

COUNTERING TERRORISM—FROM WIGGED JUDGES TO HELMETED SOLDIERS? LEGAL PERSPECTIVES ON AMERICA’S COUNTER-TERRORISM RESPONSES

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A. INTRODUCTION

In the 1980s, international terrorism was coming of age. International terrorism had matured with the marriage of state-sponsored terrorism and religious extremism. In the 1990s, it was increasingly clear that modern terrorists were successfully choosing technology to exploit the vulnerabilities of modern societies.¹ With citizens tending to live, work, and travel in close proximity providing concentrated targets, modern societies are particularly susceptible to massive attacks and weapons of mass destruction (WMDs).² This fact was not lost on perpetrators of terrorism as witnessed by its growing capabilities and lethality throughout the Cold War era.³

Amidst a background of rising deadliness of terrorists with easy access to a range of low-tech and high-tech weapons, states (notably Israel and the U.S.) began to suggest that terrorist acts might be approached from a conflict management perspective, rather than

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¹ For example, on 7 August 1998, the US Embassies in Kenya and Tanzania were bombed. At least 252 people died (including 12 US citizens) and more than 5,000 were injured. The attacks on the US embassies in East Africa were carried out on US Embassies located in the central business district in both cities. Most of the deaths were collateral damage—pedestrians on the street and passengers in public and private vehicles out on the street. In 2001, in a coordinated operation whose breadth and audacity stunned the world, terrorists believed to be part of the Al Qaeda network carried out the worst terrorist attack in modern times, targeting the symbols of US supremacy and leaving about 3000 people dead. The majority of the victims were in the giant Twin Towers complex, which housed numerous offices and thousands of workers.

² JESSICA STERN, *THE ULTIMATE TERRORISTS* 4 (1999).

³ “Between 1970 and 1995, on average each year brought 206 more incidents and 441 more fatalities.” *Id.*, at 6.

exclusively from a law enforcement viewpoint.⁴ This stance was premised on the notion that “in order to wage war against terrorism, terrorists must be seen, not as criminals, but as persons jeopardizing national security.”⁵ The belief is that only the use of armed force will result in the degree of decisive action that will minimize the likelihood that offenders will go unpunished. Isolating terrorist groups and punishing states supporting terrorism seemed the urgent (though not new) and primary goal of international cooperation aiming at pressuring countries to make measures unilaterally or multilaterally to deprive terrorist groups of mobility, safe havens, and sources of income.⁶

With the end of the Cold War, the development of terrorism as a transnational enterprise would soon make it more than ever a separate unit of policy concern not simply for states, but the international community.⁷ Though terrorism has always been high on the international agenda, it was the September 11, 2001 attacks (hereinafter “September 11”) that brought the issue of terrorism and the international regime on the use of force into a new, urgent, and sustained debate.

This Article aims to evaluate the international legal perspectives attendant to U.S. counter-terrorism measures and policy and the attendant strictures and implications. Part II

⁴ Greg Travalio & John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT’L L. 97, 99 (2003).

⁵ Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State’s Duty To Protect Its Citizens*, 15 TEMP. INT’L & COMP. L.J. 195, 212202 (2001); see also Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 89–90 (1989).

⁶ In 1997 the General Assembly adopted the International Convention for the Suppression of Terrorist Bombings, January 9, 1998, 37 I.L.M. 251, creating a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place. For background on this convention, see Alex Obote-Odora, *Defining International Terrorism*, 6 MURDOCH U. ELECTRONIC J. L. (March 1999), 59–72.

⁷ Ideological and political quagmires laid down fertile ground for a dichotomy of terrorism to come into being. In the 1960s and 1970s, focus on terrorism mainly targeted ideologically motivated individuals and small groups. The international community increasingly targeted manifestations of individual and small group acts of “terror-violence” sidestepping the politically volatile issue of state/insurgent sponsored and orchestrated “terror-violence”. M. Cherif Bassiouni, *A Policy-Oriented Inquiry into the Different Forms and Manifestations of International Terrorism*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: US PROCEDURAL ASPECTS (M. Cherif Bassiouni ed., 1988); W. T. Mallison, Jr. and S. V. Mallison, *The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human and Material Values*, 18 HOW. L.J. 12 (1973).

commences by grappling with the uneasy relationship that legal and political complexities have foisted on the UN's ability to address terrorism and the difficult issue of the definition of terrorism. Within the context of this part, the Article also addresses the two dominant counter-terrorism paradigms—law enforcement and conflict management. Part III moves on to evaluate the law enforcement paradigm which treats terrorism as a crime engaging domestic law enforcement. The part offers a discussion of the “extradite or prosecute” mechanism that lies at the heart of multilateral anti-terrorism conventions and a discussion of the bases of international criminal jurisdiction that provide a framework for domestic anti-terrorism statutes. It concludes with an analysis of the practice of apprehension of terrorists in international space, of which the U.S. has been a leading proponent, and offers a discussion of the complex legalities attendant to this controversial means.

In Part IV, the article tackles the complexities and technicalities of the conflict management paradigm. It commences by examining the international legal uncertainties inherent in treating terrorists as combatants. The analysis moves on to cover the use of both limited lethal military force in the form of targeted assassinations and large scale military force in the form of pre-emptive strikes and retaliation. In a bid to highlight the transformation from the Cold War era to the post Cold War era, the part focuses on U.S. practice and world reaction both pre- and post-Cold War. The part concludes with an examination of the post-September 11 scenario and evaluates whether any perceptible changes in law or state practice are taking place following the military campaigns in Afghanistan (“Operation Enduring Freedom”) and Iraq (“Operation Freedom Iraq”).

B. THE UN AND TERRORISM: AN ASSYMETRICAL BALANCING ACT

When the UN Charter was drafted in 1945, the right of self-defense was the only included exception (reserved to state discretion) to the general prohibition of the use of force. Previously, in addition to self-defense, customary international law had accepted reprisal,

retaliation, and retribution as legitimate responses by states whose interests had been injured.⁸ Under the UN Charter,⁹ unilateral acts of force not characterized as self-defense, regardless of motive, were made illegal. Individual or collective self-defense became the cornerstone relating to use of force.

The volatile Cold War era that ushered in the UN era saw to it that any use of external military force by states was almost always pegged on the right of self-defense in response to an attack, rather than in its anticipation. The dangers of a recognition of pre-emptive or anticipatory self-defense were easily understood.¹⁰ In addition, condemnation by the international community was almost always certain whenever any attempts were made to base use of force on any of the earlier acceptable forms of self-help recognized in customary international law.

The UN Charter, while seeming to present a neat and tidy regime on the use of force, nonetheless reflects the drafters' singular focus on creating a political system to govern conflicts between states.¹¹ They did not contemplate the existence of international terrorists nor "...fully anticipate the existence, tenacity, and technology of modern day terrorism."¹² The UN Charter simply does not directly address the subtler modes in which terrorists began to operate in the post-World War II period.

⁸ Reprisal allows a state to commit an act that is otherwise illegal to counter the illegal act of another state. Retaliation is the infliction upon the delinquent state of the same injury that it has caused the victim. Retribution is a criminal law concept, implying vengeance, which is sometimes used loosely in the international law context as a synonym for retaliation. *See, e.g.,* Derek Bowett, *Reprisals Involving Recourse to Armed Force* 66 AM. J. INT'L L. 1, 3 (1972); E. COLBERT, *RETALIATION IN INTERNATIONAL LAW*, 47 (1948).

⁹ *See* U.N. CHARTER, arts. 39–51, available at <http://www.un.org/aboutun/charter>.

¹⁰ Professor Jordan J Paust identifies this danger succinctly thus:

[I]s the responding coercion still a use of force in self-defense against an armed 'attack'? Is the responding coercion primarily pre-emptive, retaliatory, or for the purpose of imposing sanctions against a violation of international law? And if among the latter, are any of these forms of responsive coercion ever permissible?

Jordan J. Paust, *Responding Lawfully to International Terrorism: the Use of Force Abroad*, 8 WHITTIER L. REV. 711, 716 (1986)

¹¹ *See* James P. Rowles, *Military Responses to Terrorism: Substantive and Procedural Constraints in International Law*, 81 AM. SOC'Y INT'L. PROC. 287, 310–11 (1987).

Against a background of wars-by-proxy in the Cold War era, fuelled by divisive bipolar politics, terrorist violence was undergoing transformation and escalating precipitously. As national liberation movements increasingly attained their goal of self-determination, terrorism motivated by religious and ideological motivations took centre stage and frequently led to acts of violence with higher levels of fatalities than the relatively more targeted incidents of violence perpetrated by many secular liberation movements.¹³ The confluence of terrorists and state sponsorship was transforming ordinary groups, with otherwise limited capabilities, into more powerful and menacing opponents – converting them from weak and financially impoverished groups into formidable, well-endowed terrorist organizations with an ability to attract recruits and sustain their struggle.¹⁴

I. THE “FLIP-FLOP” UN RESPONSE TO THE TERRORIST SCOURGE

In response to the massacre of Israeli athletes at the 1972 Munich Olympics, the UN called for legal suppression by its members of violent acts of terrorists through ratification of the Convention for the Prevention and Punishment of Certain Acts of International Terrorism.¹⁵ Many nations, primarily the U.S. and its allies, voted against this resolution due to its bias toward, and legitimization of, violent national liberation movements.¹⁶ A primary reason of

¹² Mark Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT’L L. 25 (1987).

¹³ Ideological and political quagmires laid down fertile ground for a dichotomy of terrorism to come into being. In the 1960s and 1970s, focus on terrorism mainly targeted ideologically motivated individuals and small groups. The international community increasingly targeted manifestations of individual and small group acts of “terror-violence” sidestepping the politically volatile issue of state/insurgent sponsored and orchestrated “terror-violence”.

¹⁴ Bruce Hoffman, *Terrorism*, MICROSOFT ENCARTA ONLINE ENCYCLOPEDIA (2004), at <http://encarta.msn.com> (last visited Feb. 5, 2005).

¹⁵ *Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance, and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes: Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism*, U.N. GAOR 6th Comm., 27th Sess., Agenda Item 92, UN Doc. A/C.6/L.850 (1972) [*hereinafter Draft Terrorism Convention*].). For a brief discussion see Geoffrey M. Levitt, *The International Legal Response to Terrorism: A Reevaluation*, 60 U. COLO. L. REV. 533, 537 (1989).

¹⁶ *Id.*

the US stance supported by other major Western powers was the perception that: “[t]he Arab and Soviet blocs, along with other allies, tried to shield radical movements, with which they sympathized and supported, from being classified as terrorists—thereby protecting them from international condemnation and punishment.”¹⁷ This distinction between terrorists and revolutionaries was the subject of much disagreement.¹⁸ It was to loom large over any effort in the volatile Cold War era to establish a definition of terrorism at the international level.¹⁹

In 1974 the UN was presented with its greatest opportunity to bring terrorism within the ambit of the UN Charter through the key UN General Assembly Resolution defining “aggression,” Resolution 3314.²⁰ Sidestepping the volatile issue, the UN elected to ignore using the word “terrorism,” choosing instead to classify the activities of states who send, organize, or support “armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State...”²¹ as unlawful aggression in direct violation of the UN Charter.

After another round of ideological and political tussles, in December 1979, real, substantive progress was made by the Sixth Committee (Legal) of the General Assembly, which recommended condemning terrorism *per se*.²² Under the draft, “all acts of terrorism that endangered human lives or fundamental freedoms were unequivocally condemned” and an appeal was extended for all nations to become party to international conventions already in existence.²³ The resolution, in sum and substance,²³ was later adopted by the UN.²⁴

¹⁷ Douglas Kash, *Abductions of Terrorists In International Airspace and on the High Seas*, 8 FL. J. INT’L L. 65, 75–76 (1993).

¹⁸ For example, when Nelson Mandela first visited the U.S., he was on the State Department’s list of international terrorists. Mandela is now a Nobel Peace Prize Laureate and pre-eminent international statesman. In the Middle East, another “international terrorist,” Yasir Arafat, won the Nobel Peace Prize.

¹⁹ Jackson Nyamuya Maogoto, *War on the Enemy: Self-Defense and State-Sponsored Terrorism*, 4 MELB. J. INT’L L. 406, 410 (2003).

²⁰ *Definition of Aggression*, G.A. Res. 3314 (XXIX), UN GAOR, 29th Sess., 2319th plen mtg., Annex, Supp. No. 31, at art. 3142, U.N. Doc. A/Res/3314 (XXIX) (1974).

²¹ *Id.* at art 3(g).

²² *Draft Terrorism Convention*, *supra* note 15; *International Convention Against the Taking of Hostages*, G.A. Res. 146, U.N. GAOR, 34th Sess., 105th plen. mtg., at 245, U.N. Doc. A/34/786 (1979).

²³ *Id.*

The important move by the international community in 1979 however did not mark a practical turning point. Previous ideological and political differences continued to present a major stumbling block to repeated attempts by the UN in the 1980s to define the term “terrorism”.²⁵ These efforts, like those before, failed mainly due to differences of opinion between various states about the use of violence in the context of conflicts over national liberation and self-determination.

In spite of its failure to define terrorism, the UN General Assembly adopted Resolution 40/61 in 1985, which condemned and criminalized all acts, methods, and practices of terrorism wherever and by whoever committed.²⁶ This was a landmark resolution considering that previously, the international community had taken a piecemeal approach in addressing the problem of terrorism by identifying particular criminal acts as inherently terrorist in nature, to be prevented and punished by domestic law.

Language similar to that used in Resolution 40/61 was subsequently mirrored in a range of General Assembly and Security Council resolutions dealing with terrorism. Many of these resolutions state that terrorism is contrary to the purposes and the principles of the UN and represents a threat to international peace and security.²⁷ However, the fundamental problem lies in the distinction between unlawful and lawful force. This is especially

²⁴ G.A. Res. 34/145, U.N. GAOR, 34th Sess., Agenda Item 112, Supp. No. 46, at 244, U.N. Doc. A/RES/34/145 (1979).

