAW

Terrorism, whether international or translational, is not only a political problem; it is not only a psychological problem; it is not only a moral problem; it is, fundamentally, a legal problem.

Robert A. Friedlander

A reassessment of current legal systems to accommodate issues arising from the use of both international and domestic terrorism is needed.

Issue Paper No. 41, Vice President's
Task Force on Combatting Terrorism

The Departments of State and Justice should encourage private and academic study to determine how international law might be used to hasten—rather than hamper—efforts to respond to an act of terrorism.

Public Report of the Vice President's
Task Force on Combatting Terrorism

Proverbs 3:25 admonishes us to “be not afraid of sudden terror.” Has the age of terrorism descended upon mankind? Clearly, in the contemporary world, terror knows no boundary and the world is its theater. International terrorism is a fact of international life. It ranks among the most important and the most controversial of all international law problems.

What Is This Study All About?

This study should help us as a nation deal with being uncertain as to how best to deal with the threat posed by terrorism. We do not understand international terrorism in an international law context. We tend to emphasize the inadequacies of international law in dealing with terrorism without fully comprehending the usefulness of international law. We need an anchor for our thinking and for our actions. We need to return to basics, to grasp the fundamentals. We need to clarify in our own minds what our legal approach to international terrorism should be and what assumptions we must make in taking such an approach.

Both private and public studies, including one by the Vice President's Task Force on Combatting Terrorism, have called for an in-depth legal analysis of this social phenomenon. As members of a democratic society we are governed by the rule of law. Yet, we know so little about the role of law in combating international terrorism, which is both ironic and sad. We need to improve our intellect and sharpen our insight into such issues as: What is the legal responsibility of one state to another and to the international community concerning terrorism? How should terrorism be approached? Should it be considered a criminal activity in a law enforcement context or should it be viewed as a combatant activity in an armed conflict context? What legal reasoning exists to support the use of military force against international terrorists as well as their state sponsors and supporters?¹

This study, written for both the lawyer and the lay person, explores these and other legal issues. For the benefit of the general reader, the text has been written with minimum reliance upon legal jargon. The legal scholar should refer to the endnotes for a more exhaustive legal treatment of concepts and issues. Chapter 1 looks at the nature of international terrorism and the seriousness of the threat. This chapter is important because it provides a foundation for judging what legal approach we should take to terrorism. It also examines some of the factors that we must consider in deciding on an appropriate legal basis for the employment of military force abroad in combating terrorism.

Chapter 2 addresses choice of law, reviewing the pros and cons of various legal approaches to dealing with terrorism. Should the approach be essentially law enforcement or should it be combatant? Should the challenge of international terrorism be viewed as a peacetime crisis or as a situation of armed conflict? Does the degree of state sponsorship or support make a difference?

Chapter 3 examines the much overlooked concept of state responsibility. State responsibility is the international law concept of the duty that one state owes to another in the international community. States that sponsor or support terrorist activities against other states do so in disregard of their state responsibility. When this occurs what rights does the injured state acquire?

Chapters 4-6 form the core of the study. These chapters show how, throughout the twentieth century and culminating with the United Nations Charter, the international community has sought to restrain the use of force as a method for resolving international disputes. Today, only a limited number of circumstances justify the force option. These circumstances are contained in legal concepts or principles that, if satisfied, could serve as a rationale for legitimate use of military force abroad. Such principles include, for example, individual and collective self-defense, anticipatory self-defense, regional peacekeeping, protection of one's nationals, and invitation. This study examines the strengths and weaknesses of these and other principles as well as the degree to which the community of nations accepts each concept. The discussion identifies the set of factual conditions or circumstances that must exist if a state opts to rely on a particular principle of law. Appendix A summarizes 13 legal principles; it serves as a ready reference for decisionmakers. One must be cautioned not to use the appendix without first having read the commentary regarding each principle. To do so runs the risk of misunderstanding.

Chapter 7 summarizes the lessons learned and offers some thought about future directions. Finally, a detailed bibliography provides the reader with a starting point for further independent research.

What Is the Purpose of This Study?

In conducting military operations against international terrorists and their state sponsors or supporters, the United States is committed to democratic values, which rest in large measure upon the rule of law, including international law.² Operational international law is that body of treaty and customary international law that affects the otherwise unrestrained execution of military action. It reflects a community desire for restraint in the use of armed force. It necessitates legal advice in the planning of military operations. But what are the principles of international law that decisionmakers must consider?

The primary objective of this study is to identify those principles for the lawful use of military force. The study has two secondary purposes. The first is to review available legal approaches to terrorism. Should terrorism be treated as ordinary crime,³ whether under domestic or international law,⁴ or as unlawful combat and war crime under the law of armed conflict?⁵ The second objective is to determine the current applicable international law of state responsibility.

This study provides decisionmakers with:

- A focus for further discussion and decision.
- An opportunity to rethink fundamentals such as the status of terrorists and the responsibility of those states that sponsor or support them.
- A clearer understanding of the legitimate use of military force abroad under current international law.
- A practical framework to evaluate proposed future use of military force in situational context.⁶
- An array of legal justifications so that the full potential of international law can be utilized.
- An appreciation for the realism (rather than the inadequacy) of international law.⁷

Limits of This Study

Not all aspects of law and terrorism are discussed in this study; such an endeavor would be too ambitious an undertaking. Rather this study more narrowly focuses on contemporary norms of international law for the use of overt military force abroad against international terrorists and their sponsors and supporters.

- This study surveys current international law but excludes attempts to project what the future directions in the law may be.

- This study does not examine proposals to make terrorism an international crime, to establish an international criminal court or an international police force, to create a common judicial area for prosecution of terrorists, or to develop innovative ideas for the development of international customary law.⁸ Instead, the focus is on existing rules governing forcible response.

- The discussion includes legal rules or norms but excludes foreign policy and other nonlegal considerations bearing on the use or nonuse of force.⁹

- The study examines international law but excludes domestic law. Combating terrorism involves many domestic law issues that are beyond the scope of this study. Among the domestic law issues for the United States, for example, are the Posse Commitatus Act, the War Powers Resolution, and other legislative initiatives to deal with terrorism.¹⁰

- The discussion examines the principles governing the legitimate use of military force but excludes other international law rules unrelated to this determination. Although status of forces agreements and landing and overflight privileges are important legal considerations in planning and executing military operations, they are not considered in this study because they address how a military operation can be properly accomplished and not whether the initial decision to use force is proper.¹¹ Also beyond the scope of this study are other modalities of projecting power such as diplomatic or economic action. This study focuses strictly on the use of force. Consequently, international initiatives to outlaw various terrorist acts and to enhance extradition and prosecution of terrorists are outside the purview of this work.¹²

- This study examines the overt use of military force but excludes covert operations. Since, within the United States government, covert operations are not the responsibility of the Department of Defense (DOD), they are not considered here.¹³

- The study includes a discussion of forcible action abroad but excludes forcible action at home. This study is concerned with the application of military force outside the territorial jurisdiction of a state against international terrorists and their state sponsors and supporters. Use of force against domestic terrorists within a state's own territory is essentially a law enforcement action governed by domestic law. Although this latter use of force could raise human rights and other legal issues, such use is beyond the scope of this study.

Having drawn the parameters of this study, a caveat is required. Even though an issue is beyond the scope of this study in itself, it may be discussed to the extent of its ancillary impact upon the primary issues under consideration. This study looks at only one piece of a complex jigsaw puzzle. To fully understand that piece, it may be necessary to have some understanding of the pieces that surround it.

This Study, How Meaningful?

States combating terrorism, including the United States, are increasingly opting to use military force. One need only recall the Israeli raid on the Beirut airport in 1968; the hostage rescue missions to Entebbe in 1976, Mogadishu in 1977, and Tehran in 1980; the Israeli raid on the Iraqi nuclear reactor in 1981; and the Achille Lauro incident of 1985, the US raid on Libya in 1986, and the Israeli raid on Tunis in 1987. As a consequence, understanding international norms applicable to the legitimate use of force has become more relevant and pertinent. A hostage rescue mission in the overseas environment is one use of force. But use of military force is not restricted to such operations as the April 1986 raid on Libya reminds us. The announced United States policy of active defense portends future uses of military force in ways perhaps not previously imagined.

How did we arrive at this juncture? Frustration has driven us here. As terrorist expert Brian Jenkins of the Rand Corporation has noted, “confronted with terrorist violence from abroad, and frustrated by the lack of international cooperation, national governments are more likely to take direct military action.”¹⁴ Frustrations and failures in the international arena have led like-minded Western states, including the United States, to turn to the military option as a last resort in combating this threat.

Lack of international cooperation in this area has a long history. Following the assassination of King Alexander of Yugoslavia and French foreign minister Louis Barthou in Marseilles on 9 October 1934, the Council of the League of Nations appointed a committee of experts to draw up a preliminary draft of an international convention to assure repression of conspiracies or crimes committed with a political or terrorist purpose.¹⁵ The result was the 1937 Convention on Terrorism, which only one state, India, ratified and which never entered into force.

The United Nations record is also one of frustration for the West. After the massacre of the Israeli Olympians in Munich in 1972, the United States introduced in the United Nations a draft convention on terrorism. The UN secretary general also asked the UN General Assembly to add to its agenda at its 27th session “measures to prevent terrorist and other forms of violence which endanger or take innocent human lives or jeopardize fundamental freedoms.”¹⁶ According to Judge Abraham Sofaer, US Department of State legal adviser, “the Secretary-General’s statement evoked angry opposition, which took the immediate form of protests against considering terrorism without considering its causes.”¹⁷ Two fundamentally opposing views exist in the United Nations on the issue of terrorism: one focusing on acts and the other on causes. The former views terrorism as evil irrespective of cause. The latter sees terrorism as good or evil depending on the cause in whose service it is employed. This latter view also considers efforts to outlaw terrorism as an indirect way of attempting to restrain national liberation movements. The United States and other Western democracies take the first view. The third world, supported by the Soviet Union and its followers, takes the second.¹⁸

Even though the United Nations failed to reach agreement on the proposed United States draft general convention on terrorism or to take meaningful action on the secretary general’s

proposed agenda item, it did manage to complete work on two specialized conventions: the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents,¹⁹ and the 1979 International Convention on Hostage Taking.²⁰ Yet, these and other conventions concerning aerial hijacking and letter bombs, for example, have not produced a solution to the terrorist problem. Several factors have worked to slow progress toward this end.

First, many of the specialized conventions are watered down by conditional language. For example, the 1973 Convention on the Prevention and Punishment of Crimes against Protected Persons is annexed to UN General Assembly Resolution 3166, 28th session, which provides “that the provisions of the annexed convention could not in any way prejudice the exercise of the legitimate right to self-determination and independence... by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination (including Zionism) and apartheid.”²¹ Second, many states that actively sponsor or support terrorism are not parties to these conventions. Third, the conventions fail to provide any viable enforcement mechanism. Extradition, where provided, is subject to the “political offense” escape clause and punitive sanctions are lacking.²² Brian Jenkins summarizes the political climate as follows: “The world will not simply outlaw international terrorism... We should not be overoptimistic in regard to obtaining and enforcing international agreements.”²³

This same lack of consensus that contributes to ineffective international rule making underlies the failure of the UN Charter’s general enforcement machinery to ensure international peace and security. When established in 1945, a great assumption was made that the great powers would continue to work together in the postwar era. Due to great power rivalry and the exercise of the veto power, “the military enforcement machinery contemplated by the UN Charter to enforce its rule against shooting first was never created... The Security Council does not provide reliable central authority to enforce the rule against first use of force.”²⁴ The General Assembly has only powers of recommendation. Even if the General Assembly could act forcefully, its members are divided and its resolutions are replete with language strongly supporting the actions of national liberation movements while refusing to condemn terrorism *per se*.²⁵ This record has led Western scholars to conclude that “the United Nations is, for the most part, useless in combating terrorism.”²⁶ This disdain of the United Nations is a theme that surfaces from time to time in this study. In particular, it becomes an argument for reinterpretation of the UN Charter’s provisions on the use of force.

This lack of international cooperation has not been limited to the United Nations. The International Criminal Police Organization (Interpol) constitution provides in article 3 that “it is strictly forbidden for the organization to undertake any intervention or activities of a political, military, religious or racial character.”²⁷ Arab membership and this constitutional limitation have reduced the organization’s effectiveness in countering terrorism. Many of its functions regarding collating and distributing of information have been assumed by the West German government’s antiterrorism computer center in Wiesbaden.²⁸ Terrorism, viewed as a political expression, has had an adverse impact on Interpol. The great irony is that terrorist groups seem better able to cooperate than governments have.

The international arena has seen some successes. The cooperation among the industrialized Western democracies that make up the “summit seven” (United States, Canada, the United Kingdom, France, West Germany, Italy, and Japan) is noteworthy.²⁹ So is the 1977 European Convention on the Suppression of Terrorism, which entered into force on 4 August 1978 for all members of the Council of Europe except Ireland and Malta. This convention “removes the traditional ‘political offence’ safeguard in extradition for crimes of hijacking or other offences against aircraft, serious attacks on internationally protected persons, kidnapping, taking of hostages and offences involving the use of explosives or firearms if these endanger persons.”³⁰

But these and other limited successes have been insufficient to meet the challenge of terrorism. States have increasingly turned to unilateral action, including the use of military force. The aim is deterrence³¹ and “military force must always be one option.”³² Israel, West Germany, the United Kingdom, the United States, and others have used and, in all likelihood, will again use the force option. The ideal objective is a consistent policy of maximizing risks to terrorists and their sponsors and supporters while minimizing their potential rewards. In the words of the late William J. Casey, former director of the Central Intelligence Agency (CIA), “perpetrators and sponsors of terrorist acts must be held accountable for their deeds.”³³ Use of force is one method of achieving accountability.

To achieve deterrence and accountability, the Reagan administration has shifted US policy from a passive to an active response to terrorism.³⁴ National Security Defense Directive (NSDD) 138, 3 April 1984, endorses “active defense” through the preemptive use of military force.³⁵ In implementing the final report of the vice president’s task force, NSDD 207 (20 January 1986) provides for an active national strategy to combat terrorism.³⁶ Secretary of State George Shultz described the active defense policy thusly:

It is time to think long, hard, and seriously about more active means of defense, about defense through appropriate preventive or preemptive actions against terrorist groups before they strike. One of the best deterrents to terrorism is the certainty that swift and sure measures will be taken against those who engage in it. Resort to arms in behalf of democracy against repressive regimes or movements is indeed a fight for freedom, since there may be no other way that freedom can be achieved.³⁷

Brian Jenkins noted that “an active defense meant the use of military force.”³⁸ William Casey confirmed that “we must be free to consider an armed strike against terrorists and those who support them, where elimination of the threat does not appear to be feasible by any other means.”³⁹ An active defense policy, relying as it does on the military option, emphasizes the importance of understanding international law norms on the use of force.

International Law, Why Bother?

Some believe that international law is nothing more than irrelevant legal hocus-pocus. They believe that when it comes to power politics, the law of nations is not germane. Of what

relevance is international law? Why should we care about it? In addition to the stated US policy to comply with international law, other important reasons exist as to why international law is applicable to the conduct of military operations by the United States.

First, as stated by Justice Horace Gray in *Paquette Habana*, “international law is part of our law.”⁴⁰ The US Constitution, article I, section 8, clause 10 and article III, section 2, recognizes that the United States is subject to international law and Congress has the power to define offenses under the law of nations. From the very beginning of our federal republic, US courts have treated customary international law as an integral part of the law of the United States. As Prof Louis Henkin, Columbia University, states, “international law is not merely law binding on the United States internationally but it is also incorporated into United States law.”⁴¹ Violation of international law becomes a breach of US law that can have a significant impact on us as a nation and as individuals.

International treaty law is also US law, but it is treated somewhat differently. The Constitution, article VI, clause 2, provides that “all treaties made, or which shall be made, under the Authority of the United States” are, like federal laws, the supreme law of the land. Consequently, all laws and treaties of the United States are supreme over state laws, but of equal status to one another. Thus, a US law passed after a treaty takes effect may prevail over that treaty without violating the Constitution. Moreover, since the president has the constitutional capacity to unilaterally denounce a treaty, such action could not be challenged in US courts. In these circumstances, US law would not be violated even though international law would be, and the United States could be held accountable by the international community for such action. The important point to recognize is that customary international law, unlike treaty law, is inherently part of US law and always applies. Customary law provides the great body of international legal norms relative to the use of military force. Even those principles concerning the use of force as are contained in the United Nations Charter, articles 2(4) and 51, are now generally considered by legal scholars as having become customary international law. Moreover, no matter what the status of treaty obligations of the United States may be under our law, such obligations bind the United States internationally until properly terminated in accordance with the law of nations.