²⁵ In choosing to avoid defining terrorism conclusively, the UN has either used it in a more general sense or selected specific acts as constituting terrorist activity. Consequently, the international community has taken a piecemeal approach and addressed the problem of international terrorism by identifying particular criminal acts inherently terrorist in nature to be prevented and punished by domestic law. The result has been the adoption of numerous global treaties, regional conventions, and bilateral agreements, which are relevant to the suppression of international terrorism, and corresponding domestic laws that implement those arrangements. See Leah Campbell, *Defending against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1071–2 (2000).

²⁶ G.A. Res. 40/61, 40th Sess., 108th plen. mtg., at para. 1, 6, U.N. Doc. A/RES/40/61 (1985).

²⁷ See, e.g., G.A. Res. 31/102, U.N. GAOR, 31st Sess., 99th plen. mtg., U.N. Doc. A/RES/31/102 (1976); G.A. Res. 34/145, U.N. GAOR, 34th Sess., 105th plen. mtg., at para. 13, U.N. Doc. A/RES/34/145 (1979); G.A. Res. 38/130, U.N. GAOR, 38th Sess., 101st mtg., U.N. Doc. A/RES/38/130 (1983); G.A. Res. 44/29, U.N. GAOR, 44th Sess., 72nd plen. mtg., at para. 6, U.N. Doc. A/RES/44/29 (1989); G.A. Res. 46/51, U.N. GAOR, 46th Sess., 67th plen. mtg., at para. 6, U.N. Doc. A/RES/46/51 (1991); G.A. Res. 51/210, U.N. GAOR, 51st Sess., 88th plen. mtg., para. 6, U.N. Doc. A/RES/51/210 (1996); G.A. Res. 53/108, U.N. GAOR, 53rd Sess., 83rd plen. mtg., Agenda Item 155, U.N. Doc. A/RES/53/108 (1999); G.A. Res. 56/160, U.N. GAOR, 56th Sess., 88th plen.

problematic in light of the fact that the UN, in choosing to avoid defining terrorism conclusively, has either used the term in a more general sense or selected specific acts as constituting terrorist activity.²⁸

To date, efforts by the UN to draft a single broad definition of terrorism acceptable to all states, such as that found in the first ever penal instrument making terrorism an international offence—the League of Nations’ Convention for the Prevention and Punishment of Terrorism—have failed.²⁹ Conventional international law on terrorism is presently limited to a relatively small number of widely accepted conventions that proscribe particular types of terrorism, which reflect customary norms of international law.³⁰

Some basic features that might contribute to an acceptable and working definition can be gleaned from the following definitions by various U.S. departments that encapsulate the basic aspects of terrorism:

- [T]he unlawful use or threatened use of force or violence by a revolutionary organization against individuals or property with the intention of coercing or intimidating governments or societies, often for political or ideological purposes.³¹
- [T]he unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.³²
- [P]remeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents.³³
- [V]iolent criminal conduct apparently intended: (1) to intimidate or coerce a civilian population; (2) to influence the conduct of a government by intimidation or coercion; or (3) to affect the conduct of a government by assassination or kidnapping.³⁴

mtg., Agenda Item 119b, U.N. Doc. A/RES/56/160 (2001) [*collectively hereinafter General Assembly Resolutions*].

²⁸The result has been the adoption of a number of global treaties, regional conventions, and bilateral agreements, which are relevant to the suppression of international terrorism, and the corresponding domestic laws that implement those arrangements. “The international conventions by and large address the form or target of the terrorist attack, rather than the terrorists themselves.” Campbell, *supra* note 25, at 1071–72; see also Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The “War on Terror”*, 4 SCHOLAR 209, 213–14 (2002).

²⁹ Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, 19 *League of Nations Official Journal* 23 (never entered into force).

³⁰ The most common types of terrorism covered by these conventions include crimes against the safety of civil aviation and maritime navigation, the taking of hostages, the use of nuclear and chemical weapons, and crimes against internationally protected persons. See Yonah Alexander, *Terrorism in the Twenty-First Century: Threats and Responses*, 12 DEPAUL BUS. L. J. 59, 92–4 (1999); Louis Rene Beres, *On International Law and Nuclear Terrorism*, 24 GA. J. INT’L & COMP. L. 1, 3 n.6 (1994).

³¹ Alex P. Semid & Albert Jongman, *A Selection of Recent Governmental and Academic Definitions*, para. 8, at www.utcc.ac.th/amsar/about/document7.html.

³² *Id.* at para. 3; 28 C.F.R. § 0.85(l) (2005).

³³ Semid & Jongman, *supra* note 31, at para. 9; 22 U.S.C. § 2656f(d) (West 2005).

³⁴ *Id.* at para. 4.

The synthesis of these definitions is broadly consistent with most definitions in academic literature, which generally require two elements: actual or threatened violence against civilians or persons not actively taking part in hostilities and the implicit or explicit purpose of using the act to intimidate or compel a population, government or organization into some course of action.³⁵

II. COUNTER-TERRORISM MANAGEMENT PARADIGMS

The international confusion over a precise definition of terrorism and its collorary, State-sponsored terrorism, has hampered any effective development in the discourse regarding acceptable counter-terrorism measures. General agreement by states at a philosophical level on what constitutes terrorism masks serious disagreements in practice.

Disagreements amongst states are not surprising in light of the fact that many factors contribute to the utility of terrorism not only by independent terrorist groups but also by some states. In its simplest terms, terrorism as a weapon has proven to be cheap and to have a synergistic effect in its impact. Like other forms of low-intensity warfare, terrorism is asymmetric warfare that breaks battlefield linearity by seeking and exploiting a combination of “spaces and timing” by avoiding a target State’s strengths and attacking its

³⁵ See, e.g., HARRY HENDERSON, GLOBAL TERRORISM: THE COMPLETE REFERENCE GUIDE, 1–30 (2001); DAVID E. LONG, THE ANATOMY OF TERRORISM 1–13 (1990); Ken Booth & Tim Dunne, *Preface* to WORLDS IN COLLISION: TERROR AND THE FUTURE OF GLOBAL ORDER 1 (Ken Booth & Tim Dunne eds., 2002). This basic elements are supported by a proposed convention drafted by the International Law Association, which defines an international terrorist offence as:

[A]ny serious act of violence or threat thereof by an individual whether acting alone or in association with other persons, organizations, places, transportation or communications systems or against members of the general public for the purpose of intimidating such persons, causing injury to or the death of such persons, disrupting the activities of such international organizations, of causing loss, detriment or damage to such places or property, or of interfering with such transportation and communications systems in order to undermine friendly relations among States or among the nationals of different States or to extort concessions from States.

INT’L LAW ASS’N, REPORT OF THE FIFTY-NINTH CONFERENCE 497–504 (1982) (emphases added).

vulnerabilities.³⁶ Additionally, terrorism's effectiveness is increased by the very fact that it throws its victim(s) off balance, forcing them to grope for an appropriate means of response.

States have historically initiated a legal response as their first reaction to international terrorist activities. From the legal perspective, managing the terrorist threat requires identification of the threat and a selection from within the range of counter terrorism measures usually within the framework of international conventions that generally provide for domestic prosecution. However, legal means to combat terrorism often prove to be insufficient mechanisms for deterring future terrorist attacks.³⁷ As a consequence, states, have sought to wean themselves from a sole reliance on this paradigm. States have worked in earnest to develop new strategies within the rubric of international law to deal with terrorism, by seeking to co-opt use of military force as a countermeasure against terrorism. Two general paradigms of counter-terrorism management have developed: law enforcement—which is based on the concept of terrorists as primarily criminals and the conflict management— which treats terrorists as threats to national security. The Article turns now to consider these paradigms.

The Law Enforcement Paradigm

The U.S. has historically initiated a legal response as their first reaction to international terrorist activities.³⁸ Legal mechanisms such as extradition and prosecution are primary examples of legal responses used by states against international terrorists.³⁹

Until recently, the law enforcement approach predominated counter-terrorism responses.⁴⁰ This approach considers terrorist events as purely criminal acts to be addressed

³⁶ Marcus Corbin, *Reshaping the Military for Asymmetric Warfare* (2001), at <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=218> (last visited Feb. 5, 2005).

³⁷ Tyler Raimo, *Winning at the Expense of Law: The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas*, 14 AM. U. INT'L L. REV. 1473, 1478 (1999).

³⁸ See e.g., *id.*

³⁹ See e.g., Omnibus Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 855 (codified as amended in scattered sections of 22 U.S.C.) (providing a basis for the United States to prosecute terrorists for acts committed against Americans overseas); see also Ethan A. Nadelmann, *The Role of the United States in the*

by the domestic criminal justice system.⁴¹ This entails domestic criminal law which is clearly within the authority of individual nations and grants no status—other than that of common criminal and common crime—to either those who commit terrorist acts or to the acts themselves. A law enforcement response triggers checks and balances of a criminal justice system allowing for courts of law to uphold individual civil liberties by ensuring due process.⁴²

Under this paradigm managing the terrorist threat requires identification of the threat and a selection from within the range of counter terrorism measures usually within the framework of international anti-terrorist conventions. These conventions generally provide for prosecution through the *aut dedere, aut judicare*—extradite and prosecute—mechanism.

Despite the clear-cut positives that the domestic legal enforcement framework offers, it has proved to be inadequate. The possibility of dismissed charges or acquitted defendants is all too real and frequent.⁴³ The absence of an effective international police agency and the reality that the police in some states may be corrupt and/or ineffective or a state is willing to harbor terrorists renders this approach good in theory, but hopeless in practice.⁴⁴

The Conflict Management Paradigm

States have never relied solely on the law enforcement paradigm to combat terrorism because legal strategies often prove to be insufficient mechanisms for deterring future attacks.⁴⁵ In the face of the seriousness of new and potentially devastating terrorist threats,

International Enforcement of Criminal Law, 31 HARV. INT'L. L.J. 37, 64–71 (1990) (noting the United States' efforts to renegotiate extradition treaties in order to prosecute international terrorists).

⁴⁰ M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L. L. J. 83, 88–96 (2002).

⁴¹ See, e.g.: Raimo *supra* note 37, at 1476; Sofaer, *supra* note 5, at 89–90; Travalio & Altenburg, *supra* note 4, at 99.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Raimo, *supra* note 37, at 1478.

there seems an urgent need to take action before an attack occurs rather than respond to an attack with legal action.⁴⁶

The perceived threat that terrorism poses to states has had a great impact on the policies used to thwart it, leading some states, particularly the U.S. and Israel to seek to co-opt military force.⁴⁷ This move has been accelerated by the proliferation of transnational terrorist groups with global reach. Terrorists now use more sophisticated and devastating weapons,⁴⁸ seeking targets that inflict the greatest damage on human life and property.⁴⁹ They “now look to multi-millionaires and entire nations for financial support.”⁵⁰ With large “war chests” terrorists have steadily developed their capabilities with a lethal combination of professionalism and advanced weaponry.

The advanced weapons available to terrorists pose an alarming national security threat, providing terrorists with the ability to destabilize entire regions ... and to inflict massive harm against...citizens and property.⁵¹

In view of the reality and threat posed by international terrorism, in the 1980s Israel and the U.S. began to suggest that terrorist acts might be approached from a conflict management engaging the use of both lethal and non-lethal military force, rather than exclusively from a law enforcement viewpoint. This was premised on the fact that the legal

⁴⁶ See 143 CONG. REC. H652H651-03 (daily ed. Feb. 26, 1997) (describing law enforcement proactive measures as “prevention, immediate incident response, and post-incident response”).

⁴⁷ See *Combating Terrorism: The Proliferation of Agencies’ Efforts: Hearings Before the Subcomm. on National Security, International Affairs and Criminal Justice of the House Comm. Gov’t Reform and Oversight*, 105th Cong. 15 (1998), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_house_hearings&docid=f:50803.pdf [hereinafter *Agencies’ Efforts To Fight Terrorism*] (statement of Richard Davis, Director of National Security Analysis, National Security and International Affairs Division) (asserting that, since the 1970s, the United States’ policy toward terrorism abroad has evolved concurrently with the perception and nature of the terrorist threat).

⁴⁸ See *U.S. Counterterrorism Policy: Hearings Before the Senate Judiciary Comm.*, 105th Cong. 1 (1998) [hereinafter *Counter-terrorism Policy Hearings*] (statement of Louis J. Freeh, Director, Federal Bureau of Investigation) (announcing that the trend of international terrorism is to inflict the maximum amount of destruction to property and human life and create a sense of terror to gain media recognition).

⁴⁹ See Tim Weiner, *Man With Mission Takes On the U.S. At Far-Flung Sights*, N.Y. TIMES, Aug. 21, 1998, at A1 (noting that Osama bin Laden, president of “Terrorist University,” provides major assistance to terrorist organizations and Islamic groups from his \$250 million fortune).

⁵⁰ Raimo, *supra* note 37, at 1479.

⁵¹ *Id.*, at 1480.

means available for confronting terrorism did not conform to the new nature of the international terrorism threat. Legal strategy especially in a climate of state-sponsored terrorism simply failed to deter international terrorists from acting and equally failed to discourage “rogue states” from availing safe havens and support.⁵²

The growing belief was that only the use of armed force would result in the degree of decisive action that would minimize the likelihood that offenders would go unpunished or be free to plan attacks.⁵³ In the face of the Security Council’s inability to control the spread of international terrorism or deal with it effectively, Israel and the U.S. sought to circumvent, or stretch, the provisions of the UN Charter, arguing that they would legitimately use military force to counter terrorism. This was based on the reality that the reach and capabilities of some terrorist groups had transformed the landscape. Terrorists were now not simply criminals, but persons jeopardizing national security.⁵⁴

C. LAW ENFORCEMENT PARADIGM: TERRORISM AS A CRIME

I. ANTI-TERRORISM CONVENTIONS: THE EXTRADITE OR PROSECUTE MECHANISM

Classifying international terrorism as a crime creates a dilemma because a “criminal act of terrorism to some will embody a legitimate act of self-determination to others.”⁵⁵ At times, states have not strictly applied the definition of international terrorism to foreign acts. Some acts are often recognized as legitimate actions of groups seeking self-determination. This method of defining terrorism is based on a political standard that leaves policymakers the

⁵² See Neil C. Livingston, *Proactive Responses to Terrorism: Reprisals, Preemption, and Retribution*, in INTERNATIONAL TERRORISM: CHARACTERISTICS, CAUSES, CONTROLS 219, 219–20 (Charles W. Kegley, Jr. ed., 1990) (commenting on the different interpretations of international terrorism).

⁵³ Travalio & Altenburg, *supra* note 4, at 99.

⁵⁴ Gross, *supra* note 5, at 202; see also Sofaer, *supra* note 5, at 89–90.

⁵⁵ Charles W. Kegley, Jr., *Introduction to INTERNATIONAL TERRORISM* (Charles W. Kegley, Jr. ed., 1990), at 12 (quoting Christopher C. Joyner); see also Brian M. Jenkins, *International Terrorism: The Other World War*, in *id.*, at 29 (stating that the problem of defining international terrorism has led to the cliché “one man’s terrorist is another man’s freedom fighter”).

discretion to decide which violent acts are acceptable and allows for the subjective definition of some terrorist groups as revolutionaries.⁵⁶

In view of the difficulty in devising a single definition of terrorism that appeals to all nations, a piecemeal approach to combating terrorism was chosen by the international community. It entailed targeting very specific acts of terrorism, occurring in specific situations, circumstances or places.⁵⁷ Contemporary multilateral antiterrorist conventions began to enter the world scene in 1963.⁵⁸ The overarching enforcement mechanism of each of these conventions is the requirement that states either extradite or prosecute the offenders.⁵⁹

This pervasive “extradite or prosecute” scheme indicates that the purpose of the multilateral antiterrorist conventions is to punish and deter private actors rather than agents of states. This mechanism requires states to investigate and prosecute serious offenses. The state is given one of two choices once it obtains custody of the offender(s). It may simply extradite an alleged offender. Or, if a custodial state declines to extradite an alleged offender, it is required without exception and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. The effort at the international level to criminalize terrorism and establish the “extradite or prosecute”

⁵⁶ Raimo, *supra* note 37, at 1482–83.

⁵⁷ See Kash, *supra* note 17, at 73.

⁵⁸ Convention on Offences and Certain Other Acts Committed on Board Aircraft, *opened for signature* Sept. 14, 1963, art. 1, T.I.A.S. No. 6768, 704 U.N.T.S. 219 [*hereinafter* Tokyo Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, art. 1, T.I.A.S. No. 7192, 860 U.N.T.S. 105 [*hereinafter* Hague Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *opened for signature* Sept. 23, 1971, art. 1, T.I.A.S. No. 7570, 974 U.N.T.S. 177 [*hereinafter* Montreal Convention]; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Sept. 23, 1971, art. 2, S. TREATY DOC. NO. 19, 27 I.L.M. 627; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, art. 1, T.I.A.S. No. 8532, 1035 U.N.T.S. 167; *Convention on the Safety of United Nations and Associated Personnel*, G.A. Res. 59, U.N. GAOR, 49th Sess, 84th plen. mtg., U.N. Doc. A/49/59 (1994); Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, *opened for signature* Feb. 2, 1971, 27 U.S.T. 3949, 10 I.L.M. 255 [*collectively hereinafter* Geneva Conventions].

⁵⁹ *Id.*

regime as the primary mechanism for law enforcement is also reflected in regional initiatives.⁶⁰

In an important development, in December 1985, the UN General Assembly adopted Resolution 40/61 which “unequivocally condemned, as criminal, all acts, methods and practices of terrorism whenever and by whomever committed.”⁶¹ The significance of this resolution lay in the fact that after thousands of terrorist orchestrated injuries and deaths, affecting nations across the world, the UN had moved to take away the “shield of legitimacy” behind which terrorists hid.⁶² The world had officially accepted terrorism, not as an expression of political ideologies, but as a crime.⁶³ “The acts which fell previously through the cracks of the multiple definitions were not to be specified, but labeled criminal as a whole.”⁶⁴

II. BASES OF EXTRA-TERRITORIAL CRIMINAL JURISDICTION

The international anti-terrorism treaties mentioned above prohibiting various acts of terrorism specify the obligation of states to extradite or prosecute perpetrators of acts defined as crimes under international law. In a bid to strengthen domestic capacity to implement the treaties, the traditional nationality and territorial link that facilitates the operation of domestic criminal jurisdiction is supplemented by three additional bases that seek to grant states extra-territorial jurisdiction in recognition of the extra-territorial nature of many terrorist acts. These are: the protective principle, the passive personality principle, and the universality

⁶⁰ The 1971 Organization of American States’ Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extortion That Are of International Significance developed a class of crimes known as “common crimes of international significance” which encompass: kidnapping, murder, or other assaults against the life or personal integrity of, or extortion related to such crimes against, “those persons to whom the state has the duty to give special protection according to international law.” *Id.* at art. 1. The Convention provided in Article 5 that, if the state refuses to extradite the offender, the state must prosecute domestically “as if the act had been committed in its territory.” *Id.* at art. 5.

⁶¹ G.A. Res. 40/61, *supra* note 26, at 301.

⁶² Kash, *supra* note 17, at 76.

⁶³ Although the exact crimes to be considered terrorist acts were not designated, previously accepted conventions already provided some answers to that question. *See supra* note 58 for a list of these conventions.

principle.⁶⁵ These bases are important in not only facilitating the enforcement of international treaties, but also the passage of domestic legislation to implement and/or complement transnational treaty obligations. The Article will now turn to consider these.

The Protective Principle

The protective principle provides jurisdiction on the basis of a perceived threat to national security, integrity, or sovereignty⁶⁶ by an extraterritorial offense.⁶⁷ The protective principle permits a state to punish a limited class of crimes (excluding such offenses as violating laws against political expression) committed outside its territory by persons who are not its nationals: offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems.⁶⁸ The focus of the protective principle is the nature of the interest that may be injured, rather than the place of the harm or conduct.⁶⁹ Therefore, the conduct need only be a potential threat to the asserting state's interests or citizens.⁷⁰

The US has passed several laws based on this principle. The discussion of the full range of legislative measures is beyond the scope of this Article. One legislation in this context is worth mentioning - the *Omnibus Diplomatic Security Act* in 1985⁷¹ passed by the US Congress. Its legislative history reveals that the drafters borrowed from some of the

⁶⁴ Kash, *supra* note 17, at 76.

⁶⁵ See Christopher L. Blakesley, *Jurisdictional Issues and Conflicts of Jurisdiction*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS 131, 139–40 (M. Cherif Bassiouni ed., 1988) (defining the universality principle, the protective principle, and the passive personality principle).

⁶⁶ See BLACK'S LAW DICTIONARY 1430 (8th ed. 2004) (defining "sovereignty" as "[t]he supreme dominion, authority, or rule; [t]he supreme political authority of an independent state; [; t]he state itself").

⁶⁷ See Blakesley, *supra* note 65, at 164–72 (defining and applying the protective principle to international terrorism).

⁶⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 402 cmt. f (1987) [*hereinafter* FOREIGN RELATIONS RESTATEMENT].

⁶⁹ Christopher L. Blakesley, *Jurisdiction as Legal Protection against Terrorism*, 19 CONN. L. REV. 895, 932–33 (1987).

⁷⁰ *Id.* at 933.

⁷¹ 132 CONG. REC. S1,382-88 (daily ed. Feb. 19, 1986). This established the Bureau of Diplomatic Security within the State Department and called upon the Secretary of State to take all necessary actions to ensure the security of US in view of the vulnerability of US facilities and US nationals abroad and the need to protect them.

language in the protective principle.⁷² Congress allowed “an expansive reading of the principle which enables the US and other nations to assert jurisdiction over essentially all attacks against its citizens and interests even though there is no effect occurring within the territory of the forum state.”⁷³

The Passive Personality Principle

The passive personality principle allows the extension of jurisdiction over offenders who victimize citizens of the particular nation seeking jurisdiction.⁷⁴ It permits a state to apply its laws to an act committed outside its territory by a person who is not its citizen, when the victim of the act was its national.⁷⁵

This principle has been increasingly accepted worldwide as it is applied to terrorist and other organized attacks on a state’s nationals by reason of their nationality, or to assassination of a state’s diplomatic representative or other officials.⁷⁶

The case of *United States v. Benitez*⁷⁷ was one of the first to utilize the passive personality principle against a terrorist. The United States Court of Appeals for the Eleventh Circuit held that the passive personality principle could be used to establish jurisdiction in a case against a terrorist, not a U.S. citizen, who had robbed, assaulted, and conspired to murder U.S. Drug Enforcement Agency (DEA) agents in Columbia.⁷⁸

⁷² For a concise discussion, see Kash, *supra* note 17, at 80, who notes that Congress realized that one-half of the terrorist incidents in the previous seventeen years were aimed at US interests and citizens. Congress therefore sought to address “the protection of its citizens, the ability to maintain foreign policy, interstate and foreign commerce, and business travel and tourism.”

⁷³ *Id.*, at 80.

⁷⁴ See Blakesley, *supra* note 65, at 172–78.

⁷⁵ FOREIGN RELATIONS RESTATEMENT, *supra* note 68, § 402 cmt. g.

⁷⁶ Kash, *supra* note 17, at 81; FOREIGN RELATIONS RESTATEMENT, *supra* note 68, § 402 cmt. g.

⁷⁷ *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985). The principle was also at play in *United States v Yunis*, 924 F. 2d 1086 (D.C. Cir. 1991), wherein the court applied the passive personality principle codified in the Hostage Taking Act, 18 U.S.C. § 1203 (West 1984). The U.S. was able to assert jurisdiction as two of the passengers on the hijacked Royal Jordanian Airlines plane were U.S. citizens; thus the U.S. could prosecute Yunis, who led the Lebanon’s Amal Militia in the hijacking, because “the offender or the person seized or detained (was) a national of the U.S.” *Id.*

⁷⁸ *Benitez*, *supra* note 77, at 1316.

The Universality Principle

The most broadly worded jurisdictional base is the universality principle. It is premised on the notion that acts of terrorism are crimes against humanity and thus allow a state to prosecute an offender on behalf of the world.⁷⁹ This principle permits a state to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy or hijackings, where there is no connection between the territory and the offense or of nationality with the persons involved.⁸⁰ Therefore, the location of the terrorist act is irrelevant as are the nationalities of both the offender and offended. The crimes encompassed by this principle are considered so brutal and heinous that any state within the community of nations may prosecute the accused.⁸¹

Whether or not the universality principle applies to “treaty crimes” which predominantly include terrorist related offenses encapsulated in international and domestic laws remains a subject of great debate and, not infrequently, controversy. Domestic jurisprudence generally shies away from recognizing universal jurisdiction as establishing the basis for prosecuting overseas terrorist crimes. Thus in 1984, in *Tel-Oren v. Libyan Arab Republic*, the United States Court of Appeals for the District of Columbia ruled that terrorism did not constitute a violation of the law of nations.⁸²

⁷⁹ See Blakesley, *supra* note 65, at 139–40.

⁸⁰ FOREIGN RELATIONS RESTATEMENT, *supra* note 68, § 404. “Like the pirate of yore, the terrorist is imagined to be the enemy of all (civilized) mankind and therefore subject to capture by any state and subject to every state’s jurisdiction.” See Travaglio & Altenburg, *supra* note 4, at 105–6.

⁸¹ Universal jurisdiction allows any nation to prosecute offenders for certain crimes even when the prosecuting nation lacks a traditional nexus with either the crime, the alleged offender, or the victim. Courts developed this doctrine centuries ago to address piracy and later extended it to cover slave trading. The pirate and slave trader were deemed *hostis generis humanis*—the enemy of all people. The history of crimes, treaties, and conventions to combat terrorism, and domestic laws of all nations, “when considered as a whole, make it clear that terrorism—including hostage taking or kidnapping or wanton acts of violence against innocent civilians—is really a composite term including all of the separately universally condemned offenses, and thus triggers the universality theory of jurisdiction.” Blakesley, *supra* note 65, at 915.

⁸² *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir 1984), *cert. denied*, 470 U.S. 1003 (1985). While just one example, it carries the general tenor of domestic jurisprudence that acknowledges terrorism is an activity that attracts international condemnation, but nonetheless permits them to be viewed as either legitimate means of political protest or labeled as a criminal offense. See also Blakesley, *supra* note 69, at 795–6.

III. USE OF NON-LETHAL FORCE: APPREHENSION OF TERRORISTS IN INTERNATIONAL SPACE

Even though most states have voluntarily undertaken to prosecute or to extradite persons for the most common terrorist crimes such as air piracy and sabotage, “[w]hen States violate these obligations, and especially when they are implicated in the conduct of the terrorists involved, other States are seriously affected.”⁸³ A state which directs agents or allied entities to attack diplomats abroad or to take hostages within its own borders obviously will not order the extradition or prosecution of these perpetrators.⁸⁴ Often, the sad reality is that some nations of the world refuse to condemn terrorism and /or condone it.

[T]he impact of political considerations in the extradition process, and the various degrees of assistance and support some nations provide to terrorist groups, make it virtually impossible to gain custody of terrorists using traditional methods.⁸⁵

As a result, barring extraordinary intervention, perpetrators can escape criminal sanctions for the conduct proscribed in multilateral antiterrorist conventions as well as under domestic legislation. Nations, victimized by terrorists are thus left with no choice but to occasionally assert themselves forcefully in order to apprehend terrorists and bring them to the abducting state for prosecution.

An abduction is the forcible, unconsented removal of a person by agents of one state from the territory of another state. Professor M. Cherif Bassiouni’s assertion that international abductions violate international law by disrupting world order and infringing upon sovereignty and territorial integrity of other states is illustrative of customary international law.⁸⁶ This is in light of the fact that sovereignty is one of the most fundamental

⁸³ Sofaer, *supra* note 5, at 106–07.