Second, democratic societies are established on the rule of law, and compliance with international law is fundamental to American tradition. In the eloquent words of Abram Chayes, former State Department legal adviser,

A nation which professes to live by the rule of law invites a sure penalty, sometimes more swiftly than by the judgment of a court, if it turns from the path of the law. For us and our associates, moreover, whether we will profess to live by the law is not an issue of policy on which we have alternatives. The answer is inherent in our national tradition, in our culture, and it is implied in the purposes for which we strive in the world. It is implicit in our avowal at birth of “a decent respect for the opinions of mankind.” Thus it seems to me we will have a hard time in developing a doctrine as to the use of force which will permit us to be judge in our own case.⁴²

Combating terrorism accents this issue as terrorists seek to have established governments overreact, acting outside the law as terrorists themselves do, thereby undermining the legitimacy of the government itself.⁴³

Third, conduct consistent with international norms provides governments with the moral and legal high ground for dealing with terrorism. Failure to comply with the law will result in loss of government support at home and abroad. In the words of Prof Oscar Schachter, Columbia University Law School, “states require a basis of legitimacy to justify their actions... Power and interest are not superceded by law, but law cannot be excluded from the significant factors influencing the uses of power and the perception of interests.”⁴⁴

Fourth, and finally, the United States complies with international law because it is in its national self-interest to do so. The reasons discussed above are indicative, in part, of that self-interest. Also, the United States has an interest in preserving the status quo and the international legal order. To the extent that the United States undermines the law, it undermines international order and those vital interests.⁴⁵

NOTES

1. For a discussion of the terms terrorism, international terrorism, state-sponsored terrorism, and state-supported terrorism, see chapter 1.
2. International law is

the standard of conduct, at a given time, for states and other entities subject thereto. It comprises the rights, privileges, powers, and immunities of states and entities invoking its provisions, as well as the correlative fundamental duties, absence of rights, liabilities and disabilities. International law is, more or less, in a continual state of change and development.

Department of State, Office of the Legal Adviser, *Digest of International Law*, vol. 1, ed. Marjorie M. Whiteman (Washington, D.C.: June 1963), State Department, 7403.

Article 38(1), Statute of the International Court of Justice, annexed to the Charter of the United Nations, identifies the primary sources of international law as (a) “international conventions [treaties], whether general or particular, establishing rules expressly recognized by the contesting states,” (b) “international custom, as evidence of a general practice accepted as law,” and (c) “the general principles of law recognized by civilized nations.” The statute also identifies the “subsidiary means for the determination of [international] law as (a) judicial decisions and (b) the teachings of most highly qualified publicists.” “Charter of the United Nations,” 26 June 1945, *Statutes at Large*, vol. 59: 1031; *United States Treaty Series (TS)*, 993; *Department of State, Treaties and Other International Ads Series (TIAS)*, 5857; *Department of State, Treaties and Other International Agreements of the United States, 1776-1949*, compiled under the direction of Charles I. Bevans (hereinafter Bevans), vol. 3, Multilateral, 1931-1945, 1153.

3. The term ordinary crime as used in this study applies to all criminal acts other than those that arise in time of armed conflict, namely, war crimes and grave breaches of international law.

4. In this study, the term domestic law, sometimes referred to as municipal law, refers to the law internally created by sovereign states as contrasted to international law.

5. The term law of armed conflict encompasses “the international law regulating the conduct of states and combatants engaged in armed hostilities, often termed the law of war.” *Air Force Pamphlet (AFP) 110-31, International Law—The Conduct of Armed Conflict and Air Operations*, November 1976, para. 1-2b.

6. The vice president’s task force recognized the need for a framework for decisionmaking and recommended that

the Interdepartmental Group on Terrorism should prepare, and submit to the NSC [National Security Council] for approval, policy criteria for deciding when, if and how to use force to preempt, react and retaliate. This framework will offer decisionmaking bodies a workable set of standards by which to judge each terrorist threat or incident.

Vice President, *Public Report of the Vice President’s Task Force on Combatting Terrorism* (Washington, D.C.: February 1986), 22.

7. Many scholars and jurists have focused on the inadequacy of international law in the face of the terrorist challenge, not the least of which has been Judge Abraham D. Sofaer, the Department of State legal adviser. He has written, "The law, as presently formulated cannot reasonably be expected to repress international terrorism." Sofaer, "Terrorism and the Law," *Foreign Affairs* 64, no. 5 (Summer 1986): 922. See also Fehmy Saddy, "International Terrorism, Human Rights, and World Order," *Terrorism: An International Journal* 5, no. 4 (1982): 325-51; and Grant Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures* (Cambridge, England: Cambridge University Press, 1982), 120.

One of the central themes of the present study is that the inadequacy that many observers feel exists in international law is merely the reflection of the current state of international relations. The frustration of Judge Sofaer and others is with the inability of states to achieve consensus for future development of international law. International law can only develop as nation-states are willing to allow it to do so. No world government exists to legislate. In this sense international law is a practical expression of the art of the possible in a world composed of independent sovereign states. This state of affairs is the realism of international law.

International law may not be as inadequate as some believe, however. Concepts of international law such as choice of law (chapter 2) and state responsibility (chapter 3) offer interesting possibilities that deserve greater attention, as do the principles concerning the use of force in contemporary international law (chapters 4-6). As Prof Harry E. Almond, Jr., National Defense University, has written,

Accordingly, it must be concluded that with respect to the use of force, the loopholes in the law are not substantial. More difficult is the policy question: establishing community policy among states, state commitments to that policy, and support of states when force is used.

Almonds "Using Law to Combat Terrorism," in *Fighting Back: Winning the War against Terrorism*, ed. Neil C. Livingstone and Terrell E. Arnold (Lexington, Mass.: D. C. Heath and Co., 1986), 171. Prof Shabtai Rosenne offers these encouraging words: "international law, like all law, is common sense writ large." Rosenne, "International Law and the Use of Force," *US Naval War College International Law Studies* 62 (1980): 8.

8. For more detail on the efforts to make terrorism a crime, see the records on Convention for the Punishment and Prevention of Terrorism, opened for signature at Geneva, 16 November 1937, League of Nations, C.94.M.47. 1938.V. The general view at present is that efforts to criminalize specific acts that terrorists commit have greater hope for success than would making terrorism itself a crime. In this regard, see the work of the International Law Association (ILA), Committee on International Terrorism, "International Terrorism," Report of the Fifty-Sixth Conference Held at New Delhi (Great Britain: 1976), 155-77; "International Terrorism," Report of the Fifty-Seventh Conference Held at Madrid (Great Britain: 1978), 119-41; "International Terrorism: Third Interim Report of the Committee," Report of the Fifty-Ninth Conference Held at Belgrade (Great Britain: 1982), 495-519; "International Law: Fourth Interim Report of the Committee," Report of the Sixtieth Conference Held at Montreal (Great Britain: 1983), 349-57; and "Terrorism: Final Committee Report," Report of the Sixty-First Conference Held at Paris (Great Britain: 1985), 313-22. For comments on the work of the ILA generally, see *Terrorism: An International Journal* 7, no. 2 (1984).

On the efforts to establish an international criminal court, see Convention for the Creation of an International Criminal Court, opened for signature at Geneva, 16 November 1937, C.94.N4.47. 1938.V. For a contemporary discussion of the issue, see M. Cherif Bassiouni, ed., *International Terrorism and Political Crimes*, 3d Conference on Terrorism and Political Crimes, 1973 (Springfield, Ill.: Charles C. Thomas for International Institute for Advanced Criminal Sciences, 1975). Regarding the possibility of such a court, this author agrees with Prof Kay Hailbronner of the Federal Republic of Germany, who states: "I think there is no chance whatever of reaching agreement on that." Hailbronner quoted in ILA, "International Terrorism," Report of the 56th Conference, 118.

For comments on efforts to create an international force to combat terrorism, see "Terrorism: International Force the Best Way to Fight It," editorial, Fort Worth Star-Telegram, 1 May 1986, reprinted in "Special Edition—Terrorism" published by the Air Force News Clipping and Analysis Service, 3 July 1986, 38. In the present study, the author agrees with Grant Wardlaw (p. 103): "The diplomatic and political implications of, for example, an international anti-terrorist strike force are such that suggestions of this kind are never likely to be translated into reality."

On the efforts to establish a special jurisdiction and legal process for terrorism, see Paul Wilkinson's discussion of French president Valery Giscard d'Estaing's suggestion of creating a European judicial zone. Wilkinson sees progress in this area as unlikely. Wilkinson, "Proposals for a Liberal-Democratic Government Response to Terrorism and Low-Intensity Violence at Domestic and International Levels." in *Terrorism and Beyond: An International Conference on Terrorism and Law-Level Conflict*, ed. Brian M. Jenkins (Santa Monica, Calif.: Rand Corp., December 1982), 220-23, Rand, R-27 14-DOE/DOJ/DOS/RC

Concerning the development of new customary rules, see article 38(1) of the Statute of the International Court of Justice, which provides that international custom is "evidence of general practice accepted as law." Two basic conditions are required to create customary law: the practice of states (material element) and the belief that the practice has been accepted as law (the psychological element referred to as *opinio juris sive necessitatis*). This second element distinguishes customary international law from international comity or courtesy (*comitas gentium*). The possibilities of developing customary law, as distinguished from conventional or treaty law, in meeting the challenge of terrorism may have potential. Further research into this area of the law is needed.

9. International law is but one factor to consider in making a foreign policy decision to use military force. As Brian Jenkins notes,

How many incidents are likely to warrant a military response? Very few, judging by the historical record... Nor is the United States likely to carry out military operations on the territory of the Soviet Union or Eastern Europe... Military operations in response to terrorism are likely to involve a handful of hostile countries in the Third World where the United States has incontrovertible evidence that agents in the employ of a government have carried out a terrorist attack, that a government has instigated a terrorist attack or permitted one to occur through willful negligence, or that a government is able to bring the perpetrators to justice but refuses to do so. If we apply these criteria... a military response might have been contemplated in only a handful of episodes—less than one percent.

Jenkins, "Combatting Terrorism Becomes a War," Rand, 6988, Rand Corp., Santa Monica, Calif., May 1984,6. See also Department of the Army, Training and Doctrine Command, Joint Low-Intensity Conflict Project, vol. 1, Analytical Review of Low-Intensity Conflict (Fort Monroe, Va.: August 1986), chap. 6.

For a discussion that the use of force is likely in the event of nuclear terrorism, see Forrest R. Frank, "Nuclear Terrorism and the Escalation of International Conflict," US Naval War College International Law Studies 62 (1980): 339. Another likely occasion for the use of force is in rescue operations. See Gail Basset et al., Options for U.S. Policy on Terrorism (Santa Monica, Calif.: Rand Corp., 1981), 6, Rand, R-2764-RC.

The announced United States policy is to use armed force only in compliance with international law. Robert C. McFarlane, former assistant to the president for national security affairs, described the elements of the US active defense policy toward terrorism to the Defense Strategy Forum on 23 March 1985. One element was: "State-sponsored terrorism consists of acts hostile to the United States and 'must be resisted by all legal means'." Quoted in Almond, 168-69. This US policy was reaffirmed, in relevant part, as follows: "The U.S. Government considers the practice of terrorism by a person or group a potential threat to its national security and will resist the use of terrorism by all legal means available" (emphasis supplied). Vice President, Report on Combatting Terrorism, 7.

10. Posse Comitatus Act, US Code, Title 18, sec. 1835; 1981 amendment at US Code, Title 10, secs. 371-378. For a discussion, see William Regis Farrell, The U.S. Government Response to Terrorism: In Search of an Effective Strategy (Boulder, Colo.: Westview Press, 1982). War Powers Resolution, US Code, Title 50, secs. 1541-1548 (PL 93-148).

The United States has enacted specific domestic legislation in direct response to terrorism. See An Act for the Protection of Foreign Officials anti Guests of the United States, US Code, Title 18, secs. 112, 878, 970, 1116, 1117, and 1201 (PL 92-539); US Code, Title 18, sec. 1203, makes criminal the taking of US hostages worldwide; (IS Code, Title 18, sec. 3077, authorizes the attorney general to pay rewards for terrorism suppression; Foreign Intelligence Surveillance Act (FSA), US Code, Title 50, sec. 1801 et seq.; and Antihijacking Act (PL 93-366).

11. The 15 April 1986 US raid on Libya provides an example of how important landing and overflight rights can be to a military operation. For a brief discussion of the United Kingdom's authorization to allow US forces to depart on the mission, see James M. Perry, "Thatcher Draws Harsh Criticism by Labour, European Allies for Sanctioning Libya Strike," Wall Street Journal, European edition, 16 April 1986, 4. Concerning overflight rights, see James M. Markham, "German Voices Doubts on Qaddafi Terror Role," New York Times, 2 September 1986, 8.

12. Regarding aerial hijacking, see "Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation" (Montreal Convention), 23 September 1971, TIAS 7570, Department of State, United States Treaties and Other International Agreements (UST), vol. 24, pt. 1, 564; "Convention for the Suppression of Unlawful Seizure of Aircraft" (Hague Convention), 16 December 1970, TIAS 7192, UST, vol. 22, pt. 2, 1641; and "Convention on Offenses and Certain Other Acts Committed on Board Aircraft" (Tokyo Convention), 14 September 1963, TIAS 6768, UST, vol. 20, pt. 3, 2941; United Nations Treaty Series (UNTS), Treaties and international Agreements Reported and Filed or Recorded with the Secretariat of the United Nations, vol. 704 (1969), no. 10106, 219.

On hostage taking, see "Convention to Prevent and Punish the Acts of Terrorism Taking the

Form of Crimes against Persons and Related Extortion That Are of International Significance,” 2 February 1971, TIAS 8413, UST, vol. 21, pt. 4, 3949; Organization of American States (OAS), AG/88/rev.; and “International Convention against Taking of Hostages,” 17 December 1979, UN A/34/819 (1979).

Regarding letter bombs, see “Universal Postal Convention,” 10 July 1964. TIAS 5881, UST, vol. 16, pt. 2, 1291. For a discussion of this convention, see L. C. Green, “International Law and the Control of Terrorism,” *Dalhousie Law Journal* 7, no. 2 (April 1983): 244.

Regarding diplomats, see “Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents” (New York Convention), 14 December 1973, TIAS 8532, UST, vol. 28, pt. 2, 1955.

Requests regarding extradition ‘may be denied on the basis of the political offense exception. Although the basic rule in international law is cooperation among states with respect to fugitives from justice, an exception to this rule for political offenses arose during the eighteenth-century revolutions for political freedom and liberty. How broadly the exception is interpreted is open to dispute. Some argue that it should extend only to those whose extradition is sought for exercising political freedoms such as free speech. Others argue that it extends to any political statement, such as violence in furtherance of one’s political cause. This issue takes on significance in the context of terrorism. If one assumes the broad view of the political offense exception, then one must agree with Noemi Gal-Or, who argues that “the problem of determining the political character of the political terrorist offence is non-existent. Such an offence is by definition a political offence par excellence... The terrorist offence always fits into some theoretical category of political offence.” Gal-Or, *International Cooperation to Suppress Terrorism* (New York: St. Martin’s Press, 1985), 136.

A broad view would inhibit greatly extradition of terrorists to stand trial in countries where they committed their acts. Recently the United States and the United Kingdom concluded a supplement to their extradition treaty narrowing the political offense exception. Much remains to be done in this area. For a general discussion, see Department of State, Bureau of Public Affairs, “The Political Offense Exception and Terrorism,” statement by Abraham Sofaer, legal adviser. Department of State, before the Senate Foreign Relations Committee, 1 August 1985, *Current Policy* 762.

13. Another related issue concerns assassination. For US guidance, see Executive Order 12333, US Intelligence Activities, 4 December 1981, Code of Federal Register (CFR), Title 3, The President, 1981 Compilation, 200; Christopher Dobson and Ronald Payne, *Counterattack: The West’s Battle against the Terrorists* (New York: Facts on File, 1982), xv-xvi; and Brian Jenkins. “Assassination: Bad Policy. Morally and Logically,” *Alabama Journal-Montgomery Advertiser*, 16 November 1986, 5(B).

14. Brian Michael Jenkins. “Research Note: Rand’s Research on Terrorism.” *Terrorism: An International Journal* 1, no. 1 (1977): 92.

15. A concise history of the steps leading to the 1937 Convention for the Prevention and Punishment of Terrorism is in *Proceedings of the International Conference on the Repression of Terrorism*, League of Nations, C.94.M.47.1938.V (1938.V.3), 49-50. See also Maj William R. Farrell, USAF, “Terrorism Is .?” *Naval War College Review* 32, no. 3 (May-June 1980): 65; Seymour Maxwell Finger, “International Terrorism and the United Nations “ in *International Terrorism: National, Regional and Global Perspectives*, ed. Yonah Alexander (New York: Praeger Publishing, 1976), 323; Thomas M. Franck and Bert B. Lockwood, Jr., “Preliminary

Thoughts toward an International Convention on Terrorism,” *American Journal of international Law* 68, no. 1 (January 1974): 69-70; and Robert A. Friedlander, *Terror- Violence: Aspects of Social Control* (New York: Oceana Publications, 1983), 87.