⁸⁴ A similar situation occurred during the Iranian hostage crisis of 1979, when militant students, with the acquiescence of the Iranian government, seized the United States Embassy and forty three hostages in Tehran. The International Court of Justice held that the seizure violated two treaties on consular relations, but did not refer to the Hostage Convention. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).

⁸⁵ *Id.* at 85; D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 *TEX. INT’L. L.J.* 1, 50 (1988).

⁸⁶ M. Cherif Bassiouni, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 124 (1974). *Cf.* Andrew Wolfenson, *The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law*, 13 *FORDHAM INT’L L.J.* 705, 707 (1989–90) (asserting that this is customary law, which is subject to change and modification by continued practice within the international community). Kash argues that abductions have a

attributes of international law. Under international law, the government of one country cannot conduct activities in the territory of another country unless acting with the consent of that nation.⁸⁷

“JAMES BOND” STYLE OPERATIONS

“Operation Golden Rod”

On June 11, 1985, Fawaz Yunis and four other terrorists boarded Royal Jordanian Airlines Flight 402 armed with hand grenades and automatic weapons. While the plane was on the ground in Beirut, Lebanon,⁸⁸ Yunis took control of the cockpit and forced the pilot to take off.⁸⁹ The others tied up Jordanian air marshals and held the passengers hostage. The hostages included two American citizens.⁹⁰ Subsequently, an American investigation led to Yunis and “Operation Goldenrod” was put into effect.⁹¹ Undercover FBI agents lured Yunis on to a yacht in the eastern Mediterranean Sea with promises of a drug deal.⁹² He was arrested and transferred to a U.S. Navy ship where he was interrogated for several days.⁹³ After arriving in Washington, D.C., Yunis was arraigned on charges of conspiracy, hostage taking, and aircraft damage.⁹⁴

Commenting on the international law duty of states to prosecute or to extradite hijackers in the case of Yunis, District Judge Barrington Parker observed that nations cannot be permitted to seize terrorists anywhere in the world in an unregulated manner.

degree of acceptance under international law. Kash, *supra* note 17, at 82. The author disagrees with the assertion. Recognition of a given fact is one thing, acceptance another.

⁸⁷ See FOREIGN RELATIONS RESTATEMENT, *supra* note 68, sec. 432 cmt. b (explaining the infringement of sovereignty).

⁸⁸ Yunis, *supra* note 77, at 1089.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* A grand jury added additional aircraft damage counts and a charge of air piracy. Under the Hostage Taking Act, *supra* note 77, since two of the passengers were U.S. citizens, the U.S. was able to assert jurisdiction as “the offender or the person seized or detained (was) a national of the U.S..” The court permitted the U.S. to assert jurisdiction by relying on the universal and passive personality principles of international law jurisdiction.

Governments must act in accordance with international law and domestic statutes. He noted, however, that where a state such as Lebanon, is “incapable or unwilling . . . [to] enforce its obligations under the [Montreal] Convention,” or when a government “harbors international terrorists or is unable to enforce international law, it is left to the world community to respond and prosecute the alleged terrorists.”⁹⁵

The *Achille Lauro* Incident

On October 7, 1985, Palestinian terrorists hijacked the Italian Cruise Ship *Achille Lauro* while it was sailing the Mediterranean Sea with more than four hundred people on board.⁹⁶ It was announced the following day that the terrorists who had commandeered the ship were members of the Palestine Liberation Front. The hijacking lasted two days, during which time a disabled American was murdered and thrown overboard.⁹⁷ The hijackers surrendered to a representative of the Palestine Liberation Organization and were guaranteed safe conduct out of Egypt to an undisclosed location.⁹⁸ As the terrorists were being flown out of Egypt in an Egyptian airliner with Egyptian security men aboard, American naval forces intercepted the plane and forced it to land in Italy at a joint Italian-NATO airbase.⁹⁹ It was immediately surrounded by American commandos. The commandos, in turn, were surrounded by Italian soldiers.¹⁰⁰ After a tense standoff between U.S. and Italian forces, the Italians seized the hijackers along with Abbas and took them into custody pursuant to an agreement reached by the American and Italian governments.

⁹⁵ *Yunis*, *supra* note 77, at 906–07.

⁹⁶ John Tagliabue, *Hijackers of Ship Vow Again to Kill 400 Held Hostage*, N.Y. TIMES, Oct. 9, 1985, at A1.

⁹⁷ Judith Miller, *Hijackers Yield Ship in Egypt*, N.Y. TIMES, Oct. 10, 1985, at A1.

⁹⁸ *Id.*

⁹⁹ Bernard Gwertzman, *Reverberations: The U.S. May Pay a High Price for Its Triumph*, N.Y. TIMES, Oct. 20, 1985, at D1.

¹⁰⁰ The Italians brought criminal charges against the terrorists, but refused American requests to hold Abbas for an investigation due to lack of evidence. The day after American arrest warrants were issued for Abbas and the four hijackers, Abbas was allowed to leave Italy aboard a Yugoslavian jet. For details of the unfolding drama see generally Ross Laver, *Striking Back*, MACLEAN'S, Oct. 21, 1985, at 32, 36; Jill Smolowe, *Piecing Together*

Reacting to this incident, international law expert Andreas Lowenfeld asserted: “we did not violate anybody’s air space, we didn’t hurt anybody, and so I think we didn’t violate international law.”¹⁰¹ While intercepting an Egyptian airliner might in itself be a violation of international law, the breach of international law by Egypt in not taking the terrorists into custody and either extraditing or prosecuting them, according to Lowenfeld, prompted America’s justifiable response to a “worse breach” by Egypt.¹⁰²

The author concludes by noting that seizures of suspected terrorists overseas by arguably constitute a serious breach of the territorial sovereignty of another nation and a violation of international law.¹⁰³ Abducting terrorists in another country’s territory by unauthorized law enforcement agents infringes upon a nation’s sovereignty and breaches international law.¹⁰⁴ This generally creates fertile ground for adverse reciprocal treatment among nations. The consequences of infringing on the sovereignty of another nation may increase tension between states and weaken the fight against overseas terrorism through the use of international law.¹⁰⁵

the Drama, TIME, Oct. 28, 1985, at 31; John Tagliabue, *Italians Attempt to Reassure U.S.*, N.Y. TIMES, Oct. 14, 1985, at A1; Loren Jenkins, *PLO Leader Slips from U.S. Grasp in Italy*, WASH. POST, Oct. 13, 1985, at A1.

¹⁰¹ Stuart Taylor, Jr., *Plane Diversion Raises Legal Issues*, N.Y. TIMES, Oct. 11, 1985, at A11.

¹⁰² *Id.* Many of these same arguments can apply to Italy, Yugoslavia, South Yemen and Iraq for their assistance in helping Abbas avoid extradition and escape justice. The fact that only America wanted to prosecute all of the terrorists, including Abbas, suggests that the other nations had motives other than seeking justice for all of the participants involved in the hijacking.

¹⁰³ See FBI Authority to Seize Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 103d Cong. 16, 23, 31 (1989) [hereinafter FBI Authority to Seize Suspects Abroad].

¹⁰⁴ See FOREIGN RELATIONS RESTATEMENT, *supra* note 68, sec. 432(2) (requiring consent for a state’s law enforcement officers to conduct activities within another state).

¹⁰⁵ See Bryan F. MacPherson, *Building an International Criminal Court for the 21st Century*, 13 CONN. J. INT’L L. 21–23 (1998) (identifying negative implications of sovereignty infringement under international law through the use of self-help); see also Timothy F. Malloy, *Military Responses to Terrorism*, 81 AM. SOC’Y INT’L L.

LEGAL DIMENSIONS RELATING TO ABDUCTION

Breach of State Responsibility

Customary international law holds that a state is normally responsible for those illegalities which it has originated.¹⁰⁶ A state does not bear responsibility for acts injurious to another state committed by private individuals when the illegal deeds do not proceed from the command, authorization, or culpable negligence of the government.¹⁰⁷ However, a state is vicariously responsible for every act of its own forces, of the members of its government, of private citizens, and of aliens committed on its territory. If the state neglects the duties imposed by vicarious responsibility it incurs original liability for the private acts and is guilty of an international delinquency.¹⁰⁸

Under international law, once a government has notice that its territory is being used for the preparation of hostile acts in or against another state, it must take effective steps to prevent those acts in order to satisfy its duty under international law.¹⁰⁹ This would appear

PROC. 287, 299 (1987) 317 (asserting that countries' failure to abide by existing international laws weakens the fight against terrorism abroad).

¹⁰⁶

Customary international law holds that a state is normally responsible for those illegalities which it has originated. A state does not bear responsibility for acts injurious to another state committed by private individuals when the illegal deeds do not proceed from the command, authorization, or culpable negligence of the government. However, a state is responsible vicariously for every act of its own forces, of the members of its government, of private citizens, and of aliens committed on its territory. If the state neglects the duties imposed by vicarious responsibility it incurs original liability for the private acts and is guilty of an international delinquency. No state, however, bears absolute responsibility for international illegalities committed by individuals acting on its territory.

H. LAUTERPACHT, *OPPENHEIM'S INTERNATIONAL LAW*, 337–38, 365 (8th ed. 1995). The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations provides, in part, that a state has a duty to “refrain from organizing, instigating, assisting or participating in . . . terrorist acts in another state. . . .” G.A. Res. 2625, U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/2028 (1970).

¹⁰⁷ Luigi Condorelli, *The Imputability to States of Acts of International Terrorism*, 19 *ISR. Y.B. HUM. RTS.* 233, 239. No state, however, bears absolute responsibility for international illegalities committed by individuals acting on its territory. See *Report of the International Law Commission*, U.N. GAOR, 56th Sess, Supp No 10., at 45, U.N. Doc. A/56/10 (2001), available at [http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(e\).pdf#pagemode=bookmarks](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf#pagemode=bookmarks); *U.S. v Iran*, *supra* note 84, at 74.

¹⁰⁸ Maogoto, *supra* note 19, at 416.

¹⁰⁹ Findlay, *supra* note 85, at 23; The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/2028 (1970) provides, in part, that a state has a duty to “refrain from organizing, instigating, assisting or participating in . . . terrorist acts in another state. . . .”

then to provide reasonable grounds for the assertion that sending agents into a state's territory, specifically targeting an individual who, like a terrorist, is a criminal, does not violate the territorial integrity or political independence of the state.¹¹⁰

In any event, the actions of espionage or law enforcement agents within a nation's territory, though attracting strong condemnation, have never been considered a use of force under international law.¹¹¹ This would appear then to provide reasonable grounds for the assertion by Professor Derek Bowett that sending agents into a state's territory, specifically targeting an individual who, like a terrorist, is a criminal, does not violate the territorial integrity or political independence of the state.¹¹² Bowett's position finds support in Abraham D. Sofaer's postulation that: "a state may cross the border of another state in order to capture a terrorist, and this act will not necessarily be considered a violation of that state's sovereignty."¹¹³

Self-Defense

Article 51 of the UN Charter states that "nothing in this present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations." One school of thought, led by Professor Bowett, asserts that the customary right of self-defense allows a state to use force not only to defend against an armed attack by another state, but also to protect the lives or property of nationals or to ensure a state's political independence against nonmilitary threats.¹¹⁴ Taken to its logical extreme, this argument supports the proposition that injuring civilians in a foreign country may amount

¹¹⁰ DEREK BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 55 (1958); *see also* IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 361 (1963).

¹¹¹ *See* BROWNLIE, *id.*, at 56, where Professor Brownlie argues that actions specifically directed against individuals within the territory of a state do not violate the territorial integrity or political independence of that state.

¹¹² BOWETT, *supra* note 110, at 55; *see also* BROWNLIE, *supra* note 110, at 374–75.

to an attack (in as far as citizens and property are assimilated to the state), as required by Article 51 of the UN Charter, i.e., an attack in response to which one may engage in self-defense.¹¹⁵

Seizures of suspected terrorists overseas by U.S. officials arguably constitute a serious breach of the territorial sovereignty of another nation and a violation of international law.¹¹⁶ This is because sovereignty is one of the most fundamental attributes of international law.¹¹⁷ Under international law, the government of one country cannot conduct activities in the territory of another country unless acting with the consent of that nation.¹¹⁸ Abducting terrorists in another country's territory by unauthorized law enforcement agents infringes upon a nation's sovereignty and breaches international law.¹¹⁹

The Ker-Frisbie Doctrine

U.S. courts have developed what is known as the "Ker-Frisbie Doctrine," which holds that a forcible abduction neither offends due process nor requires a court to free a suspect seized in violation of international law.¹²⁰ Therefore, a court need not divest itself of *in personam* jurisdiction over a defendant based on the method by which the defendant was arrested and brought before the court.¹²¹

¹¹³ Kash, *supra* note 17, at 79.

¹¹⁴ Findlay, *supra* note 85, at 30.

¹¹⁵ See Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 HOUS. J. INT'L L. 309, 312 (1989).

¹¹⁶ See *FBI Authority to Seize Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. 16, 23, 31 (1989) [*hereinafter* *FBI Authority to Seize Suspects Abroad*] (statement of Abraham D. Sofaer, Legal Advisor, U.S. Dep't of State).]

¹¹⁷ *Id.* at 31 (describing sovereignty as "one of the most fundamental attributes of international law").

¹¹⁸ See FOREIGN RELATIONS RESTATEMENT, *supra* note 68, § 432 cmt. b (explaining the infringement of sovereignty).

¹¹⁹ *Id.* § 432(2) (requiring consent for a state's law enforcement officers to conduct activities within another state).

¹²⁰ Kash, *supra* note 17, at 82–83; see also Findlay, *supra* note 85, at 47.

¹²¹ Findlay, *supra* note 85, at 46.

Additionally, American law enforcement officials, relying on statutes making terrorist attacks on Americans overseas federal crimes, like to refer to abductions as “arrests.” Yet despite such court rulings and classifications:

The availability of a U.S. law on which to base the issuance of a warrant may provide law enforcement personnel with the authority to act under U.S. law; it provides no authority, however, to act under either international law or the law of the State whose territorial sovereignty is breached. To be acceptable under international law an abduction must satisfy far more exacting standards than the mere availability of an arrest warrant issued by the State responsible for the action.¹²²

In a bid to tone down the vitriolic tenor of condemnation from the international community regarding infringement of territorial integrity, the US generally has sought to orchestrate abductions in international airspace and in international waters. According to former U.S. Secretary of State George Shultz, it is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace, [or] from attacking them on the soil of other nations. . . . A nation attacked by terrorists is permitted to use force . . . to seize terrorists or rescue its citizens when no other means is available.”¹²³ This is based on the argument that intercepting an aircraft in international airspace will likely not rise to the level of a “threat or use of force against the territorial integrity or political independence of any state” within the meaning of Article 2(4) of the United Nations Charter¹²⁴ In a spirited defense of the U.S. position, Abraham D Sofaer asserts that:

The principle of territorial integrity is a major—and proper—legal constraint to taking actions against terrorists or States that support terrorism. World-class terrorists need bases in which to live and work, to train, to store their weapons, to make their bombs, and to hold hostages. The States in which they locate are almost invariably unable or unwilling to extradite them. An extradition request in such cases will do nothing more than reveal that we know their location, an advantage that would thereby be squandered. The only possible remedies against such terrorists often would require infringement of the territorial integrity of the State in which they are located.¹²⁵

¹²² Sofaer, *supra* note 5, at 106, 110.

¹²³ Terry Richard Kane, *Prosecuting International terrorists in United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT’L L. 294, 339–40 (1987).

¹²⁴ Kash, *supra* note 17, at 84.

Seizures of suspected terrorists overseas by U.S. officials, absent consent, arguably constitute a serious breach of the territorial sovereignty of another nation and a violation of international law.¹²⁶ In a bid to address the inevitable outrage that abductions attract, U.S. cases have held that a court would lose its jurisdiction only if the methods of abduction were “deliberate, unnecessary and [an] unreasonable invasion of the accused’s constitutional rights.”¹²⁷ Additionally, U.S. courts have held that in order for a court to surrender its jurisdiction, the agents’ conduct must be of a “most shocking and outrageous character,” a classification limited to “torture, brutality and similar outrageous conduct.”¹²⁸

In sum, the political and legal reality is that abductions are controversial, politically risky, and dangerous to the individuals assigned the task. The forcible removal of a person, especially protected by a state hostile to the state conducting the abduction, will be treated as criminal conduct, amounting at the least to a kidnapping. Where the State from which the person is taken is not hostile but refuses to extradite the person seized for reasons of policy, abduction is likely to cause a severe strain on relations.¹²⁹

¹²⁵ Sofaer, *supra* note 5, at 106.

¹²⁶ See *FBI Authority to Seize Suspects Abroad*, *supra* note 116. At sovereignty’s core lies the notion of supreme authority within a territory with the State as the political institution in which sovereignty is embodied. Two facets hinge at sovereignty’s core, “internal” and “external.” Sovereign authority is exercised within borders, but also, by definition, with respect to outsiders, who may not interfere with the sovereign’s governance or right to control.

¹²⁷ *U.S. v. Toscanino*, 500 F.2d 267, 275267 (2d Cir. 1974), *reh’g denied*, 504 F.2d 1380 (1974).

¹²⁸ *U.S. ex rel. Julio Juventino v. Gengler*, 510 F.2d 62, 65-66 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975).

¹²⁹ “Almost invariably, the state responsible for an abduction has apologized for the violation of the other state’s sovereignty, and often the individual seized is returned to the state from which he [or /she] was taken.” Sofaer, *supra* note 5, at 110.111. See also Paul O’Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT’L L. 279, 281–82; Martin Feinrider, *Kidnapping*, 8 ENCYCLOPEDIA OF PUBLIC INT’L LAW 357 (1985); Edwin D. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT’L L. 231 (1934); Felice Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT’L L. 265; M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT’L L. 25 (1973); Findlay, *supra* note 85.

D. CONFLICT MANAGEMENT: AN EYE FOR AN EYE

I. TERRORISTS AS WARRIORS: COMBATANTS OR NON-COMBATANTS

In December 1973, the UN General Assembly passed Resolution 3103, which granted legitimacy to conflicts involving the struggle of people against colonial and racist regimes by labeling them as “armed conflicts.”¹³⁰ In essence, it classified participants in such conflicts as legal combatants. One year later, the UN adopted a Definition of Aggression, which justified terrorist activities when terrorism is waged on behalf of self-determination movements or directed against colonial and racist regimes.¹³¹

Many groups have tried to fall within the scope of justified aggression under the UN definition by claiming that their actions are legal expressions of their rights.¹³² The UN has thus contributed to the already muddled discourse on terrorism by seeming to grant a limited amount of legitimacy to groups who are responsible for acts that have been labeled “terrorism.” Matters are not helped by states that often gave mixed signals either in condemnation or in tacit support of certain acts that would appear to fall in the category of terrorism. The end result is the international community’s failure to consistently interpret an act as an unlawful terrorist attack or a legitimate act of a freedom fighter.

¹³⁰ *Basic Principles of the Legal Status of Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*, G.A. Res. 3103, U.N. GAOR, 28th Sess., Supp. No. 30, at 142, U.N. Doc. A/9030 (1973), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/281/75/IMG/NR028175.pdf?OpenElement> (last visited Feb. 9, 2005).

¹³¹ *Definition of Aggression*, *supra* note 20, at 143142.

¹³² The variety of classifications used, resolutions adopted, and laws enacted only increase the difficulty in differentiating between a terrorist act and a legal and legitimate act of a freedom fighter. Kash, *supra* note 17, at 73. Terrorism is generally conducted by persons who do not fall within the category of combatants, but they are also not in the nature of non-combatants or protected persons. Terrorism is generally directed at persons who are not combatants; the usual targets are not military personnel or government officials. The difficult question that continues to persist is: What what is the status of the terrorist in international law? For mention of this conundrum see, e.g., Alberto R. Coll, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC’Y INT’L L. PROC. 297, 298 (1987); Emanuel Gross, *Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have a Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT’L & COMP. L. 721 (2002).

SLIPPERY LEGAL GROUND: POSITIONING THE TERRORIST IN THE LAW OF ARMED CONFLICT FRAMEWORK

International law distinguishes between those who participate in the armed conflict and those who do not,¹³³ as do the various Geneva Conventions.¹³⁴ Generally, soldiers fall within the former definition, as indeed do members of other armed militias.¹³⁵ These Conventions also afford defenses to combatants who have been captured by the enemy during the course of the fighting¹³⁶ by classifying them as prisoners of war.¹³⁷

However, the various Geneva Conventions do not refer to the legal status of civilians who do not fall within the scope of the term “combatant,” yet take an active part in the fighting.”¹³⁸ Recognition of the need for such a definition grew with the proliferation of civil wars and revolutionary and/or national liberation movements in the 1960s and 1970s, necessitating a need for the law of armed conflict to cover these belligerent groups and thus strengthen adherence to international humanitarian law. Accordingly, in 1977, this issue was addressed in Additional Protocol I to the 1949 Geneva Conventions.¹³⁹ The amended Geneva Conventions now provided prisoner of war protection for fighters who did not fall within the classic structure of conventional wars—the guerilla or freedom fighter.

Even with regard to these other groups, it is contemplated that the fighters are “rebel groups” or “non-state actors,” such as organized armed militia or paramilitary groups, with an element of organization and command structure approximate to or inherent in armed forces, especially of a political or revolutionary color. Importantly, they should conduct themselves

¹³³ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12 1949, art. 43, para. 1, 6 U.S.T. 3114, 75 U.N.T.S. 287.

¹³⁴ See Geneva Conventions, *supra* note 58.

¹³⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 133, 75 U.N.T.S. at 288-292. Civilians are protected in situations of struggle and states participating in the war are under an obligation to prevent any possible harm or suffering to such civilians.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Gross, *supra* note 5, at 202

¹³⁹ See JUDITH GAIL GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 100–106 (1993); *see generally* HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS (1988).

in accordance with the rules of combat in international law in order to benefit from the various protections.¹⁴⁰ It is evident from the final draft of the Protocol that the

protection of the interests of the civilian population was preferred over full protection of freedom fighters. The requirements that those freedom fighters refrain from intermingling with the civilian population, that they wear uniforms or other recognizable means of identification, and that they carry their weapons openly, were specifically intended to ensure that other parties to the conflict would know against whom they were fighting. These requirements were meant to ensure that civilians who were not combatants would not be endangered.¹⁴¹

Where then do terrorists fall? They are an enemy, but they do not comprise soldiers of a state or belligerent group; they wear no uniforms, have no fixed bases, and pursue uncertain goals with terror as their weapon of choice.¹⁴²

Israel, the U.S., and the United Kingdom all refused to sign Additional Protocol I. They argued, *inter alia*, that it would enable terrorist organizations to be recognized as combatants, and thereby allow them to be granted the rights of prisoners of war.¹⁴³ In their view it was not desirable to grant terrorists rights, such as the right not to be tried for their actions.¹⁴⁴

¹⁴⁰ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, art. 1, 1125 U.N.T.S. 609, 16 I.L.M. 1442. Article 1 sets out the threshold of the material field of application of the rules to non-regular forces. *See generally* Peter Rowe, *Liability for "War Crimes" During a Non-International Armed Conflict*, in 34 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE [REVIEW OF THE MILITARY RIGHT AND THE RIGHT OF WAR] 149, 152, 157 (1995).

¹⁴¹ Gross, *supra* note 5, at 203.

¹⁴² *See, e.g.*, Robert D. McFadden, *A Nation Challenged: In Profile; Bin Laden's Journey From Rich, Pious Boy to the Mask of Evil*, N.Y. TIMES, Sept. 30, 2001, at B1.

¹⁴³ Gross, *supra* note 5, at 5.

¹⁴⁴ Professor Frits Kalshoven, who participated in a 1985 panel on the question "Should the Law of War Apply to Terrorists?," asserted that terrorist organizations and terrorists are not entitled to the status of combatants:

In these circumstances, a simple statement that the law of armed conflict is applicable to terrorists seems of little practical utility. Who would be bound by such an instrument, and to what effect? Would, for instance, the authorities acquire any additional legal powers that they do not already possess under their constitutional provisions? Would they become bound to respect any special rights of terrorists not ensuing from existing human rights instruments? Again, are we to assume that terrorists must respect the law of armed conflict—with its express prohibition on acts of terror?

Antigoni Axenidou, *Should the Law of War Apply to Terrorists?*, 79 AM. SOC'Y INT'L L. PROC. 109, 118 (1985) (1987) (containing panel discussion).

Terrorism does not exactly comport with the definition of war.¹⁴⁵ However some scholars classify it as irregular or low intensity warfare that involves armed attacks against both government and non-government personnel for political purposes.¹⁴⁶ In this regard, approaching certain acts of terrorism as a war¹⁴⁷ may be a more appropriate tack because the military is better equipped for low intensity warfare and is not limited by restrictions placed on law enforcement.¹⁴⁸ Based on this reality and policy considerations, and despite the legal and political murkiness surrounding the status of terrorists in the context of the legal framework governing armed conflict, the maturation of international terrorism led the U.S. to increasingly perceive transnational terrorism as acts of war.¹⁴⁹

II. LIMITED LETHAL MILITARY FORCE: ASSASSINATIONS OR “SURGICAL STRIKES”

Assassination in historical context, and in the light of its usage in the laws of war, is, simply, “any unlawful killing of particular individuals for political purposes.”¹⁵⁰ This position accords with the view that: “Enemy combatants who fall into the hands of a state ... may not be summarily executed, however heinous their personal misdeeds.”¹⁵¹ However, this rule has never “preclude[d] attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.”¹⁵² Such attacks have been accepted as legal without significant controversy.¹⁵³

¹⁴⁵ See BLACK’S LAW DICTIONARY, *supra* note 66, at 1583 (defining “war” as “hostile contention by means of armed forces, carried on between nations, states, or rulers, or between citizens in the same nation or state”).

¹⁴⁶ Malloy, *supra* note 105, at 299 (asserting that the military should destroy terrorist planning and training facilities in nations harboring those terrorists).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 287 (arguing that the use of military action against terrorism as a form of low intensity warfare would be more effective and beneficial in long-term deterrence, short-term prevention, and punishment than political, diplomatic, economic, and legal responses).

¹⁴⁹ See 144 CONG. REC. S3002-3 (daily ed. Apr. 1, 1998) (statement of Sen. Domenici) (emphasizing that the international terrorist threat is not the same as in the past).

¹⁵⁰ Sofaer, *supra* note 5, 117.

¹⁵¹ *Id.* at 120.

¹⁵² *Id.*

¹⁵³ *Id.*

The Hague Convention of 1907, which has become binding customary international law,¹⁵⁴ prohibits the killing of individuals belonging to the other side, through the use of treacherous or deceitful means, during the course of the war. This prohibition is reaffirmed in Article 37 of Additional Protocol I to the Geneva Conventions of 1949.¹⁵⁵ The U.S. encapsulates the international law position through national proclamations and laws.¹⁵⁶

Despite international and domestic prohibition, assassination is seen as having several advantages. They include pulverizing tactical and organizational capability, preempting attacks, meting out justice to operational commanders, and limiting collateral damage that inevitably results from large-scale military incursions. These practical and operational attractions have led the U.S. to occasionally use assassination.¹⁵⁷ This was evident on November 4, 2002, when an unmanned CIA Predator drone in Yemen launched two “Hellfire” missiles striking a car carrying Al Qaeda operatives, including the Al Qaeda chief in that country who was wanted for the bombing of the USS Cole.¹⁵⁸

Assassination however, is a highly controversial counter-terrorism measure in view of the fact that states are obliged by international law not to carry out assassinations. The U.S.

¹⁵⁴ Nations must comply with customary international regardless of whether they have signed the convention that first introduced it. See YORAM DINSTEIN, *THE LAWS OF WAR* 19–22 (1983). Customary law is considered to embrace principles accepted by civilized states. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 3 Bevans 1179.