16. UN General Assembly, Official Records (UN GAOR), 27th sess., A/8791 (1972).

17. Sofaer, 903.

18. The breadth of the gap is illustrated by the remarks of delegates speaking in behalf of the third world position during the UN Sixth (Legal) Committee meetings. Guinea supported the right of national liberation movements “to undertake any type of action to assure that their countries attain independence.” UN Sixth (Legal) Committee, 1362d meeting, UN GAOR, 27th sess., A/C.6/SR. 1362 (1972), 16. The Cuban representative noted that “the methods of combat used by national liberation movements could not be declared illegal while the policy of terror unleashed against certain peoples was declared legitimate.” UN Sixth (Legal) Committee, 1358th meeting, UN GAOR, 27th sess., A/C.6/SR. 1358 (1972), 11. The Madagascar representative said that “acts of terrorism inspired by base motives of personal gain were to be condemned. Acts of political terrorism, on the other hand, undertaken to vindicate hallowed rights recognized by the United Nations, were praiseworthy. It was, of course, regrettable that certain acts in the latter category affected innocent persons.” UN Sixth (Legal) Committee, 1365th meeting, UN GAOR, 27th sess., A/C.6/SR.1365 (1972), 14.

The UN Sixth (Legal) Committee recommended to the UN General Assembly that a 35-member ad hoc committee on terrorism be formed. The committee met from 16 July through 10 August 1973. That it failed to provide more than a summary of divergent views and that it was unable to produce a draft convention should come as a surprise to no one. For a discussion of the committee’s lack of success, see Wardlaw, 109. According to Franck and Lockwood (p. 72), the committee did not produce a recommendation since “serious study of the causes of terrorism is a long term project.” The committee reconvened on 14 and 25 March 1977, but again met without result and its report reflected the divergent opinions of its member countries. See Wardlaw, 110.

19. New York Convention.

20. UN Convention against Taking Hostages. For a discussion of this convention, see Green, 252-54.

21. UN General Assembly, “Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents,” 14 December 1973, Resolution 3166, UN GAOR, 28th sess., supp. 30, A/9030 (1973), 146.

22. See Farrell, “Terrorists,” 66-67; David L. Milbank, “International and Transnational Terrorism: Diagnosis and Prognosis,” in *Contemporary Terrorism: Selected Readings*, ed. John D. Elliott and Leslie K. Gibson (Gaithersburg, Md.: International Association of Police Chiefs, 1978); and Paul Wilkinson, *Terrorism and the Liberal State* (New York: John Wiley and Sons, Halsted Press, 1977), 221.

23. Brian Michael Jenkins, “A Strategy for Combatting Terrorism,” Rand, 6624, Rand Corp., Santa Monica, Calif., May 1981, 7-8. Or, as noted by Manuel R. Garcia-Mora,

punishing terrorists is further complicated by the fact that no government is really willing to punish individuals when in so doing its political interests might be jeopardized. This observation is even more compelling in situations where a state avails itself of the activities of private persons to promote its international objectives.

Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Netherlands: Martinus Nijhoff, 1962), 195.

24. George Bunn, "International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?" *Naval War College Review* 39, no. 3 (May-June 1986): 71.

25. See, for example, UN General Assembly "Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes," 12 December 1973, Resolution 3103, UN GAOR, supp. 30, 28th sess., A/9030 (1973). The issue of the struggle of national liberation movements is central to the UN arena and the desire of the third world to press for consideration of the cause before condemning the act. The problem is, of course, that one group's national liberation is another's aggression. It also brings back into the law the concept of just war, which has long since been discarded. In this latter regard Prof John Norton Moore writes that the argument for national liberation movements is:

nothing more than the old 'just war' notion resurrected in the modern setting of the post-Charter period, and it violates that judgmental decision made by the framers of the Charter that war in the modern world is too destructive to allow social change to be brought about in international relations through the use of force.

Moore, "Legal Standards for Intervention in Internal Conflicts," *Georgia Journal of International and Comparative Law* 13, supp. (1983): 196. See also Richard R. Baxter, "The Geneva Conventions of 1949 and Wars of National Liberation," in Bassiouni; Lt Col Frances T. Symes, USAF, "Terrorism and the Amended Law of War," student research paper (Maxwell AFB, Ala.: Air War College, 15 June 1982), 7-8; and Edward McWhinney, "International Terrorism: United Nations Projects for Legal Controls," *Terrorism: An International Journal* 7, no. 2 (1984): 175-84.

Of what legal effect are United Nations resolutions? Generally speaking, they have no binding authority. However, to the extent that they express the will of the international community, they may have authority. In this regard the West ought to be gravely concerned about the course of events in the UN General Assembly and about the content of General Assembly resolutions. They could impact on the development of customary international law in a manner adverse to the foreign policy interests of the United States and the West. For a discussion of General Assembly resolutions, see Jorge Castaneda, *Legal Effects of United Nations Resolutions* (New York: Columbia University Press, 1969), and "Report of the Committee on Use of Force in Relations among States," in ILA, American Branch, 1985-86 Proceedings and Committee Reports (New York: ILA, American Branch, 1986), 191.

26. Neil C. Livingstone and Terrell E. Arnold, "Democracy under Attack," in Fighting Bock, ed. Livingstone and Arnold, 9. See also Benjamin Netanyahu, "Terrorism: How the West Can Win," *Time*, 14 April 1986, 57; Gayle Rivers, *The War against the Terrorists: How to Win It* (New York: Stein and Day, 1986), 225; and Paul Wilkinson, "Can a State Be a 'Terrorist'?" *International Affairs* 57, no. 3 (Summer 1981): 468.

27. Interpol constitution quoted in Edward A. Lynch, "International Terrorism: The Search for a Policy," *Terrorism: An International Journal* 9, no. 1 (1986): 68.

28. See Dobson and Payne, xx.

29. See Vice President, Report on Combatting Terrorism, 12.

30. United Kingdom, Foreign and Commonwealth Office, "International Reaction to Terrorism," background brief, January 1986, 5.

31. "Our goal," in the words of Secretary of State Shultz, "must be to prevent and deter future terrorist acts." George P. Shultz, "Terrorism and the Modern World," *Terrorism: An International Journal* 7, no. 4 (1985): 442. See also Netanyahu, "Terrorism: How the West Can Win," 50; Jeffrey A. Sheehan, "The Entebbe Raid: The Principle of Self-Help in International Law as a Justification for State Use of Armed Force," *Fletcher Forum* 1 (Spring 1977): 152-53; Paul Wilkinson, "Proposals for Government and International Responses to Terrorism," *Terrorism: An International Journal* 5, nos. 1-2 (1981): 161-93; and Senate, Committee on the Judiciary, Subcommittee on Security and Terrorism, Report on "State-Sponsored Terrorism," 99th Cong., 1st sess., June 1985, Senate print 99-56, 74-75.

32. Wilkinson, "Responses to Terrorism," 192-93.

33. William J. Casey, "International Terrorism: Potent Challenge to American Intelligence," address at Fletcher School of Law and Diplomacy, Tufts University, Medford, Mass., 17 April 1985, in *Terrorism*, ed. Steven Anzovin, *The Reference Shelf*, vol. 58, no. 3 (New York: H. W. Wilson Co., 1986), 69; reprinted from *Vital Speeches* 51, no. 23 (15 September 1985).

34. According to Secretary Shultz "a purely passive defense does not provide enough of a deterrence to terrorism and the states that sponsor it." George P. Shultz "Terrorism: The Challenge to Democracy," address to the Jonathan Institute's Second Conference on International Terrorism, Washington, D.C., 24 June 1984, in Anzovin, 58; reprinted from *Department of State Bulletin* 84, no. 2089 (August 1984). On 9 July 1986, Secretary Shultz stated further, "We have to be willing to do something about it in an active way... and terrorists should know and states that support terrorists should know that the United States will take action and therefore they don't operate in a cost-free environment." Department of State, "Remarks and Q&A Sessions by the Honorable George P. Shultz, secretary of state, before Foreign Press Center seminar, Countering State Supported Terrorism," Press Release 147, 9 July 1986, 4. See also Casey, 70-71; McFarlane, quoted in Almond, 168-69; and Vice President, Report on Combatting Terrorism. 7.

35. For discussion of NSDD 138, see Jenkins, "Combatting Terrorism Becomes a War," 4; Lt Col James P. Terry, USMC, "An Appraisal of Lawful Military Response to State-Sponsored Terrorism," *Naval War College Review* 39, no. 3 (May-June 1986): 59; David C. Morrison, "The 'Shadow War'," *National Journal* 18, no. 19 (10 May 1986): 1100; and Stephanie L. Nall, "Move on Terrorism Ordered by Reagan," *Washington Times*, 16 April 1984, 1.

36. For a discussion of NSDD 207, see US Army, *Analytical Review*, 8-3.

37. George P. Shultz, *Washington Post*, 25 June 1984, 1(A).

38. Jenkins, "Combatting Terrorism Becomes a War," 3.

39. Casey, 70.

40. *Paquette Habana*, 175 US 677 (1900), 700.

41. Louis Henkin, "International Law as Law in the United States," *Michigan Law Review* 82 (April—May 1984): 1561.

42. Abram Chayes, "International Law Issues: The Opposition Position," in *The Cambodian Incursion: Legal Issues; Proceedings of the Fifteenth Hammarskjold Forum*, ed. Donald T. Fox (Dobbs Ferry, N.Y.: Oceana Publications for the Association of the Bar of New York City, 1971), 41.

43. See Lloyd N. Cutler, "The Right to Intervene," *Foreign Affairs* 64, no. 1 (Fall 1985): 96-97; and Wilkinson, *Terrorism and the Liberal State*.

44. Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review* 82 (April-May 1984): 1623-24. See also Livingstone and Arnold, "Democracy under Attack," 8; and Edward Marks and Debra van Ostpal, eds., *Combating Terrorism: A Matter of Leverage* (Washington, D.C.: Georgetown University Center for Strategic and International Studies, June 1986), 16-18.

45. See Francis A. Boyle, "The United Nations Charter and the Iranian Hostage Crisis," in *Terrorism, Political Violence and World Order*, ed. Henry Hyunwook Han (Lanham, Md.: University of America, 1984), 537-39; and Stanley Hoffmann, "International Law and the Control of Force," in *The Relevance of International Law*, ed. Karl Deutsch and Stanley Hoffmann (Cambridge, Mass.: Schenkman Publishing Co., 1968), 21-46.

CHAPTER 1

WHAT IS TERRORISM AND HOW SERIOUS IS THE THREAT?

The purpose of terror is to terrorize.

V.I. Lenin

The one means that wins the easiest victory over reason: terror and force.

Adolf Hitler

The lesson is that America was kicked out of Lebanon when an individual Arab was able to kill 300 Americans—An armed people will never be defeated, but regular armies are unreliable.

Mu'ammarr al-Qadhafi

As discussed in the next chapter, international law offers two distinct approaches to managing terrorism: law enforcement and the law of armed conflict.⁷ Whether either approach is appropriate is another question; whichever is best will depend in large measure on the nature of the terrorist challenge. We must understand the challenge of terrorism before we can assess the suitability of a response.

This chapter provides the foundation for that understanding. In this chapter we determine as best we can what terrorism is and how serious the threat is. We seek answers to questions such as: Is terrorism a minor nuisance or a significant threat to national security? Is it likely to be a temporary or an enduring problem? What factors should be considered in evaluating this threat? Some of these questions cannot be answered completely. However, to the extent that we must make assumptions about terrorism, we must identify them clearly. By distinguishing between knowledge and assumption, decisionmakers will have a clearer understanding of the issues and the alternative courses of action.

To provide this clear framework for decisionmaking, this chapter pursues the following line of reasoning: What is terrorism? How does international law define terrorism? What other terminology must we understand? What is international terrorism? In what ways do states involve themselves with terrorists? What distinguishes between state sponsorship, state support, state toleration, and state inaction? How serious is the terrorist threat? Is it a recent threat or does it have historical antecedents? Do statistics support the conclusion that the threat is serious? What other factors should we consider to place the magnitude of the challenge into the proper perspective?

What Is Terrorism?

According to Darrell M. Trent, associate director and senior research fellow, Hoover Institution, terrorism has “no shared definition.”² Brian Jenkins of the Rand Corporation writes that terrorism is a “fad word used promiscuously. . . . What we have, in sum is the sloppy use of a word that is rather imprecisely defined to begin with.”³ Others have noted that it is a term “with various connotations and no singular meaning”⁴ and that terrorism is a term in common use [having] little common meaning.”⁵ The term terrorism is an emotive word with negative connotations: “Terrorism, like beauty, remains in the eye of the beholder.”⁶ According to psychologist H. H. A. Cooper, “terrorism is thus an easily recognized activity of bad character, subjectively determined and shaped by social and political considerations.”⁷

Dutch political scientist Alex P. Schmid, in *Political Terrorism*, reviewed more than 140 definitions of terrorism written between 1936 and 1981. From these he identified 22 elements and 20 purposes or functions of terrorism. The five most frequently identified elements were: violence or force, political purpose, terror or fear, threat, and anticipated psychological effects or reactions by third parties.⁸ The five most frequently identified purposes or functions were to: terrorize or put the public in fear, provoke indiscriminate repression or countermeasures by established authorities, mobilize the forces of terrorism or immobilize the forces of the established authorities, affect public opinion in a positive or negative way, and seize political power or overthrow regimes.⁹

Although Schmid’s study highlights the diversity of views on terrorism, it also offers some general-impressions of what terrorism is about. But these impressions are only vague feelings: political violence, fear, innocent victims, third-party influence, and criminal and warlike activity. Lacking a common definition of terrorism creates problems of communication and understanding. Absent an agreed-on definition, statistics must be compiled on the basis of assumptions about terrorism. Without a universal definition or standard of what terrorism is, all data bases and statistical collections on terrorism are suspect. To appreciate fully the statistics offered, the assumptions underlying the collection of the data must be stated. Unless these assumptions are stated, comparison of data collected by various organizations, groups, and individuals is extremely difficult if not impossible. Not only are assumptions likely to differ from compiler to compiler, but in compiling their data bases groups may change their basic assumptions over time, making comparison of even their data toilsome, if not invalid. Both the Rand Corporation¹⁰ and the Central Intelligence Agency (CIA)¹¹ data collection efforts illustrate the problem.

If a general definition would be so helpful, why then have nations and scholars been unable to agree on one? In part this lack of consensus may stem from “a struggle for legitimacy.” “The edifice of legitimations,” note sociologists P. L. Berger and T. Luckman, “is built upon language and uses of language as its principal instrumentality.”¹² Language is not neutral, it is value laden. As Brian Jenkins aptly wrote, “Use of the term [terrorism] implies a moral judgment; and if one party can successfully attach the label terrorism to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint.”¹³ As Australian criminologist Grant Wardlaw has noted, “This has led a number of writers to contend that the term ‘terrorism’ cannot be used as a behavioral description because it will always carry the flavour of some moral judgement.”¹⁴ Certainly the struggle for legitimacy, whether by those fighting terrorists or by those wishing to avoid being branded as such, must be recognized.

The issue is a matter of very real concern to all parties. Wrapped up in the law is status, recognition, standing, and equality. The more legitimacy a terrorist organization can obtain, the more it stands on a par with government; the more likely it is to garner support of money and men from others; and the better able it will be to pursue its goals. Yasir Arafat’s welcome to the United Nations, for example, gave increased legitimacy to the Palestine Liberation Organization (PLO) and to its methods. Governments opposing terrorism are especially sensitive to this matter. They want domestic and international law applied to terrorists in a manner denying them any measure of legitimacy. In particular, they insist on characterizing every act of terrorists as criminal. Chapter 2 looks more closely at this issue and the possibilities available in law to governments for accomplishing their objectives.

Moreover, this lack of “universal agreement about who is a terrorist [exists because] political and strategic goals affect different states differently.”¹⁵ Religion and ideology also hamper efforts to reach an agreed-on definition. The third world approach to terrorism is influenced by their support for national liberation movements. The diverse political and strategic goals of Israel and the Arab states in a setting of religious struggle gives each of them a different perspective of what is terrorism. Similarly, the political and strategic goals of the United States and those of an ideologically motivated Soviet Union affect superpower assessment of the Nicaraguan contras, the Afghans on either side, and the PLO.

Even within the US government, officials do not have a uniform view of what constitutes terrorism. A 1985 Senate report concluded that “each agency or office of government has approached the problem of definition from its own point of view and responsibilities.”¹⁶ Wide differences abound as each federal agency has written its own definition. Walter Laqueur, chairman of the Research Council, Center for Strategic and International Studies, Georgetown University, noted that “the U.S. Government alone has provided half a dozen [definitions], which are by no means identical.”¹⁷

Although the US government has produced numerous definitions of terrorism, the three most authoritative are:

1. Vice President's Task Force on Combatting Terrorism

The unlawful use or threat of violence against persons or property to further political or social objectives. It is generally intended to intimidate or coerce a government, individuals or groups to modify their behavior or policies.¹⁸

2. Department of State

Premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended to influence an audience.¹⁹

3. Department of Defense

Unlawful use or threatened use of force or violence against individuals or property, with the intention of coercing or intimidating governments or societies, often for political or ideological purposes.²⁰

Being the most authoritative does not mean that these definitions are official. As both the vice president's task force and the Department of State acknowledge, "while neither the United States nor the United Nations has adopted official definitions of terrorism, Americans readily recognize the bombing of an embassy, political hostage taking and most hijackings of an aircraft as terrorist acts."²¹ Simply put, these are definitions drafted and used by US government agencies and groups but none are officially the accepted definition of the US government.

Each of the three definitions is flawed in some way; thus the unofficial status of each is fortunate. The major defect in the State Department definition is the omission of the modifier unlawful to describe the violence perpetrated by terrorists. It is inconceivable that terrorist violence could ever be other than illegal and criminal. The vice president's task force and Department of Defense (DOD) definitions have the same problem. Both believe it possible to terrorize property. It is difficult to imagine threatening property in the terrorist sense. Property is inanimate. Ultimately property put at risk must threaten a human being if it is to generate fear or terror—an essential element of terrorism. The DOD definition contains another, perhaps more serious, problem. It suggests by the use of the word often that terrorism might occur for other than political or ideological reasons. If terrorism can result from acts motivated by personal reasons, then how can terrorist acts be distinguished from ordinary crimes?

Terrorism is a slippery subject and the foregoing comments indicate the complexity of the definitional problem. Perhaps the most that can be hoped for is a sense or feeling for what terrorism is. Secretary of State George P. Shultz may have best sensed it when he wrote, "Terrorism is, above all, a form of political violence."²² For purposes of this study the following definition crafted from the three authoritative ones discussed above will be used as a general guide:

Terrorism is the unlawful use or threatened use of force or violence against individuals to generate fear with the intent of coercing or intimidating governments, societies, or individuals for political, social, or ideological purposes.

Is a Legal Definition Necessary?

A generally accepted definition of terrorism does not exist in international law.²³ In the words of George Washington University law professor W. T. Mallison, Jr., “terror and terrorism are not words which refer to a well defined and clearly identified set of factual events. Neither do the words have any widely accepted meaning in legal doctrine. Terror and terrorism, consequently, do not refer to a unitary concept in law or fact.”²⁴

The first attempt at a definition in international law was in the 1937 Convention for the Prevention and Punishment of Terrorism. That convention defined “acts of terrorism” as “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.”²⁵ Other provisions of the convention severely restricted the acts recognized as crimes chiefly to those committed against public officials. The convention never entered into force and the definition, thought by many to be narrow and unrealistic, became a dead letter.²⁶ From that time until the present, no further definition of terrorism in international law has been formulated. A 1972 United States effort at a convention on terrorism, which included a legal definition, failed. The most recent UN effort on terrorism, General Assembly Resolution 40/61, 9 December 1985, does not even attempt to define it.²⁷

International lawyers are divided over whether the lack of an international law definition of terrorism is a serious problem.²⁸ But most agree with the late Judge Richard Baxter, Harvard University law professor and judge of the International Court of Justice (ICJ), that “we have cause to regret that a legal concept of ‘terrorism’ was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.”²⁹ If one looks at the long history of the UN effort to define aggression, a term that much like terrorism is emotional, value laden, and inextricably intertwined in politics, then one is led to acknowledge the wisdom of Judge Baxter.³⁰

Why has a legal definition of terrorism been so difficult to achieve? The answer lies in the issue of legitimacy but viewed from a slightly different perspective. States wish to reserve to themselves the political and legal determination of what terrorism is. They do not want to be bound by an abstract definition that could create serious political problems in a particular situation.³¹ Also, some states see efforts directed at terrorism as opposition to self-determination. Others see measures aimed at controlling terrorism as disguised measures aimed at their cause. Still others see the need to address the underlying causes of terrorism before terrorism itself can be addressed.³²

If a general definition of terrorism is not possible, then what approach should we take? First, a new term could be devised, one containing the essence of terrorism without its negative emotive aspects. Such a new term would not be so easy to conjure up. However, such an approach has a precedent. The evolution of the term quarantine in the Cuban missile crisis is an example, but the creation of this new term was not without criticism.³³

Second, terrorism could be viewed as merely one aspect of a much larger human rights issue. This view was reflected in the thinking of the Carter administration.³⁴ This approach is rooted in the observation of University of Houston law professor Jordan Paust that “human rights expectations seem to prohibit all forms of violent terrorism per se.”³⁵ However, treating terrorism as a human rights question is a two-edged sword.

A persuasive argument can be made that human rights and terrorism are fundamentally incompatible and that terrorism must yield to the higher community value of human rights. Therefore, terrorism is unlawful activity. But, if terrorism is a human rights issue, then like other human rights issues terrorism should be judged by the purpose or cause which it is intended to serve. Suggesting that the terrorist cause might be germane to judging the lawfulness of terrorist acts is anathema to the West. In the words of Secretary Shultz, “the grievances that terrorists supposedly seek to redress through acts of violence may or may not be legitimate. The terrorist acts themselves, however, can never be legitimate. And legitimate causes can never justify or excuse terrorism. Terrorist means discredit their ends.”³⁶

A third approach is to focus on the acts of terrorists and seek to criminalize those acts through international agreement rather than attempting to define terrorism. The Committee on Terrorism of the International Law Association has taken this tack.³⁷ The United States—by supporting those bilateral and multilateral conventions that prohibit certain acts such as hijacking and those agreements that protect diplomats—has furthered this approach.³⁸ But this approach has serious limitations not the least of which are loose language, unenforceability, and nonratification by states whose conduct supports terrorists. Each of these three approaches merits further study.

This study focuses on a fourth approach: the use or threatened use of military force abroad. When certain factual circumstances exist, a nation is justified under international law in resorting to the use or threatened use of military force. This principle applies even in the absence of an accepted international law definition of terrorism. Put another way: What legal preconditions justify the force option? Subsequent chapters will consider those factual circumstances.

We can strive to develop definitions for particular documents as required, but we should not be consumed in the task of attempting to write a general all-encompassing legal definition to fully describe such a complex subject. Definitions are merely tools which, in and of themselves, are more or less useful. As long as we have a sense of the social phenomenon of terrorism, a general legal definition may be unnecessary. And although a general international law definition does not exist, we can proceed without one. Other terminology used in this study, however, requires clarification, not in the legal but in the factual sense.

International Terrorism: A Working Definition

The Department of State defines international terrorism as “terrorism involving citizens or territory of more than one country.”³⁹ For purposes of this study, however, the more detailed definition proposed by Brian Jenkins is adopted. He defines international terrorism as

incidents in which terrorists go abroad to strike their targets, select victims or targets because of their connection to a foreign state (diplomats, executives or foreign corporations), attack airliners on international flights, or force airliners to fly to another country. It excludes the considerable amount of terrorist violence carried out by terrorists operating within their own country against their own nationals, and in many countries by governments against their own citizens.⁴⁰

As Jenkins notes, “International terrorism in this sense is violence against the ‘system’, waged outside the ‘system’.”⁴¹ It is terroristic violence “across international”⁴² having “international repercussions; or acts of violence which are outside the accepted norms of international diplomacy and rules of war.”⁴³ Precisely this type of terrorism—that is, terrorism projected across national frontiers—is the concern of international law. International terrorism is an international law issue.⁴⁴

Hence, state sponsorship or support is not a precondition for international terrorism, as the term is used in this study. The CIA⁴⁵ and some scholars⁴⁶ distinguish international terrorism from transnational terrorism⁴⁷ based on whether the terrorist act is state sponsored. In CIA rhetoric, state-sponsored international terrorism would be a redundancy. Not so here. This study does not adopt the CIA approach because of the need to consider the nature and degree of state involvement in international terrorism as a separate issue from whether terrorists operate across national boundaries. The latter condition, per se, violates international law, while the level and kind of state involvement are factors that determine the legal remedies open to the harmed state, as we shall see in the discussion of state responsibility in chapter 3.⁴⁸

Levels of State Involvement

As noted by Prof John H. Murphy, Villanova University, “the whole issue of state support of international terrorism, however, is badly in need of typology; there are different kinds of state support.”⁴⁹ Four levels of state involvement, from greatest to least, are: sponsorship, support, toleration, and inaction through inability to act. Because these levels have not been understood nor carefully delineated in the general literature, some confusion prevails.

State Sponsorship

State sponsorship exists when a state directly uses international terrorism “as another weapon of warfare to gain strategic advantage where they cannot use conventional means.”⁵⁰ According to the CIA, 1980 was “the first year [since World War II] that a large number of deadly terrorist attacks were carried out by national governments.”⁵¹ State-sponsored terrorism, to turn a phrase of Gen Carl von Clausewitz, “is a continuation of war by other means.” A 1985 Senate report agreed that terrorism “can be another tool for nations to project military and political power. Terrorism [becomes] an instrument that can be brought into action whenever a state wishes to project its power into the territory of another without accepting the responsibility, accountability, and risks of avowed belligerency.”⁵² States identified by the United States government as having sponsored international terrorism at one time or another include Libya, Iraq, Syria, and South Yemen.⁵³

State Support

State support of international terrorism exists when a state uses its resources to provide assistance in the form of training, arms, explosives, equipment, intelligence, safe havens, communications, travel documents, financing, or other logistic support but does not direct terrorist incidents.⁵⁴ States give support when they provide capability without assuming control or direction. Current evidence suggests that the Soviet Union and Soviet-bloc countries—including Bulgaria, Cuba, Czechoslovakia, and East Germany—are actively providing this type of state support.⁵⁵

State Toleration

State toleration exists when states, although aware of terrorist groups within their borders, do not support them but do not act to suppress them either. Such terrorist groups may be self-supporting or may have foreign sponsors or supporters. They may carry out their terrorist activities primarily abroad having reached an unspoken understanding with the host government. Allegations that some Western European nations have tolerated international terrorists within their borders have surfaced from time to time—the Euzkadi ta Azkatasuna (Basque National Liberty movement) in southwestern France, for example).

State Inaction

In this particular circumstance, the state does not wish to ignore international terrorists within its borders but lacks the ability (either through inadequate domestic police and military forces or lack of technology) to respond effectively. In such a situation, as we shall see in chapter 3, the state’s responsibility to deal with these terrorists continues. It may meet this responsibility by inviting another state or regional organization to assist it. The aerial hijacking to Mogadishu in 1977 is an example. The Somalian government, unable to act, asked for assistance from the West German government. If a state is incapable of responding to international terrorism and does not request outside help, then a situation may arise in which assistance may be given without an invitation. The Entebbe hostage rescue is sometimes cited as an example, although

there is evidence that President Idi Amin of Uganda may have participated in the hijacking scheme and was not simply unable to act, as many previously have believed.

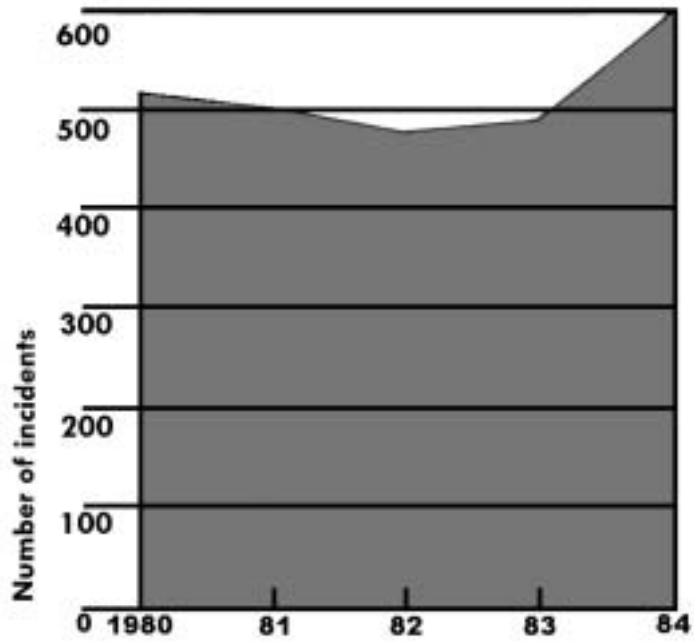
Terrorism in Perspective

Scholars agree that terrorism is an ancient trade, a form of political activity as old as history. The Romans had to deal with the terrorism of the sicarii, a sect of Jewish zealots, active in ancient Judea (AD. 66—73). Hassan Ben Sabbah, born in AD. 1007, was the leader of a sect that reputedly drugged its victims with hashish prior to killing them. The word assassin derives from this sect's method of murder. In the period of the Jacobins, 1793—94, France had its Reign of Terror. It is from these times that the word terror was added to our vocabulary. The activities of nineteenth- and twentieth-century anarchist and terror groups are well known. Infamous are the People's Will (Narodnaya Volya) and their assassination of Russian tsar Alexander II in 1881; the Israeli Stern gang of the 1930s and 1940s; and factions of the Palestine Liberation Organization.⁵⁶

Over the years, several political thinkers have written about this phenomenon. Friedrich Nietzsche wrote, "We are terrified by the idea of being terrified."⁵⁷ Niccolo Machiavelli advised in *The Prince* that "in actions of man, and especially princes, from which there is no appeal, the end justifies the means. Let a prince therefore aim at conquering and maintaining the state and the means will always be judged honorable and praised by everyone."⁵⁸ Mikhail Bakunin, the Russian anarchist, called terrorism "the propaganda of the dead."⁵⁹

The historical examples cited thus far have been of domestic terrorism. It would be an error to conclude, as some do, that domestic terrorism is old but international terrorism is new, having its origins in the midtwentieth century. We can find many prominent examples of international terrorism. On 14 January 1858 Felice Orsini, an Italian, attempted to assassinate Emperor Napoleon III and Empress Eugenie of France. On 28 June 1914 a Serbian, Gavrilo Princip, a member of Young Bosnia (Mlada Bosna), assassinated Archduke Francis Ferdinand of Austria and his wife at Sarajevo, Yugoslavia. This act played a vital role in igniting World War I. As Paul Wilkinson of the University of Aberdeen notes, after the First World War international terrorists were endemic in the new Balkan States.⁶⁰

Although surveys of history show that terrorism has been a problem for earlier ages, the statistics available today seem to indicate that terrorism now may be far more widespread and acceptable as a form of political action than at any time in the past. Keeping in mind the problems and assumptions underlying data collection, as previously noted, what general impressions can statistics provide us about the threat? Department of State* statistics (fig. 1) for the five years 1980—84 indicate that international terrorist incidents are on the rise.



Source: US Department of State, "International Terrorism," Selected Documents 24 (1986), 3

Figure 1. International Terrorist Incidents, 1980-44.

*The Department of State is the lead agency in the US government on international terrorism.

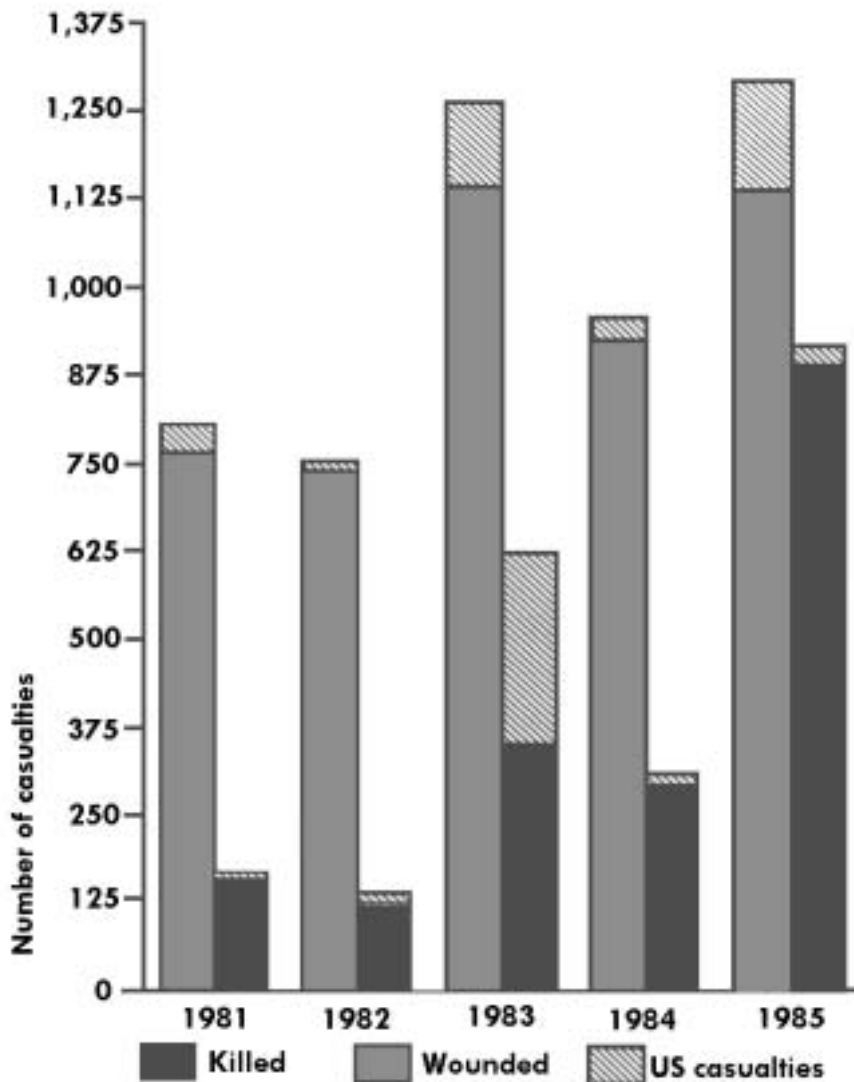
The Vice President's Task Force on Combatting Terrorism found the number of incidents rising to 812 in 1985.⁶¹ This trend probably will continue upward in the years to come.⁶² Approximately 25 percent of all incidents were directed against Americans; of these, the number directed against Defense Department personnel and facilities is shown in table 1.