¹⁵⁵ See Protocol Additional to The Geneva Conventions of 1949 Relating to the Protection of Victims of International Armed Conflict, *opened for signature* Dec. 12, 1977, art. 37, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [*hereinafter* Additional Protocol I].

¹⁵⁶ Compare U.S. DEP’T OF ARMY, FM 27-10: DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE 17 (“[Article 23b of the 1907 Hague Regulations] is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy “dead or alive”); with Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1982), *reprinted in* 50 U.S.C. § 401 (West 2005) 12333, (“No person employed or acting on behalf of the US Government shall engage in, or conspire to engage in assassination.”). This order, issued by then-President Reagan, which remains in effect and is binding on all executive branch personnel, is derived from a virtually identical provision issued by the then U.S. President Ford in 1976. Exec. Order No. 11,905, 3 C.F.R. 90, 99 (1977), *reprinted in* 50 U.S.C. § 401 (West 2005). The only substantive change in the prohibition since that date is that the earliest version prohibited “political” assassination; the word “political” was deleted from the order by President Carter in 1978. Exec. Order No. 12,036, 3 C.F.R. 112, 129 (1979), *reprinted in* 50 U.S.C. § 401 (West 2005).

¹⁵⁷ Assassination, though, is very evident in Israel’s responses to suicide bombings and other terrorist acts. See Harel Amos & Gideon Alon. *IDF Lawyers Set “Conditions” For Assassination Policy*, HA’ARETZ (Isr.), Feb. 4, 2002, *available at* www.haaretzdaily.com.

¹⁵⁸ Sources: U.S. kills Cole Suspect, CNN ONLINE, Nov. 5, 2002, *at* <http://www.cnn.com/2002/WORLD/meast/11/04/yemen.blast/> (last visited Feb. 9, 2005).

and Israel claim that occasionally operational necessities override the law, as “surgical strikes” target the brains behind terrorist activities and thus offer a discriminating counter measure that limits collateral civilian casualties often found in larger scale military operations.¹⁵⁹ However, there is both legal and moral distaste for official killing, and especially the intentional killing of specific individuals for political and policy reasons.¹⁶⁰

ASSASSINATION: MORAL DILEMMA BUT EFFECTIVE RESPONSE?

From a tactical standpoint, a limitation on assassination undoubtedly disadvantages states in a contest with states or groups that routinely resort to murder, even of citizens having nothing to do with their political objectives. The major dilemma is whether there can be a proper use of assassination?

It is accepted that in domestic cases of terrorism, the state is entitled to use force against terrorists operating within its own territory. However, even this entitlement is subject to constraints. If no imminent danger is anticipated, it is forbidden to use force against the terrorists. A terrorist may not be killed for his [or her] past actions, thereby preventing him [or her] from realizing his [or her] right to a fair trial.¹⁶¹

In other words, force may not be used against a terrorist as a punitive act, but only as a preemptive act. Similarly, the state is bound and subject to a number of core human rights, both under international and domestic law, that are eviscerated when terrorists (actual or suspected) are assassinated.¹⁶² Whether or not the assassination of terrorists or perceived terrorists is justified presents not just a legal dilemma but a moral one as well:

If the killing of terrorists will prevent the death, or serious injury, of many innocent people, then, at least according to the principle of moral utilitarianism, it would seem possible to kill them. The justification of any action as proper, according to this approach, is determined by whether the action will lead to the best possible result among all the possible outcomes in that situation. In other words, one must aspire to the maximum general good in each and every situation. If the good result ensuing

¹⁵⁹ See, e.g., *The Surgical Strike is a Myth: Foreign Report*, JANE'S DEFENCE WKLY., Sep. 18, 2001 at http://www.janes.com/security/international_security/news/fr/fr010918_1_n.shtml (last visited Feb. 21, 2005); “Precise” and “Surgical”: *NBC's Bombing Claims Lack Verification*, Mar. 26, 2003 at <http://www.fair.org/activism/nbc-bombs.html> (last visited Feb. 21, 2005).

¹⁶⁰ Sofaer, *supra* note 5, at, 116–121.

¹⁶¹ Gross, *supra* note 5, at 224; see Jami Melissa Jackson, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications*, 24 N.C. J. INT'L L. & COM. REG. 669, 686–687 (1999).

¹⁶² Gross, *supra* note 5, at 224.

from the performance of the act outweighs the bad ensuing from it, then it must be performed, irrespective of whether the act entails killing, torture, or the like.¹⁶³

But even in the case of ticking bomb situations that Gross's above quotation seems to allude to, that a particular terrorist will cause great damage or deaths of innocent civilians must be proved to a relatively high degree of certainty.¹⁶⁴

The decision to foil a terrorist act by killing the terrorists must be made with thorough consideration and after exhausting all other possible actions. If there is no other reasonable way of preventing the terrorist action and it is possible to kill enemy soldiers who are about to attack one's army, then it is possible to kill the terrorists.¹⁶⁵

Attacks aimed at specific individuals potentially involve claims of "assassination," which is prohibited under international law. Prohibiting "assassination" is legally, militarily, and morally sound. Assassination is in essence intentional and unlawful killing—murder—for political purposes. Besides the use of limited force, states often respond with large scale military force in situations where terrorist acts are tied to state-sponsors. The Article next turns to an analysis of this measure.

III. LARGE-SCALE MILITARY FORCE: TERRORISM AS AN ACT OF WAR

In the early years of the UN, the use of military force as a counter-terrorism measure was debated almost entirely in terms of Israeli counter-terror practice.¹⁶⁶ Many emphasized that Israel's defiance of the UN and UN war-decision law destroyed respect for the UN and international law. However, UN debates emphasizing the illegality of the preemptive

¹⁶³ *Id.* at 229–230.

¹⁶⁴ *Id.* at 234.

¹⁶⁵ *Id.* at 234.

¹⁶⁶ This is not surprising considering that a Palestinian group (the militant Popular Front for the Liberation of Palestine) was responsible for hijacking an Israeli El Al commercial flight on July 22, 1968, the incident that is considered to mark the beginning of the current era of international terrorism. As Dr Bruce Hoffman notes, "Although commercial planes had often been hijacked before, this was the first clearly political hijacking." Hoffman, *supra* note 14.

character of the Israeli actions suffered from a tendency to mix *jus ad bellum* with *jus in bello* thus preventing development of any meaningful discourse.¹⁶⁷

The debate on the use of military force was renewed with the U.S. attack on Libya on April 15, 1986, causing a different dimension of the complexities of the Arab-Israeli conflict to come to light . The U.S. (whose interests and citizens were and are a primary target of terrorists) replaced Israel in the classic confrontation between the Security Council's restrictive view of counter-terror self-defense and the concomitant permissive view of war of national liberation terrorism, as well as the long-held Israeli view of the efficacy of counter-terror self-defense and deterrence.

The U.S. had reached the conclusion that counter-terror self-defense and deterrence warranted preventive/retaliatory military attacks. The new U.S. policy was of particular interest as it was unencumbered by the political and legal complexities of Israel involved in a war against terror, suppression of resistance, and obligations of an occupying power all on one tapestry.

THE COLD WAR ERA: TERRORIST ACTION AND REACTION

State Responsibility

It is beyond dispute that states are directly responsible under international law for controlling terrorists operating within their borders and have a responsibility to refrain from actively supporting terrorist organizations.¹⁶⁸ As early as 1970, the UN General Assembly, in

¹⁶⁷ Many thorny questions relating to the Arab-Israeli Conflict served to split the international community regarding the use of military force against an uncertain mosaic of a war of national liberation and a war against terrorism. Many difficult issues surround the conflict, which pose a number of complex issues including: Doesn't international law permit an insurgent force directed toward support of fundamental rights and rules? Aren't insurgents entitled to use certain levels and types of force against a regime that represses their preemptory right to "self-determination" and hence "national liberation?" Isn't Israel necessarily bound to whatever its preservation and safety require? Hasn't a kind of holy war warrant been extended to the PLO where *jus ad bellum* judgments about the war of national liberation have swallowed up any concern for the war-conduct, *jus in bello* issues?

¹⁶⁸ Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217, 245, 261 (1976).

Resolution 2625, made it clear that a state's mere acquiescence in terrorist activity emanating from its soil is a violation of the state's international obligations.¹⁶⁹ Numerous other resolutions from both the UN General Assembly and the UN Security Council and other contemporary international instruments¹⁷⁰ leave no doubt that harboring or supporting terrorist groups violates a state's responsibility under international law.¹⁷¹

Several decisions of arbitral tribunals have granted substantial damages against states in the past for failing to prevent persons within their jurisdictions from conducting hostile activities against other states. Primary examples include the \$15,500,000 awarded to the U.S. in the late 19th century in a proceeding against Britain for allowing a Confederate warship (*The Alabama*) to be completed and to leave British territory.¹⁷²

Similarly, in the Texas Cattle Claims arbitration, the U.S. successfully pursued a claim against Mexico with regard to the actions of Mexican-based outlaws and military personnel. The American-Mexican Claims Commission found Mexico liable on four legal bases for raids into Texas by outlaws or military personnel, namely:

- (1) active participation of Mexican officials in the depredations;
- (2) permitting the use of Mexican territory as a base for wrongful actions against the US and the citizens thereof, thus encouraging the wrongful acts;
- (3) negligence, over a long period of years, to prosecute or otherwise to discourage or prevent the raids;
- and (4) failure to cooperate with the Government of the US in the matter of terminating the condition in question.¹⁷³

¹⁶⁹ G.A. Res. No. 2625, U.N. GAOR, 25th Sess., Supp.Doc No. 28, U.N. Doc. No. A/8018 (1970).

¹⁷⁰ See, e.g., G.A. Res. No. 40/61, U.N. GAOR, 40th Sess., 108th plen. mtg., U.N. Doc. A/RES/40/61 (1985); S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg., U.N. Doc S/RES/748 (1992); *Draft Articles on Responsibility of States for Internationally Wrongful Acts: Report of the International Law Commission on the Work of its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001).

¹⁷¹ In November 2001, the International Law Commission completed work on its Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Article 8 of these Draft Articles provides:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.

International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts: Report of the International Law Commission on the Work of its Fifty-Third Session*, U.N. GAOR, 56th Sess. 53rd sess, Supp. No. 10, U.N. Doc. A/56/10 (2001). Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 53rd Sess., G.A. Supp. No. 10 (A/56/10) (2001).

¹⁷² This vessel subsequently distinguished itself as the most successful Confederate raider capturing or destroying more than sixty Union vessels. JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW 999 (1970).

The position by the arbitral tribunals has been reaffirmed by the International Court of Justice (ICJ). In the *Corfu Channel Case* as well as the *Iran Hostage Case*, the ICJ found that Albania and Iran, respectively, had a duty under international law to make every reasonable effort to prevent illegal acts against foreign states.¹⁷⁴ They had acted unlawfully by knowingly allowing their territory to be used for illegal acts.¹⁷⁵ In the setting of terrorism, the circumstances are much the same; a state is bound under international law to prevent the use of its territory as a base or sanctuary. The nature of the terrorist threat however dictates decisive action by a state to deal with the menace and forecloses a wait to facilitate the use of peaceful avenues.

The idea that if a state is unable to or unwilling to effectively police its territory, then a victim state can reach across borders and take necessary action, was not a new one. In 1818, the U.S. established the right to enter the territory of another state to prevent terror attacks, where the host was unable or unwilling to quell a continuing threat when it sent troops into Spanish Florida.¹⁷⁶

In contemporary times, the same problem of state sponsorship of illegal activity that includes offering safe haven and enhancing capabilities of insurgents persists, only this time, the threat is more urgent—international terrorism. This strikes at the heart of a nation’s duty to protect its citizens and national interests. States that sponsor terrorism have a great capacity to evade responsibility relating to the actions of terrorist groups they support.

¹⁷³ American Mexican Claims Comm’n, *Report to the U.S. Sec’y of State, reprinted in* MARJORIE M. WHITEMAN, 8 DIGEST OF INTERNATIONAL LAW 748, 753 (1967).

¹⁷⁴ *Corfu Channel Case* (UK v. Alb.), 1949 I.C.J. 4, 22 (Dec. 5); *U.S. v. Iran*, *supra* note 84, at 32–33, 36.

¹⁷⁵ *Id.*

¹⁷⁶ For years, southern plantation owners and white farmers lost runaway slaves to the Florida swamps with friendly Seminole and Creek Indians offering refuge to the slaves and leading raids against white settlers. The U.S. government could do little about the problem because the swamps lay deep within Spanish Florida. President James Monroe directed General Andrew Jackson to proceed against the Seminole Indians, with the explanation that the Spanish were bound by treaty to keep their Indians at peace, but were incompetent to do so. Jackson invaded Florida in 1818, burned Seminole villages, hanged tribal leaders, captured Pensacola and deposed the Spanish governor. See JOHN B. MOORE, 2 A DIGEST OF INTERNATIONAL LAW, 404 (1906).

For years states have supplied funds, arms, and sanctuary to known terrorist organizations without being treated as having responsibility for the terrorist actions. In such situations, states claim they have no knowledge of or do not support terrorist actions, and they explain their support for the groups involved on the ground that the groups have other, legitimate purposes.¹⁷⁷

The end result is that states that sponsor terrorism attempt to protest that they are at “arms-length” and thus not part and parcel of the terrorist enterprise. Even in situations where state complicity is established, states often claim that they have warned suspected terrorist organizations, that they will expel them if proved guilty of a terrorist act.¹⁷⁸

Attacks on Terrorist Infrastructure and Camps

In December 1985, several airline passengers were killed by terrorists in simultaneous attacks at the Rome and Vienna airports, including five Americans; many more were wounded.¹⁷⁹ Immediately after these attacks in which several civilians were killed, the Libyan leader Muammar Qadhafi labeled the killers as “heroes.”¹⁸⁰ The U.S. was incensed and moved swiftly to impose drastic sanctions short of force.¹⁸¹ Then, U.S. President Ronald Reagan had this warning:

By providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the U.S. under established principles of international law, just as if he [Qadhafi] had used its own armed forces If these [economic and political] steps do not end Qadhafi’s terrorism, I promise you that further steps will be taken.¹⁸²

¹⁷⁷ Sofaer, *supra* note 5, at 100–101.