TABLE 1
International Terrorist Incidents
Involving DOD Personnel, 1980—84

Year	Number of Incidents
1980	43
1981	56
1982	67
1983	56
1984	60
1985	47

Source: USAF Special Operations School, Dynamics of International Terrorism Course, Class 86J, August 1986, Hurlburt Field, Florida.

Figure 2 shows the number of total US casualties killed or wounded as a result of international terrorist incidents for the period 1981 through 1985. In reviewing the statistics from the late 1960s to the present, we find that fewer than 500 Americans have been killed as a result of incidents.⁶³ The 241 Marines and other service members who died in Beirut in 1983 comprise more than half this figure. In 1984, 31 Americans were injured and 11 killed; 160 Americans were injured and 233 killed in 812 terrorist incidents in 1985. Compared to the 45,000 American highway fatalities and the 18,000 American homicides in 1985, this threat does not seem significant.⁶⁴ The threat seems even less serious when we are told by the Federal Bureau of Investigation (FBI) that for the past two and one-half years no international terrorist incidents have occurred in the United States.⁶⁵



1985 figures are preliminary and may be subject to review and revision

Source: US Department of State, "Patterns of Global Terrorism: 1984," November 1985, ii.

Figure 2. Casualties from International Terrorist Attacks, 1981-85.

In pure numbers the international terrorist threat appears to be overstated. "The actual amount of violence caused by international terrorism," admits Brian Jenkins, "has been greatly exaggerated. Compared with the world volume of violence or national crime rates, the toll has been small."⁶⁶ He also notes, "Indeed, compared with the volume of ordinary violent crime, the amount of terrorist violence is minuscule."⁶⁷ In yet another analysis, Jenkins observes, "Without devaluing human life it might also be pointed out that terrorism at least at its current level is a bearable price. A comparison of the toll of terrorism versus the toll of ordinary crimes should serve to reduce an exaggerated sense of alarm caused by a relatively few, albeit dramatic

A Threat More Serious Than Numbers Indicate?

Statistical data in itself does not support the proposition that international terrorism is a serious threat.⁶⁹ Some writers have suggested that “the United States might be far better served to ignore terrorism on the political level, both minimizing its inability to deter attacks and deflating the status of terrorists from international outlaws to common criminals.”⁷⁰ The United States, however, has not chosen to follow this course. According to the Vice President’s Task Force on Combatting Terrorism, in 1985 the US government spent more than \$2 billion and 18,000 work years addressing this problem.⁷¹ This effort also consumed much valuable time of many senior US officials.

Why does combating international terrorism rank so high on the national agenda? Can it be as serious an issue as war, national debt, overpopulation, starvation, trade balance, and disease? And why was Secretary Shultz moved to say on 4 February 1985: “Terrorism poses a direct threat not only to Western strategic interests but to the very moral principles that undergird Western democratic society [emphasis supplied]?”⁷² Several factors make international terrorism a threat beyond what mere numbers suggest.

Perception

The strength in terrorism is not in action but in reaction. The effect is greater than the event. Popular “perceptions of terrorism are determined not by statistics but rather by spectacular acts.”⁷³ By achieving disproportionately large effects, terrorists are able to cause worldwide alarm and force governments to deal with them. These perceptions, although not reality, become reality.⁷⁴ Confidence in government is shaken. According to Robert Grant, a terrorism expert with the Atlantic Council of the United States, terrorism “creates the enormous frustration for a government of not being able to provide for the security of its citizens, and undermines public perceptions of the government’s ability to rule.”⁷⁵

Antithesis of Democracy and Morality

Terrorism is contrary to all that democracy stands for. It seeks to displace the rule of the majority by the dictates of the few. Some authorities consider it another form of totalitarianism. The vast majority of terrorist acts have been directed against democracies.⁷⁶ Seldom is a totalitarian state the victim; frequently it is a sponsor or supporter. Darrell Trent summarizes this concern in these words:

Terrorists seek reversals in the system of authority that is the framework of civilized people—by demanding release for those who have been imprisoned according to due process of law, by attempting to dictate policy without regard to the structure of democracy, by aspiring to reorder society or determine its direction without consideration of, or in spite of, majority consensus.⁷⁷

In sum, “terrorism is an affront to civilization.”⁷⁸

Declining US Credibility

International terrorism is an international problem. The world community looks to the United States as a community leader to provide direction. However, the United States has failed in many of its visible counterterrorist efforts, a fact that has created doubt about US competence. "The U.S. experience in the Iranian desert was depicted," concluded the Georgetown University Center for Strategic and International Studies, "not simply as a difficult attempt that failed, but as a debacle, a symbol of U.S. military impotence and presidential bungling."⁷⁹ Robert McFarlane, then assistant to the president for national security affairs, remarked in 1985 that "a cumulative effect of this pattern of low level violence is a slow attrition of our national security brought on by the slow erosion of our reliability, of our apparent ability to solve problems, a declining confidence among our friends and allies."⁸⁰

Multiplier Effect of Terrorist Attacks

International terrorist incidents can trigger bigger events. The assassination of the heir to the throne of the Austro-Hungarian Empire in 1914, which led to World War I, is a frequently cited example. Although recent terrorist events have not had such cataclysmic effects (some worry about miscalculated state sponsorship or Soviet support of international terrorism escalating into World War III), significant effects have occurred. Adm James D. Watkins, former chief of naval operations, found that more than 30 armed conflicts in progress in 1984 were spawned by some form of terrorism.⁸¹

Consider the impact on governments and on North-South and East-West relations of the assassination of Anwar Sadat of Egypt, Indira Gandhi of India, and Bashir Gemayel of Lebanon.⁸² What would have been the impact if the attempted assassination of Prime Minister Margaret Thatcher in Brighton had been successful? On 13 May 1981 a Turkish terrorist attempted to assassinate Pope John Paul II in St. Peter's Square, Rome. What effect would that have had on Soviet influence in Poland and on Solidarity?⁸³ On 9 October 1983 North Korean agents set off an explosion at the Aung San or Martyrs' Mausoleum in Rangoon, Burma, hoping to murder President Chun Doo Hwan and the entire South Korean cabinet. Seventeen officials died, including the deputy prime minister and three senior cabinet officials. President Chun escaped. The purpose of the terrorist attack was to cause the collapse of the Seoul government.⁸⁴

International terrorism has had a considerable impact on the US government. In 1979 the US Embassy in Tehran, Iran, was seized, and for 444 days the nation was held hostage. Following the 1983 and 1984 bombings of the US Embassy annex and US Marine Corps headquarters in Lebanon, the United States withdrew its forces from the area, an action that reduced Western leverage there and allowed control of Lebanon to shift to more radical elements.⁸⁵ At the end of 1986, the Reagan administration revealed that it had sold military arms to Iran (while pressuring other nations not to do so) in what amounted to an exchange of arms for the release of American hostages held in Lebanon.⁸⁶ Uncertainty has arisen over the administration's policy on hostage taking and negotiating with terrorists.⁸⁷ Foreign governments are upset; senior administration officials are at odds with one another; and some top officials have resigned or been dismissed.

Diplomatic relations between countries are often adversely affected by terrorist and counterterrorist actions. The United States severed relations with Iran and Libya over terrorism. In 1980 Guatemalan police stormed the Spanish Embassy. During the attack a fire broke out, the embassy (which was occupied by arm-at militants) was burned and 39 persons died, including 32 of the 33 hostages. Only the Spanish ambassador survived. Outraged, Spain broke relations with Guatemala.⁸⁸ The shooting in April 1984 of a London policewoman at St. James Square in front of the Libyan People's Bureau led to Great Britain's breaking of diplomatic relations with Libya.⁸⁹ The involvement of Syria in the attempted El Al bombing on 17 April 1986 by Nezar Hindawi led to Britain's severing of diplomatic relations with Syria.⁹⁰ United States-Italian relations were not helped as the forces of each faced one another on the tarmac in Sardinia after the United States militarily diverted the Egyptian airliner carrying the Achille Lauro terrorists. Neither were US-Egyptian relations.

Hijackings and terrorist incidents make foreign travel less desirable. Experts have estimated that in 1986 American tourism to Europe was down more than 50 percent due to terrorism. Terrorism indirectly caused one of the worst international aviation accidents, when on 27 March 1977, two 747 jets collided at Tenerife Airport, Canary Islands. The two aircraft had been diverted from Las Palmas because a terrorist bomb had exploded in a flower shop there.⁹¹

Brian Jenkins authored a scenario on how terrorism might be used to influence events far beyond the immediate incident.

Suppose a target nation has part of its strategic forces deployed overseas, including missile sites in another country. Perhaps there already has been some local opposition to the presence of these weapons. And perhaps also there are one or two extremist groups which have carried out relatively minor acts of violence. The groups have some international links but they lack the resources for any major undertaking. It is conceivable that through their links with a foreign power local terrorists could be provided with the intelligence and some equipment necessary to launch an attack on one of the sites. Shortly before a bilateral treaty allowing the use of the sites is to be renewed, the terrorists attack, but, of course, fail. They penetrate the perimeter, but little damage is done to the missiles. Local newspapers, however, receive an anonymous tip that some lethal radioactive material has been released as a result of the attack. Indeed, checks with primitive Geiger counters show some presence of radioactivity. The country whose missiles they are claims that no radioactive material escaped, and that probably the terrorists themselves deliberately spread a small quantity of radioactive waste material to alarm the population; there is said to be no danger; the denial is not convincing. Meanwhile, the terrorists warn of further attacks. Demonstrations against renewal of the arrangement by which the weapons are there in the first place begin and grow... The local government is shaken by the episode. There are further terrorist incidents. Relations between the two countries are strained. The owner of the missiles is finally asked to remove them.⁹²

Does this scenario seem farfetched? Hardly. One need only recall the demonstrations in Europe against the deployment of the cruise missile. And consider the following: “Unknown individuals disseminated radioactive materials normally used in medicine aboard an Austrian train in April 1974, causing much concern if not substantial property damage and casualties among railroad passengers.”⁹³

Terrorism disrupts international relations. It plays states and societies against one another. “The delivery truck,” notes a 1985 Senate report, “may turn out to be the most destructive weapon of this era, not the SS-18 or the 55-20 ballistic missile.”⁹⁴

“New Aspects”

As discussed, international terrorism is not new. But developments of the past decade have given it a new and more threatening character. One new aspect is networking, that is, the rendering of assistance between terrorist organizations.⁹⁵ Another new and more dangerous aspect is state sponsorship and support.⁹⁶

Access to the armories, training facilities, intelligence service, funds, safe havens, and other sources of expertise of sympathetic states vastly improves the firepower, effectiveness, and sophistication of terrorist groups.⁹⁷ States sponsor and support terrorism because it is cheap and the risk, low. “Modern conventional war,” writes Brian Jenkins, “is becoming increasingly impractical. It is too destructive. It is too expensive.”⁹⁸ Terrorism is a force multiplier.

For the weaker states the high leverage/low cost factors provide them with an impact they could never hope to achieve in a conventional arena. For the Soviet Union, the high leverage/low risk function is attractive because it is able to achieve certain strategic objectives—disunity within the NATO alliance, for example—without increasing the risk of conventional or nuclear engagement. The United States has been hard put to devise a policy that would alter the risk-benefit calculus for these sponsors of international terrorism.⁹⁹

In 1969 Andrew Scott articulated the concept of informal penetration in his study *The Revolution in Statecraft*.¹⁰⁰ He saw, in addition to formal techniques of foreign policy, a growing complexity of informal operations carried on by persons other than diplomats and soldiers (nonactors). These nonactors received state support through large organizations, massive budgets, extensive training programs, and all paraphernalia of institutionalization. He was uncertain whether this trend was good or bad, acknowledging that “the full implications of informal penetration for international stability will probably not be clear for some time to come.”¹⁰¹ Scott thought this trend created both problems and potentialities and withheld judgment. Today the implications are clearer. Sponsors and supporters of international terrorists have no compunction about their methods while democratic states are constrained in the manner in which they can effectively meet the challenge.¹⁰²

And what has the challenge become? State-sponsored or -supported international terrorism has been called “a new form of warfare,”¹⁰³ a “tool of low-intensity warfare,”¹⁰⁴ “protracted political warfare... a form of ‘indirect aggression’,”¹⁰⁵ and “surrogate warfare.”¹⁰⁶ Jacques Bergier in his book *World War III Has Begun* sees World War II as the last conventional war, World War III as a terrorist war having begun with the West already losing.¹⁰⁷ Is terrorism properly to be equated with war and warfare? Most commentators use these terms in the generic sense much as they would refer to the war on poverty or the war against disease or unemployment. Whether, in legal terminology, terrorist conduct constitutes war or warfare is an entirely different issue that we explore in chapter 2. What is certain, however, is that more and more states are sponsoring and supporting international terrorism. This trend likely will continue because of the low cost and risk to the sponsoring or supporting state.¹⁰⁸ Many believe that an effective way to meet this challenge is not only to deal with the international terrorists themselves but to weaken the link between them and their sponsors and supporters.¹⁰⁹

Summary and Transition

International state-sponsored and -supported terrorism is a serious threat to the United States.¹¹⁰ The US government considers it a national security challenge.¹¹¹ The Joint Chiefs of Staff (JCS) evaluated this threat in the U.S. Military Force Posture FY-I 986 in these words:

The use of terrorism against the United States... continues to pose a formidable challenge... The threat from international terrorism has never been greater... In addition to the renewed activity of terrorists indigenous to countries of western Europe, the threat is growing from Muslim transnational groups which originate in the Middle East and are influenced by Iran, Libya and Syria. These groups pose a significant threat to U.S. interests both in the Middle East and in Europe.¹¹²

What factual circumstances, evidence, and preconditions must exist in a particular situation to justify the lawful use of military force as an option is yet to be addressed. This chapter has provided an insight into basic definitions and with a historical and statistical overview of the threat and has examined other perspectives that help explain the seriousness of terrorist activities. If the reader understands that state-sponsored and -supported international terrorism is a serious challenge to international order and to American security interests, then a basis exists for an understanding of why the use of military force may be necessary in particular situations. If the threat is not appreciated, then neither will be the remedy.¹¹³

NOTES

1. The goal is to “manage” terrorism. It cannot be eliminated for, as Ernest Evans writes, “in a world marked by ideological rivalries, ethnic clashes, and extremes of wealth and poverty, it is utopian to hope for an end to politically motivated violence.” Evans, “Toward a More Effective U.S. Policy on Terrorism,” in *Political Terrorism and Energy: The Threat and Response*, ed. Yonah Alexander and Charles K. Ebinger (New York: Praeger, 1982), 250. Also, as Brian Jenkins notes, “a certain amount of political violence is a price paid for a free and open society.” Brian Michael Jenkins, “Fighting Terrorism: An Enduring Task,” Rand, 6585, Rand Corp., Santa Monica, Calif., February 1981, 4.

2. Darrell M. Trent, “Terrorism: Threat and Reality,” *Vital Speeches* 46, no. 3 (15 November 1979): 79.

3. Brian Jenkins, *International Terrorism: A New Mode of Conflict* (Los Angeles: Crescent Publications, 1975), 2, California Seminar on Anna Control and Foreign Policy, research paper 48.

4. Charles W. Stecker, “Political Terrorism: National and International Responses since 1972” (master’s thesis, University of Nebraska, December 1982), 4.

5. Maj William R. Farrell, USAF, “Terrorism Is...?” *Naval War College Review* 32, no. 3 (May-June 1980): 64.

6. *Ibid.*, 68.

7. H. H. A. Cooper quoted in *ibid.*, 64.

8. The 22 elements identified were: (1) violence, force; (2) political; (3) fear, terror emphasized; (4) threat; (5) (psychological) effects and (anticipated) reactions; (6) victim-threat differentiation; (7) purposive, planned, systematic, organized action; (8) method of combat, strategy, tactic; (9) extranormality, in breach of accepted rules, without humanitarian constraints; (10) coercion, extortion, induction of compliance; (11) publicity aspect; (12) arbitrariness, impersonal, random character, indiscriminateness; (13) civilians, noncombatants, nonresisting neutrals, outsiders as victims; (14) intimidation; (15) innocence of victims emphasized; (16) group, movement, organization as perpetrator; (17) symbolic aspect, demonstration to others; (18) incalculability, unpredictability, unexpectedness of occurrence of violence; (19) clandestine, coven nature; (20) repetitiveness, serial or campaign character of violence; (21) criminal; and (22) demands made on third parties. Alex P. Schmid, *Political Terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature* (Amsterdam: North-Holland Publishing Co., 1983), 76—77.