¹⁷⁸ See, e.g., Hafez Assad et. al., *Following An Independent Course*, TIME, Apr., Ap 3, 1989, at 30 (statement of Hafez Assad, President of Syria)..

¹⁷⁹ See, e.g., Sofaer, *supra* note 5, at 103.

¹⁸⁰ Quoted in Sofaer, *supra* note 5, at 103.

¹⁸¹ *Id.*

¹⁸² President’s News Conference, PUB. PAPERS 17–18 (Jan. 7, 1986). A few weeks after Reagan’s warning, on January 15, 1986, then U.S. Secretary of State, George P. Shultz repeated the point:

There should be no confusion about the status of nations that sponsor terrorism against Americans and American property. There is substantial legal authority for the view that a state which supports terrorist or subversive attacks against another state, or which supports or encourages terrorist planning and other activities within its own territory, is responsible for such attacks. Such conduct can amount to an ongoing armed aggression against the other state under international law.

Secretary George Schultz, Address Before the Low-Intensity Warfare Conference at the National Defense University, (Jan. 15, 1986), in DEP’T ST. BULL., March 1986, at 15, 17.

Shortly after Shultz's statement, on April 5, 1986, Le Belle discotheque in West Germany, a popular hang-out for the off-duty American servicemen was bombed leaving two Americans dead and one hundred fifty four persons injured.¹⁸³ U.S. intelligence indicated Libya sponsored this terrorist attack¹⁸⁴ and was about to order additional attacks against U.S. personnel and facilities throughout Europe.¹⁸⁵ President Reagan responded to this threat by bombing military targets in Tripoli and Benghazi, Libya on April 14, 1986.¹⁸⁶

In deciding to use military force against Libya, deterrence certainly was a major, if not the primary, consideration.¹⁸⁷ President Reagan emphasized that the U.S. would act "with others if possible and alone if necessary to insure that terrorists have no sanctuary anywhere."¹⁸⁸ Despite the U.S. claim that the Berlin bombing had actually been ordered by the Libyan government, the U.S. action was widely condemned.¹⁸⁹ The UN General Assembly adopted a resolution condemning the U.S..¹⁹⁰ A proposed Security Council

¹⁸³ John Tagliabue, *2 Killed, 155 Hurt in Bomb Explosion at Club in Berlin*, N.Y. TIMES, Apr. 6, 1986, at A1. One serviceman was killed in the blast; another died of wounds shortly after.

¹⁸⁴ President Ronald Reagan, Address to the Nation (Apr. 14, 1986), reprinted in DEP'T OF STATE BULL., June 1986, at 8.

¹⁸⁵ Richard Halloran, *U.S. on World Alert*, N.Y. TIMES, Apr. 16, 1986, at A18.

¹⁸⁶ David Turndorf, *The U.S. Raid on Libya: A Forceful Response to Terrorism*, 14 BROOK. J. INT'L L. 187, 187 n.1 (1988).

¹⁸⁷ As Major Phillip A. Seymour notes:

Although President Reagan cited self-defence under Article 51 of the UN Charter as the legal basis for the air strike, his explanation implicitly included retaliation (ie, reprisal) as an additional justification. ... In deciding to use military force against Libya, deterrence certainly was a major, if not the primary, consideration. ... This interpretation is supported by then Vice President George Bush's comments a month prior to the Libyan raid when he stated that American policy in combating terrorism would be one of a willingness to 'retaliate'.

Major Phillip A. Seymour, *The Legitimacy of Peacetime Reprisal as a Tool against State-Sponsored Terrorism* 39 NAVAL L. REV. 221, 223 (1990). See also President Ronald Reagan, *International Terrorism*, in U.S. DEP'T OF STATE BUREAU OF PUB. AFFAIRS, SPEC. REP. NO. 24, 1986, at 1; see also the concise analysis by Gregory Francis Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 197-200 (1987).

¹⁸⁸ President Ronald Reagan, *supra* note 187, at 1.

¹⁸⁹ Steven R. Weisman, *Parley in India Condemns Bombings*, N.Y. TIMES, Apr. 16, 1986, at A16; John Tagliabue, *OPEC Ministers Reject Libya Appeal*, 4; A20, col. 1; N.Y. TIMES, Apr. 16, 1986, at A20; Bernard Gwertzman, *Hanoi, Citing Attack, Suspends Talks on Missing*, N.Y. TIMES, Apr. 19, 1986, at A4.

¹⁹⁰ G.A. Res. No 41/38, U.N. GAOR, 41st Sess., 78th plen. mtg., U.N. Doc. No. A/RES/41/38 (1986).

resolution condemning the U.S. action failed to pass owing to vetoes by the U.S., the United Kingdom, and France.¹⁹¹

Retaliatory Strikes

When the UN Charter was drafted in 1945, the right of self-defense was the only included exception to the prohibition of the use of force, though customary international law had previously accepted reprisal, retaliation, and retribution as legitimate responses as well.¹⁹² Since 1953, the use of force by way of reprisals has been strongly condemned by the UN as an illegal use of force under the UN Charter.¹⁹³ Though some in the international community would argue that reprisal action is inherent to maintaining security, most states condemn the practice.¹⁹⁴

In the 1980s, frustration with the legal strictures inherent in the concept of self-defense in the face of the ever-increasing threat of terrorism and the inability to root out terrorist groups, would lead the U.S. down the path that Israel had embarked on many years earlier—a resort to retaliatory strikes against terrorist cells located in sovereign states.

The US stance of “passive, reactive and patient defense response”¹⁹⁵ to terrorism of the early 1970s shifted to a “no compromise” and very proactive approach.¹⁹⁶ In National Security Decision Directive 138 (NSDD 138), signed on April 3, 1984, President Reagan signaled that as far as the executive branch was concerned, the debate over whether military

¹⁹¹ Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 47 (2002).

¹⁹² Reprisal allows a state to commit an act that is otherwise illegal to counter the illegal act of another state. Retaliation is the infliction upon the delinquent state of the same injury that it has caused the victim. Retribution is a criminal law concept, implying vengeance that is sometimes used loosely in the international law context as a synonym for retaliation. *See generally* MALCOLM N. SHAW, *INTERNATIONAL LAW* 777–91 (4th ed. 1997).

¹⁹³ BOWETT, *supra* note 110, at 13–14.

¹⁹⁴ Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations’ Emerging Role*, 45 NAV. L. REV. 217, 225 (1998).

¹⁹⁵ Shirleyce Manning, *The United States’ Response To International Air Safety*, 61 J. AIR L. & COM. 505, 519 (Dec. 1995–Jan. 1996).

¹⁹⁶ Ronald D. Crelinsten & Alex P. Schmid, *Western Responses to Terrorism: A Twenty-Five Year Balance Sheet*, in *WESTERN RESPONSES TO TERRORISM* 307 (Alex P. Schmid & Ronald D. Crelinsten eds., 1992).

force was within or without the range of counter-terrorism measures was over. Defense Department official Noel Koch explained that NSDD 138 “represent[ed] a quantum leap in countering terrorism, from the reactive mode to recognition that proactive steps [were] needed.”¹⁹⁷ Henceforth, the U.S. would use military force in both pre-emptive and retaliatory scenarios with an aim of ensuring swift and effective retribution.

The U.S. policy position that “... retaliation against terrorist attacks is a legitimate response and an expression of self-defense”¹⁹⁸ was practically expressed by Israel on October 1, 1985. Six F-15 Israel fighter-bombers unleashed a barrage of bombs on the headquarters of the Palestine Liberation Organization in a suburb of Tunis, the capital of Tunisia, responding to alleged terrorist attacks.¹⁹⁹ Israel Defense Minister, Yitzhak Rabin seemed to be almost echoing U.S. policy when he stated: “We decided the time was right to deliver a blow to the headquarters of those who make the decisions, plan and carry out terrorist activities.”²⁰⁰

The UN Security Council was swift to vigorously condemn the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the UN, international law, and norms of conduct.²⁰¹ The strike against Libya following the

¹⁹⁷ Robert C. Toth, *Preemptive Anti-Terrorist Raids Allowed*, WASH. POST, Apr. 16, 1984, at A19. The National Security Decision Directive remains classified.

¹⁹⁸ See Bernard Gwertzman, *US Supports Attack, Jordan and Egypt Vow to Press for Peace*, N.Y. TIMES, Oct. 2, 1985, at A9. U.S. Ambassador Walters supported the Israeli justification for the attack in spite of the abstention:

My Government could not support the draft resolution, disproportionately placing all blame for this latest round of the rising spiral of violence in the Middle East onto only one set of shoulders, while not also holding at fault those responsible for the terrorist acts which provoked it We speak of a pattern of violence, but we must be clear: it is terrorism that is the cause of this pattern, not responses to terrorist attacks [W]e recognize and strongly support the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks. This is an aspect of the inherent right of self-defence recognized in the United Nations Charter. We support this principle regardless of attacker, and regardless of victim.

U.N. SCOR, 40th Sess., 2615th mtg. at 111–12, U.N. Doc. S/PV.2615 (1985).

¹⁹⁹ The Israeli attack by six F-15 fighter-bombers apparently left seventy men, women and children dead and more than one hundred Tunisians and Palestinians wounded. See *Cycle of Terrorism Will Continue With Retaliatory Strikes*, HOUSTON POST, Jan. 2, 1986 at 2B.

²⁰⁰ *Israel Calls Bombing a Warning to Terrorists*, N.Y. TIMES, Oct. 2, 1985, at A8.

²⁰¹ Three days after the attack, a single session of the Security Council adopted Resolution 573 (with the only abstention by the United States), which condemned the Israeli attack; demanded that Israel, “refrain from perpetrating such acts of aggression or from the threat to do so” urged member states to “dissuade Israel from

German disco bombing six months after the Israeli raid though based on state responsibility was also justified on the basis of retaliation.²⁰²

A sharp distinction has also been drawn between the use of force in self-defense and its use in reprisals.²⁰³ Reprisals and retaliatory strikes are illegal under contemporary international law because they are punitive, rather than legitimate actions of self-defense.²⁰⁴ It would be difficult to reconcile acts of reprisal with the overriding dictate in the UN Charter that all disputes must be settled by peaceful means. Further, under the UN Charter regarding self-defense, there are three main principles that go into examining the *jus ad bellum* dimensions of a state's response if it has suffered a terrorist attack.²⁰⁵ These principles dealing with the timeliness of the response and the requirements of necessity and proportionality are difficult to reconcile with retaliatory strikes.

IV. POST-COLD WAR: A NEW EPOCH IN TERROR AND COUNTER-TERRORISM RESPONSES

With the end of the Cold War, acts generally described as “terrorism” proliferated in frequency and severity. The rise of globalization and decolonization, and the increasing accessibility and availability of weapons and technology was quickly enabling well-financed and organized terrorist organizations to transform themselves into global outfits with greater

resorting to such acts” and supported Tunisia’s right to reparations. S.C. Res. 573, U.N. SCOR, 40th Sess., U.N. Doc. S/RES/573 (1985) (vote: 14–0–1), reprinted in 24 I.L.M. 1740–41.

²⁰² Seymour, *supra* note 187, at 223.

²⁰³ The legal status of reprisals is stated very succinctly by Professor Ian Brownlie: “[t]he provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force.” BROWNIE, *supra* note 110, at 281 (internal citation omitted).

²⁰⁴ *Id.* at 13.

²⁰⁵ In an exchange of diplomatic notes between the governments of the US and Great Britain, then US Secretary of State Daniel Webster outlined a framework for self-defence. Military response to a threat was judged permissible so long as the danger posed was “instant, overwhelming, leaving no choice of means and no moment of deliberation.” C. HYDE, 1 INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 240 (2nd ed, 1945). The Caroline criteria of necessity and proportionality became widely accepted as customary international law and as a consequence form part of the concept of self-defense encapsulated later in the UN Charter.

reach and lethality.²⁰⁶ As transnational terrorism became more of a threat, “the world community became more tolerant of military actions against states that supported terrorism.”²⁰⁷

The new mood within the international community was captured in the early 1990s in the reaction of the international community to the 1988 Pan Am bombing over Lockerbie, Scotland. The Security Council characterized as a threat to international peace and security Libyan support for terrorism. In Resolution 748, the Security Council imposed economic sanctions on Libya for its continuing involvement with terrorist activities and for its refusal to extradite two Libyan nationals alleged to have been involved in the bombing of Pan Am Flight 103. The Council affirmed that:

In accordance with Article 2, paragraph 4 of the Charter of the United Nations, every State has a duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when such acts involve a threat or use of force.²⁰⁸

In characterizing Libyan action as a threat to international peace and security, it would seem that the door to possible use of military force had been opened. After all Article 1(1) gives, as the first purpose of the UN the centrality of maintaining international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.²⁰⁹

These provisions make clear the importance, in the legal order embodied in the Charter, of maintaining international peace but also the readiness to use force to combat aggression and to prevent threats to the peace from materializing into acts of aggression or breaches of the peace—the Charter is about keeping the peace not about pacifism.²¹⁰

²⁰⁶ In relation to the rise of terrorism, see generally PETER CHALK, *WEST EUROPEAN TERRORISM AND COUNTER-TERRORISM: THE EVOLVING DYNAMIC* 25–44, 65–90 (1996).

²⁰⁷ Travaglio & Altenburg, *supra* note 4, at 106.

²⁰⁸ S.C. Res. 748, U.N. SCOR, 47th Sess., 3063d mtg. at 52, U.N. Doc. S/RES/748 (1992).

²⁰⁹ U.N. CHARTER, art 1(1).

²¹⁰ Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al Qaida and Iraq*, 4 *SAN DIEGO INT’L L.J.* 7, 10 (2003).