9. The 20 purposes or functions were: (1) to terrorize, to put the public or sections of the public in fear; (2) to provoke (indiscriminate) countermeasures by the incumbents, deliberately provoking repression, reprisals, and counterterrorism; (3) to mobilize forces; (4) to affect public opinion in a positive or negative way, to cause a polarization and radicalization among the public or sections thereof; (5) to seize political power, to overthrow regimes; (6) to break down, eradicate resistance; (7) to obtain money to finance arms purchases and operations; (8) to maintain power, to discipline, to control, to dissuade target groups, to enforce obedience, allegiance, conformity; (9) disorientation, psychological isolation of the individual from his social context; demoralization of society, causing disorder; create alarm; create an atmosphere of anxiety, insecurity; create a climate of panic, collapse; (10) extermination, to damage, injure, or eliminate government property or personnel, elimination of opposing and rivaling forces, either

physically or by neutralizing their effectiveness; (11) to disrupt and discredit the processes of government, to erode democratic institutions, to destroy public confidence in government, to disrupt normal operations of society, to demonstrate the vulnerability of the government and shatter the image of strength surrounding it; (12) to project an image of strength and determination (abroad); (13) advertising the movement or cause, to gain publicity, to attract attention, to awaken public opinion, to force audiences to take grievances seriously and to redress them, to gain recognition, to acquire popular support; (14) to immobilize security apparatus, to immobilize forces; (15) to win recruits for the terrorist movement; (16) morale-building within the terrorist movement itself and with their sympathizers; (17) to maintain discipline within the terrorist organization, to punish errant members and traitors; (18) winning of specific concessions through coercive bargaining (release of prisoners, publication of manifesto, etc.), extortion; (19) punishment for cooperation with the enemy or for engaging in harmful activities or for other guilts; and (20) to impose domination, to subdue and paralyze. to subjugate, intimidate. Ibid., 97-99.

10. Concerning the factors and assumptions underlying the Rand Corporation's statistics on terrorism, see Brian Michael Jenkins, "The Study of Terrorism: Definitional Problems," Rand, 6563, Rand Corp., Santa Monica, Calif., November 1980, 5-6.

11. Concerning CIA statistics, Grant Wardlaw writes, with evident frustration:

A recent report by the United States central Intelligence Agency (CIA) illustrates that even compilations of statistics of international terrorism are fraught with danger... The 1980 report was interesting in that it completely revised many of the figures published in previous years. "The agency said that its previous data had been too dependent on 'U.S. sources' and that it is now satisfied that its records are complete and current... The fact that an agency with the resources of the CIA can conclude at a particular point in time that many of its previously published statistics were underestimates makes it difficult to have confidence in the accuracy of their figures.

Wardlaw, *Political Terrorism: Theory, Tactics, and Counter-Measures* (Cambridge, England: Cambridge University Press, 1982), 50-51. See also John F. Murphy, *Punishing International Terrorists: The legal Framework for Policy Initiatives* (Totowa, N.J.: Rowman & Allanheld, 1985), 119; and Schmid, 267-78.

12. P. L. Berger and T. Luckman, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, N.J.: Doubleday and Co., 1966), 64.

13. Jenkins, "Study of Terrorism," 1. One panel at the 1981 National Security Affairs Conference saw obstacles to defining terrorism "not the least of which were ideological values and bureaucratic politics that distorts analysis, and cross-national differences that make it difficult to generalize about terrorist profiles and the effectiveness of terrorism." Panel 5 summary, "Global Terrorism: What Should the U.S. Do?" in "The 1980s: Decade of Confrontation?" Proceedings of the Eighth Annual National Security Affairs Conference, 13-15 June 1981 (Ft. Lesley J. McNair, Washington, D.C.: National Defense University, 1981), 237.

14. Wardlaw, 5.

15. Senate, Committee on the Judiciary, Subcommittee on Security and Terrorism, Report on "State-Sponsored Terrorism," 99th Cong., 1st sess., June 1985, Senate print 99-56, 7.

16. Ibid., 25.

17. Walter Laqueur, "Reflections on Terrorism," *Foreign Affairs* 65, no. 1 (Fall 1986): 88.

18. Vice President, Public Report of the Vice President's Task Force on Combatting Terrorism (Washington, D.C., February 1986), 1.

19. Department of State, "Patterns of Global Terrorism: 1984," Washington, D.C.: November 1985, inside front cover.

20. DOD Directive 2000.12, Protection of DOD Personnel and Resources against Terrorist Acts, 16 June 1986, para. C.1. This definition is a change from the 12 February 1982 version of DODD 2000.12, which provided that the unlawful use or threatened use of force or violence was "by a revolutionary organization." An Air Force definition can be found in APR 208—1, The US Air Force Antiterrorism Program, October 1982, para. a. This is a limited definition, however, intended for use within the context of the US Air Force antilogarithms program.

21. Vice President, Report on Terrorism, 1. See also State Dept., "Global Terrorism." inside front cover.

22. George P. Shultz, "Terrorism in the Modern World," *Terrorism: An International Journal* 7, no. 4 (1985): 432.

23. Domestic law of the United States has not addressed the definitional issue either, and no federal common law exists. A few federal statutes contain definitions, but those definitions were drafted for the specific purpose of each law. For example, US Code, Title IS, sec. 1203, makes criminal the taking of US citizens as hostages worldwide, while sec. 3077 authorizes the attorney general to pay rewards for suppression of terrorism. Sixteen states have statutes dealing with terrorism or terrorist threats: Arkansas, California, Delaware, Georgia, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, New Hampshire, North Dakota, Pennsylvania, Tennessee, Texas, and Utah.

24. W. T. Mallison, Jr., and S. V. Mallison, "The Concept of Public Purpose Terror in International Law: Doctrine and Sanctions to Reduce the Destruction of Human and Material Values," *Howard Law Journal* 18(1974): In a similar vein, Francis A. Boyle has written that "'terrorism' is a vacuous and amorphous concept entirely devoid of an accepted international law meaning." Boyle, "Upholding International Law in the Middle East," in *Terrorism, Political Violence and World Order*, ed. Henry Hyunwook Han (Lanham, Md.: University of America, 1984), 519. Christopher C. Joyner, George Washington University, agrees that terrorism's "exact status under international law remains open to conjecture and polemical interpretation." Joyner, "Offshore Maritime Terrorism: International Implications and Legal Response," *Naval War College Review* 36, no. 4 (July—August 1983): 20. See also Paul Wilkinson, *Terrorism and the Liberal State* (New York: John Wiley and Sons, Halsted Press, 1977), 52.

25. See Convention for the Prevention and Punishment of Terrorism, opened for signature at Geneva, 16 November 1937, League of Nations, C.94.M.47.1938.V.

26. See Hans-Peter Glasser, "Prohibition of Terrorist Acts in International Humanitarian Law," *International Review of the Red Cross*, no. 253 (July-August 1986): 201; and Jordan J. Paust, "'Nonprotected' Persons or Things," in *Legal Aspects of International Terrorism*, ed. Alona E. Evans and John P. Murphy (Lexington, Mass.: Lexington Books for American Society of International Law, 1978), 351.

27. UN General Assembly, resolution on international terrorism, 9 December 1985, Resolution 61, UN GAOR, 40th sess., supp. 53, A/40/53 (1986), reprinted in *Official Documents*, *American Journal of International Law* 80, no. 2 (April 1986): 435-37. See also George R. Constantinople, who writes, "The resolution condemns terrorism, but it is disappointing in its force since it does not define terrorism and takes no substantive measures to act against terrorism on the international level. The denunciation of terrorism is carefully balanced by the reaffirmation of the 'inalienable right to self-determination'." Constantinople, "Toward a New Definition of Piracy: The Achille Lauro Incident," *Virginia Journal of International Law* 26, no. 3 (1986): 724, n. 1. The vice president's task force on terrorism misread the value of this resolution by calling it the "first unequivocal resolution condemning terrorism." Vice President, *Report on Terrorism*, 12.

28. Jordan Paust, University of Houston Law School, takes the view that a precise, realistic definition at the international level is necessary for common opposition to impermissible terrorism [emphasis added]. See Paust, 351. See also Edward A. Lynch, "International Terrorism: The Search for a Policy," *Terrorism: An International Journal* 9, no. 1 (1986): 67; and Wardlaw, 103.

29. Richard R. Baxter, "A Skeptical Look at the Concept of Terrorism," *Akron Law Review* 7 (1974): 380.

30. See UN General Assembly, "Definition of Aggression," Resolution 3314, UN GAOR, 29th sess., supp. 31, A/9631 (1974), 142. See also Jack I. Garvey, "The U.N. Definition of 'Aggression': Law and Illusion in the Context of Collective Security," *Virginia Journal of International Law* 17, no. 2 (Winter 1977): 199.

31. See Senate, *State-Sponsored Terrorism*, 29.

32. See Noemi Gal-Or, *International Cooperation to Suppress Terrorism* (New York: St. Martin's Press, 1985), 99, n. 6.

33. See Carl Q. Christol and Comdr Charles R. Davis, USN, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Materiel to Cuba, 1962," *American Journal of International Law* 57, no. 3 (July 1963): 525-45; Leonard C. Meeker, "Defensive Quarantine and the Law," *American Journal of International Law* 57, no. 3 (July 1963): 515-24; and Quincy Wright, "The Cuban Quarantine," *American Journal of International Law* 57, no. 3 (July 1963): 546-65.

34. See *Combatting Terrorism: A Matter of Leverage*, ed. Edward Marks and Debra van Ostpaal (Washington, D.C.: Georgetown University Center for Strategic and International Studies, June 1986), 49-50.

35. Jordan J. Paust quoted in Richard B. Lillich and John M. Paxman, "State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities," *American University Law Review* 26, no. 2 (Winter 1977): 308. See also Paust, 354-57; and Robert A. Friedlander, *Terror-Violence: Aspects of Social Control* (New York: Oceana Publications, 1983), 93.

36. Shultz, "Terrorism in the Modern World," 437. See also Friedlander, 77; Gayle Rivers, *The War against Terrorists: How to Win It* (New York: Stein and Day, 1986), 103; Paul Wilkinson, book review essay, "Can a State Be a 'Terrorist'?" *Journal of International Affairs* 57, no. 3 (Summer 1981): 468; and S. J. Sorabjee quoted in *International Law Association (ILA), "International Terrorism,"* in *Report of the Fifty-Seventh Conference Held at Madrid* (Great Britain: 1978), 134.

37. See "Introduction," n. 8.

38. See Yoram Dinstein, "Comments on the Fourth Interim Report of the ILA Committee on International Terrorism (1982)," *Terrorism: An International Journal* 7, no. 2 (1984): 66; Christopher Dobson and Ronald Payne, *Counterattack: The West's Battle against Terrorists* (New York: Facts on File, 1982), 184; John R. Stevenson, "International Law and the Export of Terrorism," *Department of State Bulletin* 67, no. 1745 (4 December 1972): 645; David Williamson, Jr., "Terrorism: What Should We Do?" in *Terrorism*, ed. Steven Anzovin, *The Reference Shelf*, vol. 58, no. 3 (New York: H. W. Wilson Co., 1986), 173; and "Control of Terrorism in International Life: Cooperation and Self-Help," in *American Society of International Law, Proceedings of the 71st Annual Meeting*, 21-23 April 1977 (Washington, D.C.: 1977), 18-19.

39. State Department. "Global Terrorism," inside front cover.

40. Jenkins, "Study of Terrorism," 3-4. See also Brian M. Jenkins, "International Terrorism: Trends and Potentialities," *Journal of International Affairs* 32, no. 1(1978): 116. The only US federal statute containing a definition of international terrorism is the Foreign Intelligence Surveillance Act (FISA), US Code, Title 50, chap. 36, sec. 1801. The FISA definition is a narrow one drafted for the limited purpose of providing the FBI with jurisdiction overseas and for the purpose of issuing warrants. International terrorism is defined as:

1. Violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any state [thereof], or that would be a criminal violation if committed within the jurisdiction of the United States or any state [thereof]:

2. [Acts that] appear to be intended

A. to intimidate or coerce a civilian population.

B. to influence the policy of the government by intimidation or coercion; or

C. to effect the conduct of a government by assassination or kidnapping; and

3. [Actions that] occur totally outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the person they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

41. Jenkins, *A New Mode of Conflict*, 9.

42. Andrew J. Pierre, "The Politics of International Terrorism," in *Contemporary Terrorism*, ed. John D. Elliott and Leslie K. Gibson (Gaithersburg, Md.: International Association of Chiefs of Police, 1978), 36; reprinted from *Orbis* 19, no. 4 (Winter 1976).

43. Jenkins, *A New Mode of Conflict*, 11.

44. L. C. Green of the University of Alberta reminds us that “international law is only concerned with issues affecting the interests of more than one country. In so far as terrorism is concerned this means that the act in question must in one way or another be transnational in character.” Green, “International Law and the Control of Terrorism,” *Dalhousie Law Journal* 7, no. 2 (April 1983): 244.

45. Central Intelligence Agency (CIA), National Foreign Assessment Center, “Patterns of International Terrorism: 1980,” June 1981, ii. See also Jenkins, “Study of Terrorism,” 4. This distinction between international terrorism and transnational terrorism was also made in 1986 during the Dynamics of International Terrorism Course, USAF Special Operations School, Hurlburt Field, Fla., and Legal Aspects of Terrorism Course, the US Army Judge Advocate Generals School, Charlottesville, Va.

46. See Farrell, 68; Friedlander, 85; and Lt Col Donald B. Vought, USA, Retired, and Lt Col James H. Fraser, Jr., USA, “Terrorism: The Search for Working Definitions,” *Military Review* 66, no. 7 (July 1986): 75.

47. The distinction made between the international and transnational terrorist is that the former is state-sponsored or state-supported while the latter acts autonomously without state sponsorship or support. Some argue that these terms are dated and that state-sponsored terrorism should be used instead of international terrorism and nonstate-sponsored terrorism should be used instead of transnational terrorism.

48. See generally Gail Basset al., *Options for U.S. Policy on Terrorism* (Santa Monica, Calif.: Rand Corp., 1981), 6, Rand, R-2764-RC; and Louis G. Fields, Jr., “The Third Annual Waldemar A. Solf Lecture in International Law: Contemporary Terrorism and the Rule of Law,” *Military Law Review*, no. 113 (Summer 1986): 11.

49. John F. Murphy quoted in “Terrorism and Countermeasures: Is Section 905 of the Revised Restatement Helpful?” in *International Law Practitioner’s Handbook*, no. 32 (May 1986): 12.

50. Shultz, “Terrorism: The Challenge to Democracies,” address before the Jonathan Institute’s second Conference on International Terrorism, Washington, D.C., 24 June 1985, in Anzovin, 55; reprinted from Department of State Bulletin 84, no. 2089 (August 1984).

51. CIA, “Patterns of Terrorism,” iii.

52. Senate, *State-Sponsored Terrorism*, 47-48. See also Brian Michael Jenkins, “Military Force May Not Be Ruled Out,” Rand, 7103, Rand Corp., Santa Monica, Calif., June 1985, 2; and Lynch, 4-5.

53. See State Department, “Global Terrorism,” 4. For Libya’s role in sponsoring international terrorism, see Foreign and Commonwealth Office, “Libyan State Terrorism,” background brief, April 1986, 1-4; Department of State, “Libya under Qadhafi: A Pattern of Aggression,” Special Report 138, January 1986, 1-8; Department of State, Office for Combatting Terrorism, “Libya Talking Points,” 1 April 1986, 1; Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law*, 1977, ed. John A Boyd (Washington, D.C.:1979), 209, State Department, 8960; Senate, Committee on the Judiciary, Subcommittee on Security and Terrorism, *Hearings on Terrorism: The Role of Moscow and Its Subcontractors*, 97th Cong., 1st sess., 26 June 1981, series no. 97-44, 15-16; David Segal, “Libya: Millions for Murder: Khadaffi Bankrolls World Terror,” *Soldier of Fortune*, August

1986, 108; and *Political Terrorism*, vol. 2, 1974-1978, ed. Lester A. Sobel (New York: Facts on File: 1978), 16.

54. See Vice President, *Report on Terrorism*, 2; and Marian Nash Leich. "Four Bills Proposed by President Reagan to Counter Terrorism," *American Journal of International Law* 78, no. 4 (October 1984): 915.

55. See Basset al., 10-11; Department of Defense, *Soviet Military Power*, 1986 (Washington, D.C.: 1986), 124-28; Maj John G. Humphries, USAF, "International Terrorism as a Lawful Form of Warfare: An Idea Whose Time Should Not Arrive," student research paper 86-1200 (Maxwell AFB, Ala.: Air Command and Staff College, April 1986), I; "1980s: Decade of Confrontation?" 239-60; Senate, *Stare-Sponsored Terrorism*, 8-9; Senate, *Hearings on Terrorism*, 4-6; Shultz, "Terrorism: The Challenge," 55; Dobson and Payne, xi-xiii; Samuel T. Francis, *The Soviet Strategy of Terror* (Washington, D.C.: Heritage Foundation, 1981); Roberta Goren, *The Soviet Union and Terrorism* (London: George Allen and Unwin, 1984); Claire Sterling, *The Terror Network: The Secret War of International Terrorism* (New York: Reader's Digest Press, 1981); Wardlaw, 55-56; Lynch, 19; Robert C. McFarlane. "Terrorism and the Future of Free Society," in *American Bar Association, Committee on Law and National Security, Intelligence Report* 7, no. 5 (May 1985): 7; and Drew Middleton, "Soviets Seen Adopting 'Low-Intensity Warfare'," *Air Force Times*, 5 August 1986, 69.

56. See "Preface," Anzovin, 5; Richard B. Lillich, *Transnational Terrorism: Conventions and Commentary* (Charlottesville, Va.: Michie Co., 1982), xiii; Wardlaw, 18-24; and Col William D. Neale, USA, Retired, "Oldest Weapon in the Arsenal: Terror," *Army* 23, no. 8 (August 1973): 10-17.

57. Friedrich Nietzsche quoted in Neale, 11.

58. Niccolo Machiavelli quoted in *ibid.*

59. Mikhail Bakunin quoted in *ibid.*

60. Wilkinson, *Terrorism and the Liberal State*, 180-81.

61. Vice President, *Report on Terrorism*, "Preamble/Foreword."

62. See *Soviet Military Power*, 125; Department of State, Office for Counterterrorism, "Fact Sheet: World-wide Terrorism" (1986); Basset al., I; Marks and van Ostpal, 6-7; Rushworth M. Kidder, "The Libyan Raid: Four Months Later," *Christian Science Monitor*, II August 1986, 21; Jeffrey D. Simon, "Global Perspective: The Year of the Terrorist," *TVI Report* 6, no. 3 (Winter 1986): 1; Scott C. Truver, "Maritime Terrorism, 1985," *US Naval Institute, Proceedings* 112 (May 1986), 161; Andrew Whitley, "Deaths from Terrorism 'Double in 1985,'" *Financial Times*, 14 August 1986, 4; and "Special Report: Terrorism," *The World and I*, no. 3 (March 1986), 38-102.

63. See Lt Col William R. Farrell, USAF, "Responding to Terrorism: What, Why and When," *Naval War College Review* 39, no. 1 (January-February 1986): 49.

64. A study of the Israeli situation found that terrorism inflicted 0.5 percent of the total number of casualties (exogenous deaths and injuries) but counterterrorism consumed about 61.9 percent of Israel's total casualty-preventing expenditures. The reason, according to the study, is that Israel perceives terrorism as a major threat not based on statistics but on other factors. Another possibility might well be that the heavy expenditures have resulted in a highly successful program. See Lt Col Hanan Alon, Israeli Defense Forces, "Terrorism and Countermeasures: Analysis versus a Participant's Observation," in *Terrorism and Beyond: An International Conference on Terrorism and Low-Intensity Conflict*, ed. Brian M. Jenkins (Santa Monica, Calif.: Rand Corp., December 1982), 233-39, Rand, R-2714-DOE/DOJ/DOS/RC.

65. Information provided by L. Carter Cornick, Jr., supervisory special agent, Terrorist Research and Analysis Center, Criminal Investigative Division, Federal Bureau of Investigation, to the Eighth Legal Aspects of Terrorism Course, US Army Judge Advocate Generals School, Charlottesville, Va., 20 October 1986.

66. Jenkins, *A New Mode of Conflict*, 12.

67. Brian Jenkins, "Future Trends in International Terrorism," presented at Defense Intelligence College, Washington, D.C., Rand, 7176, Rand Corp., Santa Monica, Calif., December 1985, 3.

68. Jenkins, "Fighting Terrorism," 5.

69. "Perhaps we count the wrong things," writes Brian M. Jenkins, "more likely, the things we can count do not reflect our perceptions of the phenomenon. Terrorism is not simply what terrorists do, but the effects—the publicity, the alarm—they create by their actions." Jenkins, "Trends and Potentialities," 119.

70. Marks and van Oostpal, 5.

71. Vice President, Report on Terrorism, 10. According to Brian Jenkins, "Prior to the 1973 Yom Kippur War, a senior Israeli officer estimated that the total cost in men and money to Israel for all defensive and offensive measures against at most a few thousand Arab terrorists was 40 times that of the Six Day War in 1967." Jenkins, *A New Mode of Conflict*, 21.

72. George P. Shultz quoted in Senate, *State-Sponsored Terrorism*. 38.

73. Jenkins, "Fighting Terrorism," 3.

74. See Brian Michael Jenkins, "Combatting Terrorism Becomes a War," Rand, 6988, Rand Corp., Santa Monica, Calif., May 1984, 3; and Wilkinson, "Can a State Be a 'Terrorist'?" 469.

75. Robert Grant, "Terrorism: What Should We Do?" in Anzovin, 160.

76. See Laqueur, 87; Trent, 79-81; and Senate, *State-Sponsored Terrorism*.

77. Trent, 82.

78. Marks and van Oostpal, 5. See also Senate, *State-Sponsored Terrorism*, 5.

Marks and van Oostpal, 6.

McFarlane, 5.

Adm James D. Watkins, USN, "Terrorism: An 'Already Declared' War," *Wings of Gold* 9, no. 2 (Summer 1984): 19.

82. See William J. Casey, "International Terrorism: Potent Challenge to American Intelligence," address at the Fletcher School of Law and Diplomacy, Tufts University, Medford, Mass., 17 April 1985, in Anzovin, 59-60; reprinted from *Vital Speeches* 5), no. 23 (15 September 1985): 713-11. See also David L. Milbank, "International and Transnational Terrorism: Diagnosis and Prognosis," in Elliott and Gibson, 66-67.

83. See Senate, *State-Sponsored Terrorism*. 13.

84. See *ibid.*, 15. See also Neil C. Livingstone and Terrel E. Arnold, "The Rise of State-Sponsored Terrorism," in *Fighting Back: Winning the War against Terrorism*, ed. Livingstone and Arnold (Lexington, Mass.: D. C. Heath and Co., 1986), 11-12. They also note that "Soviet Foreign Minister Andrei Gromyko reportedly offered the Spanish government of Prime Minister Felipe Gonzalez a deal whereby Moscow would end its support of the Basque Homeland and Liberty Movement [Euzkadi ta Azkatasuna—ETA] in exchange for Spain's agreement not to join NATO." Livingstone and Arnold, "Rise of Terrorism," 13.

85. See James Berry Motley, "Target America: The Undeclared War," in *Fighting Back*, ed. Livingstone and Arnold, 70. See also Jenkins, "Corn-battling Terrorism Becomes a War," 2.
86. See Gerald M. Boyd, "Iran Is Said to Get U.S. Weapons Aid in a Hostage Deal," *New York Times*, 7 November 1986, 1; William Drozdiak and Walter Pincus, "Iran Says McFarlane Carried Out Secret Mission to Iran," *Washington Post*, 5 November 1986, 1; and Walter Pincus, "Shultz Protested Iran Deal," *Washington Post*, 7 November 1986, 1.
87. See Department of State, Bureau of Public Affairs, "International Terrorism: U.S. Policy on Taking Americans Hostage," Washington, D.C., June 1986.
88. See Bass et al., 7; and Jenkins, *Terrorism and Beyond*, 5.
89. See Frank Brenchley, "Diplomatic Immunities and State-Sponsored Terrorism," *Conflict Studies* 164 (1984): 2.
90. See Karen DeYoung, "Britain Cuts Ties with Syria over El Al Bombing Links: Hindawi Guilty; Damascus Reacts," *Washington Post*, 25 October 1986, 1(A) and 19(A).
91. Friedlander, 86-87.
92. Brian M. Jenkins, "International Terrorism: A Balance Sheet," in Elliott and Gibson, 224.
93. See, "Austria Seeks 'Atom Guerilla'," *San Jose Mercury*, 23 April 1974, as quoted in Forrest R. Frank, "Nuclear Terrorism and the Escalation of International Conflict," *US Naval War College International Law Studies* 62 (1980): 535.
94. Senate, *State-Sponsored Terrorism*, 2.
95. See Sterling; and Rivers, 88-101.
96. See Casey, 61; and Laqueur, 89-98.
97. See Casey, 66. See also Brian Michael Jenkins, "Combatting Terrorism: Some Policy Implications." Rand, 6666, Rand Corp., Santa Monica, Calif., August 1981, 3-6; and Wilkinson, *Terrorism and the Liberal State*, 199-200.
98. Jenkins, "A Balance Sheet," 20. See also Kenneth B. Roberts, "Terrorism and the Military Response," *Strategic Studies Institute, Army War College, Carlisle Barracks, Pa.*, October 1975, 2-4.
99. Marks and van Ostpal, 4. See also Thomas M. Franck, "International Legal Action Concerning Terrorism," *Terrorism: An International Journal* I, no. 2 (1978): 189; Benjamin Netanyahu, "Terrorism: How the West Can Win," *Time*, 14 April 1986, 49; Schmid, 206-8; Wilkinson, *Terrorism and the Liberal State*, 181-84; and Maj Jeffery W. Wright, USA, "Terrorism: A Mode of Warfare," *Military Review* 64, no. 10 (October 1984): 38.
100. Andrew M. Scott, *The Revolution in Statecraft: Informal Penetration* (New York: Random House, 1969).
101. *Ibid.*, 166.
102. See Wilkinson, *Terrorism and the Liberal State*, 199.
103. See Edgar O'Ballance, "Terrorism: The New Growth Form of Warfare," in *International Terrorism in the Contemporary World*, ed. Marius H. Livingston, Lee Bruce Kress, and Marie G. Wanek, *Contributions in Political Science*, no. 3 (Westport, Conn.: Greenwood Press, 1978); Jenkins, "Corn-battling Terrorism Becomes a War"; Jenkins, *A New Mode of Conflict*; and J. Wright.
104. See Robert H. Kupperman, Debra van Ostpal, and David Williamson, Jr., "Terror, the Strategic Tool: Responses and Control," *Annals of the American Academy of Political and Social Science* 463 (September 1982): 24.

105. See Stephen Sloan, *Beating international Terrorism: An Action Strategy for Preemption and Punishment* (Maxwell AFB, Ala.: Air University Press, December 1986), 4 and 7.

106. See Gordon A. Christenson quoted in “Controlling Transnational Terrorism: The Relevance of International Law,” in *American Society of International Law, Proceedings of the 72nd Annual Meeting, 27-29 April 1978* (Washington, D.C.: 1978), 348.

107. Jacques Bergier’s book is discussed in Gerardo Jorge Schamis, *War and Terrorism in international Affairs* (New Brunswick, N.J.: Transaction Books, 1980), 35-38.

108. See Jenkins, “Combatting Terrorism Becomes a War,” 1; Jenkins, “Future Trends,” 5-6; Livingstone and Arnold, “Democracy under Attack,” in *righting Back*, ed. Livingstone and Arnold, 3-5; and Milbank, 72.

109. See Senate, *State-Sponsored Terrorism*, 68; M. Ma, “Forms of State Support to Terrorism and the Possibility of Combating Terrorism by Retaliating against Sponsoring States,” in *On Terrorism and Combating Terrorism*, ed. Arid Merari (Frederick, Md.: University Publications of America, 1985), 119-26; Jenkins. “A Strategy for Combatting Terrorism,” Rand, 6624, Rand Corp., Santa Monica, Calif., May 1981, 6; Netanyahu, 48-52; and William L. Waugh, Jr., *International Terrorism; How Nations Respond to Terrorists* (Salisbury, N.C.: Documentary Publications, 1982), 137-39.

See Marks and van Ostpal, 1.

See US Army, Training and Doctrine Command, Joint Low-intensity Conflict Project, vol. 1, *Analytical Review of Low-intensity Conflict* (Fort Monroe, Va.: 1 August 1986), 5-1.

112. Department of Defense, *U.S. Military Force Posture FY-1986* (Washington, D.C.: 1985). 94-95. Regarding the analysis of the threat of international terrorism, governments, media, and the terrorists themselves tend to overestimate the threat while the military—concerned about roles, missions and funding—tends to underestimate it.

113. Concerning the problem of educating the public as to the threat, see Vice President. *Report on Terrorism*, 17; and Sloan, xiv.

CHAPTER 2

INTERNATIONAL LAW AND INTERNATIONAL TERRORISM: WHICH APPROACH SHOULD WE TAKE?

Criminal means once tolerated is soon preferred.

Edmund Burke

(Terrorism) is not just criminal activity, but an unbridled form of warfare.

George P. Shultz

The Western democracies are still not aware of it as warfare against them.

Lord Chalfont

Some experts see terrorism as the lower end of the warfare spectrum, a form of low-intensity, unconventional aggression. Others, however, believe that referring to it as war rather than criminal activity lends dignity to terrorists and places their acts in the context of accepted international behavior.

Vice President's Task Force
on Combating Terrorism

International law offers two approaches to international terrorism. States can treat terrorism as a law enforcement problem or they can invoke the law of armed conflict. The law enforcement approach considers international terrorism as primarily a civil police responsibility. The objective is to deter terrorists, but, failing that, to manage them successfully through arrest, prosecution, and imprisonment. Consequently, this approach seeks to improve law enforcement by promoting international agreement and cooperation among nations. Outlawing terrorism making it a universal international crime like piracy or slave trading is the ideal. For the present, states have emphasized negotiating new treaties to define specific terrorist acts as crimes. Conventions on aerial hijacking, letter bombs, and attacks on protected persons such as diplomats are examples. Information exchange and judicial cooperation are essential ingredients of this approach. Nations have focused their attention on extradition agreements and on redefining narrowly the political offense escape clause. Terrorists are viewed as ordinary criminals and not as engaging in combatant activity. In exceptional circumstances when the use of military force abroad is required, that action occurs in the context of a response to a peacetime crisis.

The law of armed conflict approach considers international terrorism as primarily a military responsibility. Terrorists are viewed as unlawful or unprivileged combatants engaging in warlike or combatant activity. As such, terrorists are criminals whose arrest, prosecution, and imprisonment are universal obligations of all states in accordance with the 1949 Geneva conventions. When the use of military force abroad is required, such use takes place in the context of armed conflict.

Under both approaches the terrorist is a criminal. However, it is incorrect to believe that terrorists would be given a status under the law of armed conflict other than that of unlawful combatants engaging in criminal conduct. The differences in these two approaches are highlighted by the choices offered in the following questions: Should international terrorism be a civil police or military responsibility? Should international terrorism be viewed as ordinary criminal activity or combatant activity? Is terrorism simply a crime or is it surrogate warfare? Should use of force abroad against international terrorists and their state sponsors or supporters be viewed as a peacetime crisis or as a response to armed conflict?

Among the factors to consider in deciding which is the best approach to international terrorism are foreign policy and other political considerations, the nature of the threat, and the advantages and disadvantages of each approach. Foreign policy and other political considerations are beyond this study. The nature of the terrorist threat has been discussed in chapter 1. This chapter identifies the approach adopted by the West, including the United States; discusses the reasons for this approach and its advantages and disadvantages; and examines the alternate approach and its advantages and disadvantages.

West Opts for Law Enforcement Approach

The United States and other like-minded governments have tended to target terrorists as ordinary criminals subject to prosecution under domestic criminal law. Most efforts in the international arena have been directed at finding ways to enhance the effectiveness of applying domestic criminal law to terrorists. These efforts have included, for example, improving extradition procedures and bringing into being new multilateral and bilateral conventions criminalizing various acts of terrorists—such as aircraft hijacking—that can be prosecuted by national judicial authorities.

The United States government and other Western democracies have organized to deal with terrorism in terms of law enforcement. The lead US agency for domestic terrorism is the Federal Bureau of Investigation (FBI). The FBI has transferred terrorism responsibility from its intelligence and sabotage division to its criminal division. This shift reflects the thinking of senior leadership that the terrorist is an ordinary criminal not a combatant. The Department of State, not the Department of Defense, is the lead US agency for international terrorism. Basic cooperation among nations is at the police-to-police or judiciary-to-judiciary level.

Law enforcement responsibility is primarily a civil police and not a military function. In instances where military force has been used overseas against international terrorists or their sponsors, the action has been akin to law enforcement (hostage rescue attempts, for example) or

punishment of a state sponsor (the April 1986 raid on Libya). The state sponsoring or supporting international terrorism may be viewed as engaging in “armed aggression against the United States... just as if [it] had used its own armed forces” but international terrorists themselves will not be so recognized.¹

The military may feel uneasy and uncertain about its role in essentially a law enforcement function. Terrorists are not combatants, and military action is not taken in a warlike context. Military actions against terrorists are characterized as a response to a peacetime crisis and not an armed conflict. Moreover, in today’s world, military force generally is seen as an ineffective means to project power abroad. Hence, in this context, the law of armed conflict does not apply to international terrorists.

Some may argue that this view is changing and that terrorism now is viewed as essentially a form of warfare. Brian Jenkins of the Rand Corporation has concluded that “terrorism indeed has become a new mode of warfare.”² Terrorist expert Paul Wilkinson of the University of Aberdeen agrees: “International terrorist attack is simply a different mode of war, not an alternative to war as such.”³ But other experts do not fully agree. Some experts see a trend in that direction but are guarded as to whether terrorism has really become warfare.⁴

Government officials in the United States have joined the discussion with some strong words about terrorism as warfare. Jeane J. Kirkpatrick, former US permanent representative to the United Nations, has asserted that “terrorism is a form of war.”⁵ Ambassador Vernon Walters, her successor, agrees, “We are not dealing here with the acts of individuals or groups but rather with a state policy to use force by clandestine means or, as one speaker in the debate put it, ‘war by another name’.”⁶ Secretary of State George Shultz is quoted as saying that terrorism is “no longer the random acts of isolated groups or local fanatics,” but rather it “is now a method of warfare.”⁷ The Long commission, appointed by Secretary of Defense Caspar Weinberger to investigate the October 1983 bombing of the Marine Corps headquarters in Beirut, characterizes the threat to the United States as “terrorist warfare, sponsored by sovereign states or organized political entities to achieve political objectives.”⁸

Ambassador Robert Oakley, head of the Department of State, Office of Counterterrorism, speaking in September 1985, placed terrorism into the conflict spectrum as a “form of low-intensity warfare.”⁹ Although Defense Department agencies continued to struggle with the issue, the Joint Chiefs of Staff (JCS), in November 1985, approved a definition of low-intensity conflict that included terrorism.

Low-intensity conflict is a limited politico-military struggle to achieve political, social, economic, or psychological objectives. It is often protracted and ranges from diplomatic, economic, and psychosocial pressures through terrorism and insurgency. Low-intensity conflict is generally confined to a geographical area and is often characterized by constraints on the weaponry, tactics, and level of violence.¹⁰

But, as regards terrorism, the armed services to date have developed no doctrine, strategy, tactic, training, or force structure based on this definition of low-intensity conflict. Congress, in the 1986 Defense Reorganization Act, has given the Defense Department a strong nudge to develop these written standards. Yet, one has to wonder whether these military deficiencies exist because the military sees low-intensity conflict, including terrorism, as a low priority, as Congress suspects, or because the military does not believe that international terrorism should be characterized as a form of warfare. Conceptualizing and planning for a nonwarlike activity cannot be an easy task for the military.

How, then, do we assess the current discussion? The talk about terrorism being a form of warfare is just that, talk. It is an attempt to convey or emphasize the seriousness of the perceived threat, but it is not intended that the legal consequences of calling terrorism warfare should follow. The term is used in the generic sense as one would speak of the war on poverty or the war against illiteracy. The primacy of the criminal element of terrorism is clearly manifest in official US government actions and statements. In the words of President Ronald Reagan, terrorists “must be treated as to what they really are. And that is, they are base criminals.”¹¹ The aim, according to Ambassador Louis Fields, is to recognize that “terrorist crimes, like all crimes, should be universally condemned and universally prosecuted.”¹² Terrorism is essentially criminal activity within the domain of law enforcement authorities.

Why the Bias toward Law Enforcement?

More and more writers on the subject have taken the position that “the key to an effective response to the threat posed by terrorist states is the commitment to address the attacks they sponsor within the scope of armed conflict.”¹³ Yet, the law enforcement approach stands unchallenged. Dr Stephen Sloan, a former senior research fellow at the Air University Center for Aerospace Doctrine, Research, and Education, could write correctly in mid-1986 that “terrorism is still not viewed by various civilian policymakers in general and by the military in particular to be a form of warfare,”¹⁴

Law Enforcement: The Only Alternative

Why? First, there has been no serious research into an alternative to the law enforcement approach. No US government department or agency has studied the pros and cons of the law of armed conflict approach. The Vice President’s Task Force on Combatting Terrorism did not address the issue. The task force’s final report simply noted that some experts see terrorism as a form of warfare while others “believe that referring to it as war rather than criminal activity lends dignity to terrorists and places their acts in the context of accepted international behavior.”¹⁵ The report does not draw a conclusion as to which view is correct but notes that Americans know terrorism when they see it. Neither private scholars nor jurists have prepared a detailed study either.

Although policymakers may have selected the proper approach to international terrorism, they have done so without the benefit of a review of the advantages and disadvantages of each

approach. Moreover, so strongly held is the belief that the law enforcement approach is the correct one that policymakers may be reluctant to even consider an analysis which may challenge the current approach. Fundamental beliefs are like that.

Terrorism as a Form of Aggression Is Denied

Second, as Yale University law professor Eugene Rostow proposes, the psychological mechanism of denial may be at work in this instance. In an article titled “Overcoming Denial,” he admonishes:

We understand what is happening in the world. But we resist confronting our knowledge, as our fathers resisted confronting the truth about Hitler fifty years ago... What can we do about state-sponsored terrorism? We must first recognize that it is a form of aggression. Aggression is the most serious of all violations of international law, a profound threat to the state system on whose stability and viability peace depends.¹⁶

International terrorism is recognized as a threat to national security. Is it more appropriate to manage such a threat using the law enforcement or law of armed conflict approach? This question cannot be answered until denial is overcome and we decide to look critically at the advantages and disadvantages of each approach.

Law of Armed Conflict Misunderstood

Third, misconceptions about the law of armed conflict approach have driven us to embrace the law enforcement approach. High-ranking policymakers and jurists hold false beliefs about the law of armed conflict as a body of law and what it means if it is applied to international terrorism. They incorrectly believe that the choice is between treating terrorists as criminals under the law enforcement approach or as combatants under the law of armed conflict approach. They are unaware that the law of armed conflict would treat terrorists as criminals, would recognize them as engaging unlawfully in combatant activity, would consider them as unlawful combatants, and would deny them legitimacy by identifying them as perpetrators of acts contrary to the fundamental international humanitarian law that serves as a basis of the law of armed conflict. Because such misconceptions are deeply held, accepting terrorism as warfare and adopting the law of armed conflict approach have become unthinkable.

Abraham Sofaer, State Department legal adviser, unequivocally believes “terrorism, in essence, is criminal activity.”¹⁷ This assessment, although accurate, is not dispositive of which approach to terrorism should be taken because both approaches would treat international terrorists as criminals. Sofaer erroneously continues: “Another approach has been to secure for terrorism a legal status that obscures or denies its fundamental criminal nature. The laws of war mark the line between what is criminal and what is an act of combat.”¹⁸ His statement contains at least three misconceptions.

1. If the law of armed conflict is applied to international terrorists, then they will receive legal status that implies acceptance of their methods. However, the law of armed conflict condemns terrorist methods as unlawful.

2. There is a wall between criminal law and the law of armed conflict as if the latter did not address criminal activity. The law of armed conflict, to the contrary, includes provision for war crimes and grave breaches of the 1949 Geneva conventions, and provides for universality of criminal jurisdiction.

3. If the law of armed conflict were applied to international terrorists, then they would be given combatant status. In fact, however, the law of armed conflict recognizes that not all persons who engage in combatant activity are combatants entitled to prisoner of war (POW) status. Some, like terrorists, are unprivileged or unlawful combatants.

Policymakers, and therefore policy, have been influenced by these incorrect legal views.

The following statement of Noel C. Koch, a former senior Department of Defense official responsible for terrorist issues, serves as a clear example:

There is a legalistic perspective that sees the acts in question as crimes and their perpetrators as criminals; this is placed against a more general tendency to see terrorism as “war.” But if war, then its practitioners may be subject to the laws of war, and those apprehended in its practice may be “prisoners of war” as they insist, rather than merely impressionable pawns turned into criminals by more clever, and evil men. The point is not academic. It would be grotesque to afford terrorists the rights that belong to legitimate combatants under the laws of war.¹⁹

These issues are not academic, they fundamentally impact on the choice of approach to terrorism. But Koch’s analysis contains certain misconceptions.

First, if the law of armed conflict is applied to international terrorists, then they will somehow cease to be criminals. However, the issue is not whether the acts of terrorists constitute crimes or not. The acts of terrorists are criminal under both national domestic law and the law of armed conflict. At issue is how best to treat terrorism. Based on the factual situation presented, is the better approach to international terrorism essentially to treat it as deviant societal conduct of a criminal nature within the context of law enforcement or to treat it as a form of warfare governed by the law of armed conflict, including its criminal law provisions?

Second, if the law of armed conflict is applied to international terrorism, then terrorists become lawful combatants entitled to POW status if captured. Under the law of armed conflict, however, terrorists are neither lawful combatants nor entitled to POW status.

Third, if the law of armed conflict is applied, then the acts of international terrorists will be sanctioned or approved by the international community and terrorists will have achieved both status and recognition for their cause. This contention is simply incorrect. Because a body of law

is applied to an activity or conduct does not mean that the law approves of that conduct. When domestic criminal law addresses the murderer it does not, thereby, approve murder. The law of armed conflict addresses terrorist acts as either war crimes or grave breaches of the Geneva conventions and, instead of approving of terrorism, condemns those acts. Rather than bestowing status or recognition on international terrorists and their state sponsors or supporters, the law of armed conflict identifies participation in such acts as universal crimes that bring no honor. In the words of Dr Sloan, “It must be stressed however that recognizing that terrorism may be more than a criminal act does not mean to imply that the perpetrator has some degree of legitimacy for his or her actions.”²⁰

Imprecise Dividing Line between Peace and War

Fourth, and finally, inadequate research, denial, and misconceptions have contributed to a belief that treating terrorists as criminals requires a law enforcement approach. We do not understand what it truly means to treat terrorism as a form of warfare. “Many, for example,” notes Harry Summers, a recognized writer on military strategy, “give lip-service to the idea that terrorism is a form of warfare, but few understand what that admission entails.”²¹ National leaders see the problem for the most part not as a lack of understanding but as a condition of the existing political scene. Former secretary of defense Caspar Weinberger notes, for example, “In today’s world, the line between peace and war is less clearly drawn than at any time in our history.”²² Secretary Shultz discusses why this situation exists:

Among the factors contributing to this lack of understanding are our perceptions that the nation and the world are either at war or at peace, with the latter being the normal state; and the existence of a well-resourced campaign by our adversaries to create and support misunderstanding of the means and ends of this confrontation.²³

A realization of a lack of understanding can be healthy. It can lead to research, to rejection of denial, and to dispelling misconceptions. Understanding can be improved but where are the inquiring initiatives?

Managing International Terrorism

In rethinking the issue of how to approach terrorism, we must focus on managing international terrorism. Domestic terrorism—that is, terrorism that occurs within the borders of a particular state and has no international implications—is criminal activity within the domestic criminal law jurisdiction of that country. The only applicable approach to domestic terrorism is the law enforcement approach.

International law governs relations between states and, generally speaking, is not concerned with matters within a state’s domestic jurisdiction. Whether the law of armed conflict, as part of international law, should apply to international terrorism, as defined in chapter 1, is open for consideration.

Although both approaches, law enforcement and law of armed conflict, potentially could be applied to international terrorism, the issue is somewhat more complex than simply choosing between them. It may be inappropriate to take the same approach to all types of international terrorism. The law enforcement approach might be the best, if not the only, way to deal with international terrorism that is not state sponsored or supported. However, that assessment might change if the organization engaging in terrorist acts, even though not state sponsored or supported, has been recognized as having status as an international entity. The PLO, for example, may have such status although a case can be made that the PLO is sponsored or supported by several states.

The law of armed conflict, as part of international law, applies between states and recognized international entities. If an international terrorist organization is not state supported or sponsored nor recognized as an international entity, then the law of armed conflict by its own terms may well not apply to the situation. However, since the focus of this study is limited to state-sponsored and -supported international terrorism, both approaches conceivably may apply.

Thrust of the Law Enforcement Approach

The central feature of the law enforcement approach is to make terrorism synonymous with crime.²⁴ But making the law enforcement approach work requires international cooperation. Terrorists are prosecuted for their acts in domestic courts in accordance with domestic law. No international tribunal tries them. When terrorists flee the jurisdiction of the state in which they have committed their criminal act (a *modus operandi* of international terrorists), that state must seek the judicial assistance of the state to which they have fled. The objective is to have the state in whose jurisdiction the terrorists have sought haven either prosecute or extradite them. Achieving and improving cooperation with foreign law enforcement authorities so that the offenders do not escape punishment is the primary goal of the United States.²⁵ But “attempts to stretch the authority of a legal system across international boundaries inevitably leads to collisions with elements of the sovereign-state system, especially jurisdictional barriers and a tendency among law enforcement agencies to give low priority to another country’s crime.”²⁶

This section assesses four aspects of the law enforcement approach. The first two concern the effectiveness of efforts to strengthen international cooperation and agreements to improve extradition and to criminalize acts of terrorists. The remaining two, arresting and imprisoning terrorists, concern the appropriateness of treating terrorists as ordinary criminals.

Extradition

Improving extradition is an essential element of the law enforcement approach. “Most acts committed in the course of political disturbances [are] intended to disrupt the political order of states [but] have been considered as ‘political acts’ [thereby] ruling out extradition” because of the political offense exception.²⁷ Moreover as is clear from years of debate on terrorism and

the history of extradition... no viable international... community consensus exists in the area of political crimes.”²⁸

Achieving international cooperation in this area has been difficult. The key problem has been the political offense escape clause in extradition agreements, which gives a requested nation the right to deny extradition to the requesting nation. Closing this loophole has proven to be a monumental task. How can this clause be narrowed to exclude terrorists but retain its original purpose of protecting dissidents and other like-minded persons from persecution through prosecution for their politically held beliefs? How can third world support be obtained in light of their primary concern for national liberation movements? How do you obtain the cooperation of states that sponsor, support, or tolerate international terrorism by providing terrorists with safe havens?

The effort of the European community and the revised United States—United Kingdom extradition agreements are unusual successes in this area.²⁹ The 1977 European Convention on the Suppression of Terrorism removes the political offense exception from extradition requests for certain offenses such as aircraft hijacking, serious attacks on internationally protected persons, kidnapping, hostage taking, and use of explosives and firearms to endanger persons. Similarly, the 1985 supplement to the United States—United Kingdom extradition treaty removes the political offense exception for selected crimes, such as aerial hijacking and murder of diplomats, that are associated with terrorism. Noteworthy is the fact that successes to date have been achieved only among the Western democracies.

Also significant is the fact that even United States courts, as demonstrated in *Eain v. Wilkes*, have difficulty with the political offense issue if forced to address it.

The evidence in this case reveals that the PLO seeks the destruction of the Israeli political structure... and thus directs its destructive efforts at a defined civilian population. That, it could be argued, may be sufficient to be considered a violent political disturbance. If, however, considering the nature of the crime charged, that were all that was necessary in order to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts.³⁰

With these words, the *Eain* court places the emphasis, not on law, but on logic. Much remains to be done to make extradition an effective tool in combating terrorism.

Criminalizing Terrorist Acts

A second aspect of the law enforcement approach is an initiative to provide a sounder basis for judicial cooperation among states through a common agreement on the definition of the

crime involved. This initiative has been pursued at two levels: one to outlaw terrorism generally as an international crime, and the other to identify specific acts committed by terrorists and make them international crimes.

The first general attempt to outlaw terrorism occurred in 1937, in the form of a draft Convention on the Prevention and Punishment of Terrorism.³¹ But the draft convention never entered into force. The effort failed in large measure because World War II occupied the affairs of states and because the interest of the international community in the subject waned. A general convention was not given serious consideration again until 1972, when the United States introduced in the United Nations the text of a proposed agreement to outlaw terrorism. This effort also failed, not for any lack of interest, but because the United Nations became embroiled in a debate of terrorist causes rather than focusing on terrorist acts.³² Consequently, no general convention is in force today that makes terrorism per se an international crime.

A recent effort of international law scholars to draft a general convention outlawing terrorism deserves mention because those scholars have taken a unique approach to the problem. They seek to adopt for law enforcement purposes the criminal standard contained in the law of armed conflict. These scholars believe that “if terrorism is prohibited in time of war, clearly it must be prohibited in time of peace.”³³ The language proposed in 1982 by the International Law Association (ILA), Committee on Terrorism, reads as follows:

No person shall be permitted to escape trial or extradition on the ground of his political motivation who, if he performed the same acts as a soldier engaged in an international armed conflict, would be subject to trial or extradition.³⁴

Even though this language has been weakened in later drafts, the ILA proposal has little hope of going anywhere.³⁵ Support for any general convention on terrorism does not now exist. This effort does show, however, the growing concern about the inequality between the criminal law enforcement standards in time of peace and those prevailing in time of armed conflict.

Efforts to make criminal specific terrorist acts, such as airplane hijacking, hostage taking, and attacks on diplomatic personnel, have been more successful.³⁶ These conventions have been of limited usefulness, however, because of loose language, nonratification by states that sponsor or support international terrorism, and lack of enforcement measures for noncompliance.³⁷

Arresting Terrorists

The law enforcement approach considers terrorists to be ordinary criminals and seeks to treat them as such. But is it appropriate to consider terrorists as ordinary criminals? What are the implications of such treatment? The first area of concern is the way that the arrest process functions. The kind and degree of force authorized in the arrest process are very different from the type and level of force applied in a combat situation. The contrast is “between the principle of minimal use of force as practiced by police and the military philosophy to use all necessary force to achieve the objective.”³⁸ The use of force for civil law enforcement and military purposes differs. “Military rules are designed to meet the primary purpose of the engagement,