The new pugnacious mood was further manifest by the fact that there was little objection to the 1993 cruise missile attacks against Iraq for its role in the foiled assassination attempt on the life of former President George Bush, Sr.²¹¹ Five years later, when the U.S. bombed terrorist targets in Afghanistan and Sudan in reaction to the bombings of two of its embassies in East Africa, the world reaction to the U.S. attacks against Afghanistan was muted.²¹² While the criticism of the bombing of the pharmaceutical factory in Sudan was more intense, the protest was largely confined to the quantity of proof presented by the U.S. that chemical weapons were processed at the factory. Neither the Security Council nor the General Assembly took any formal action with regard to either attack.

SEPTEMBER 11: CROSSING THE RUBICON

On September 11, 2001, in a terrorist attack whose audacity and horrific toll left the world reeling, four commercial aircraft were hijacked and crashed into the symbols of American supremacy—its economic dominance and military might. Two of them were flown into the twin towers of the World Trade Center in New York City, causing both buildings to collapse, a third aircraft crashed into the Pentagon building in Arlington, Virginia, which houses the headquarters of the U.S. Department of Defense and the U.S. armed forces, the fourth aircraft, crashed near Somerset, Pennsylvania.²¹³

The tragic events of September 11 prompted the international community to examine international terrorism anew. The magnitude of the acts went beyond terrorism as it was known, and statements from various capitals around the world pointed to a need to develop

²¹¹ See Jack Plaxe, *Terrorists Must Pay a Price*, WASH. POST. , July 10, 1993, at A17.

²¹² International reaction to the 1998 US cruise missile strikes against terrorist targets in Afghanistan and Sudan in response to the US embassy bombings in East Africa was mixed, with the most intense criticism focused on the Sudan attack. Western European nations supported the US actions to varying degrees, while the Russian President Boris Yeltsin declared that he was “outraged” by the “indecent” behaviour of the United States. China issued an ambiguous statement condemning terrorism, and Japan said it “understood America’s resolute attitude towards terrorism.” See Phil Reeves, *Outraged Yeltsin Denounces “Indecent” US Behaviour*, INDEP. (London), Aug. 2, 1998, at 2.

new strategies to confront a new reality. Previously acts of terrorism were seen as criminal acts, carried out by private, non-governmental entities.²¹⁴ In contrast, the September 11 attacks were regarded as an act of war.²¹⁵ This effectively marked a turning point in the long-standing premise of international law that force, aggression, and “armed attacks” are instruments of relations between states.²¹⁶ Terrorism was no longer merely a serious threat to peace and stability to be combated through domestic and international penal mechanisms—use of force was now an avenue for managing the consequences of terrorist strikes.

State Responsibility Marches to New Frontiers

In the aftermath of the September 11 attacks, the statements were strident and unequivocal. On the day of the attacks, President George Bush Jr. stated succinctly: “We will make no distinction between the terrorists who committed these acts and those who harbor them.”²¹⁷ Congress, in its joint resolution of September 14, 2001, authorized the use of force against those who “aided” or “harbored” those who carried out the September 11 attacks, as well as those who committed the attacks.²¹⁸ On September 16, 2001, Vice President Cheney stated that “if you provide sanctuary to terrorists, you face the full wrath of the United States of America.”²¹⁹

In a speech before a joint session of Congress on September 20, 2001, a pugnacious President Bush stated: “From this day forward, any nation that continues to harbor or support

²¹³ Rensselaer Lee & Raphael Perl, *Terrorism, the Future, and U.S. Foreign Policy*, in MAJOR STUDIES AND ISSUE BRIEFS OF THE CONGRESSIONAL RESEARCH CENTER 1 (Supp. 2002).

²¹⁴ Maogoto, *supra* note 19, at 407.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ In his address to the nation immediately following the terrorist attacks on September 11th, President Bush stated that America would “make no distinction between the terrorists who committed these acts and those who harbor them.” President George W. Bush, Address to the Nation, *reprinted in* WASH. POST, Sept. 12, 2001, at A2.

²¹⁸ *After the Attacks: Text of Joint Resolution Allowing Military Attacks*, N.Y. TIMES, Sept. 15, 2001, at A16.

²¹⁹ *It’s Going to Require Constant Vigilance*, WASH. POST, Sept. 17, 2001, at A12.

terrorism will be regarded by the US as a hostile regime.”²²⁰ The message was later firmly reiterated in sweeping terms:

America has a message for the nations of the world: If you harbor terrorists, you are terrorists. If you train or arm a terrorist, you are a terrorist. If you feed a terrorist or fund a terrorist, you’re a terrorist, and you will be held accountable by the U.S. and our friends.²²¹

The guiding principle reflected by these statements to treat those who harbor terrorists no differently than the terrorists themselves was described by White House spokesman Ari Fleischer as “a dramatic change in American policy.”²²² Yet while the breadth of these statements appeared at odds with the tenor of the international legal regime on the use of force, the world community either said little about this change in policy, or endorsed it.²²³ This lack of reaction as well as the wide support that the U.S. would soon enjoy in its military campaign against Afghanistan was perceived in certain quarters as “perhaps the strongest manifestation of evolving customary international law regarding the use of force against terrorism.”²²⁴

Operation “Enduring Freedom”

In the immediate aftermath of the September 11 attacks, the U.S. connected the Taliban regime to Al Qaeda on the grounds that it harbored Osama bin Laden and his organization, refused to deliver bin Laden to requesting states, and that the Taliban increased their responsibility for Al Qaeda’s actions after the fact by endorsing the September 11

²²⁰ President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited Feb. 9, 2005).

²²¹ President George W. Bush, Remarks to Troops and Families at Fort Campbell (Nov. 21, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011121-3.html> (last visited Feb. 9, 2005). See also U.S. Ambassador James Cunningham, Statement to the U.N. General Assembly (Sept. 12, 2001) (“There should be no doubt: we will deal with those who support and harbor terrorists as we deal with the terrorists themselves”).

²²² Wendy S. Ross, *No Discussions, No Negotiations with Taliban, White House Says*, Sept 21, 2001, at http://www.usembassy.it/file2001_09/alia/a1092110.htm. See also Press Release, White House, Press Briefing by Ari Fleischer (Sept. 25, 2001) (statement of Ari Fleischer) (“I think you need to look at it exactly as the President described it, which is that anybody who harbors terrorism will be the target of our operations and the target of our actions”), available at <http://www.whitehouse.gov/news/releases/2001/09/20010925-3.html>.

²²³ Travalio & Altenburg, *supra* note 4, at 109.

²²⁴ *Id.*

attacks.²²⁵ The symbiotic relationship of Al-Qaeda in Afghanistan and the Taliban regime meant that the Taliban shared significant responsibility for Al-Qaeda's actions in the September 11 attack.

Before the U.S. even attacked Afghanistan, the UN Security Council affirmed that the September 11 attacks gave rise to a right of self-defense.²²⁶ Passed by the Council the day after the attacks, Resolution 1368 condemned the attacks and recognized "the inherent right of individual or collective self-defense in accordance with the Charter."²²⁷

Resolution 1373, passed seventeen days later by the Security Council reaffirmed the right of self-defense in the context of the September 11 attacks and went on to reaffirm "the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts."²²⁸ Moreover, the Security Council's subsequent characterization of those acts as "armed attacks" was echoed by other international bodies.²²⁹ Thus, the U.S. enjoyed strong support from the Security Council before it had to articulate the actual case for its actions in Afghanistan and despite the possibility that existing restrictions on the right of self-defense precluded a lawful exercise of that right under the circumstances.

Professor J. M. Beard notes that: "The unprecedented response of the UN Security Council and the international community in general to the September 11 terrorist attacks on the United States provides a stark contrast to the reaction to the raid on Libya [in 1986]."²³⁰

²²⁵ Michael Byers, *Terrorism, the Use of Force and International Law after 11 September 2001*, 51 INT'L & COMP. L. Q. 401, 408-09 (2002).

²²⁶ S.C. Res. 1368, U.N. SCOR, 56th Sess, 4370th mtg., U.N. Doc. S/RES/1368 (2001).

²²⁷ *Id.*

²²⁸ S.C. Res 1373, U.N. SCOR, 56th sess, 4385th mtg., UN Doc S/RES/1373 (2001).

²²⁹ Press Release, North Atlantic Council, Statement by North Atlantic Council (Sept. 12, 2001), available at <http://www.nato.int/docu/pr/2001/p01124e.htm> (last visited Feb. 9, 2005).. 10, 2004). The Foreign Ministers of the Organization of American States, meeting in consultation, likewise invoked the 1947 Inter-American Treaty of Reciprocal Assistance in declaring that "these terrorist attacks against the United States of America are attacks against all American States." *Terrorist Threat to the Americas*, Org. of American States, Consultation of Ministers of Foreign Affairs, 24th mtg., OAS Doc. RC.24/Res.1/01 (Sept. 21, 2001), available at <http://www.oas.org/OASpage/crisis/RC.24e.htm> (last visited Feb. 9, 2005).

²³⁰ Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y. 559, 565 (2002).

He concludes by asserting that a number of factual and legal distinctions between the circumstances surrounding the September 11 attacks and previous terrorist attacks giving rise to the use of force by the U.S. demonstrated the propriety of this particular exercise of self-defense under Article 51 and customary international law.²³¹ These positive sentiments are based on the willingness of states and the UN Security Council to invoke and affirm the right of self-defense in response to the September 11 terrorist attacks on the U.S. in sharp contrast to previous terrorist attacks. In any case:

Before the September 11 terrorist attacks, the UN Security Council had never approved a resolution explicitly invoking and reaffirming the inherent right of individual and collective self-defense in response to a particular terrorist attack...The Council's unprecedented willingness to invoke and reaffirm self-defense under Article 51 in response to the September 11 terrorist attacks is an important act and, for some states, helped legitimize the US military response as a legal use of force.²³²

“Operation Enduring Freedom” commenced on October 7, 2001 with a mix of air strikes from land-based bombers, carrier-based jetfighters, and cruise missiles. The initial military objectives of “Operation Enduring Freedom” included the destruction of terrorist training camps and infrastructure within Afghanistan, the capture of Al Qaeda leaders, and the cessation of terrorist activities in Afghanistan.²³³ By October 20, 2001, U.S. and Coalition forces had destroyed virtually all Taliban air defenses. By mid-March 2002, the Taliban had been removed from power and the Al Qaeda network in Afghanistan had been destroyed.²³⁴

“Operation Enduring Freedom” in Afghanistan signaled a renewed determination on the part of the U.S. to combat international terrorism and states that sponsor it, as well as laid fertile ground for debate on the strategic or legal approach that States should adopt in responding to such threats. This was coupled with a recognition that the modern threat to U.S. power and security rises not from one particular organization, but from the growing

²³¹ *Id.*

²³² *Id.*

²³³ As articulated by President George W. Bush on Sept. 20, 2001, *supra* note 220.

²³⁴ Operations in Afghanistan involved significant contributions from the international community. By 2002 the coalition had grown to more than sixty eight nations, with twenty seven nations having representatives at the U.S. Central Command (CENTCOM) headquarters

threat of international terrorism, particularly terrorism that enjoys active or tacit state support.²³⁵

Wide support for the U.S. action as well as the fact that the action was given firm footing by Security Council resolutions led many to believe that the UN Charter regime on the use of force was visibly enrolled in change.²³⁶ Military action in Afghanistan in the aftermath of the September 11 attacks drew favorable responses to the use of force; the U.S. right of self-defense often being mentioned in the same breath as the terrorist attacks.²³⁷

About six months after routing Al Qaeda fighters and toppling the Taliban from power, on September 12, 2002, President Bush challenged the UN to address the threat posed by Iraq as highlighted by its continuing defiance of the Security Council.²³⁸ The war against Iraq was to be the defining moment in the evolution of the “Bush Doctrine,” marking a growing coherence and confidence in the strategy of “offensive defense”.

Old Solutions for New Problems: Pre-Emptive Strikes

Customary international law has long recognized that no requirement exists for states to “absorb the first hit.” The doctrine of anticipatory or pre-emptive self-defense, as developed historically, is applicable only when there is a clear and imminent danger of attack. The means used for pre-emptive response must be strictly limited to those required for the elimination of the danger and must be reasonably proportional to that objective.

The UN Charter seems to expressly preclude the concept of a pre-emptive strike. Under the Charter, self-defense can only be in response to an armed attack, not a threatened

²³⁵ The war on terror “will not end until every terrorist group of global reach has been found, stopped and defeated. . . . From this day forward, any nation that continues to harbor or support terrorism will be regarded by the US as a hostile regime.” President George W. Bush, Address to a Joint Session of Congress and the American People, *supra* note 220.

²³⁶ Frederic L. Kirgis, *The American Society of International Law (ASIL) Insights: Israel’s Intensified Military Campaign against Terrorism*, Dec. 10, 2001 available at <http://www.asil.org/insights/insigh78.htm> (last visited May 20, 2004).

²³⁷ S.C. Res. 1368, *supra* note 226; S.C. Res. 1373, *supra* note 228.

attack. A significant number of scholars argue that the UN Charter precludes any right of anticipatory self-defense.²³⁹ This argument relies on a restrictive reading of Article 51 of the UN Charter which permits the use of force in the event that “*an armed attack occurs.*”²⁴⁰ These writers assert that this language, at least by implication, precludes the use of force in anticipation of an attack or other event triggering the right of self-defense.²⁴¹

The basis for the restrictive argument is that, once recognized, a right to anticipatory self-defense is potentially very difficult to define or limit, and bad faith or an error in judgment could easily lead to unnecessary conflict.²⁴² It is contended that the right to respond with force in self-defense, even to a triggering act that has already occurred, is temporally limited. As the Caroline incident²⁴³ indicates, the customary right of self-defense appears to require immediate action.²⁴⁴ Otherwise, there is a strong argument that the use of force is nothing more than a reprisal, which, while permitted under limited circumstances by customary international law, is widely agreed to have been outlawed by the UN Charter.

Weapons of Mass Destruction: A New Calculus in Preemptive Action

Some scholars believe that a right of truly anticipatory self-defense has emerged outside of Article 51 in light of the availability of weapons of mass destruction.²⁴⁵ Professor

²³⁸ President’s Address to U.N. General Assembly, 38 WEEKLY COMP. PRES. DOC. 1529 (Sept. 12, 2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html> (last visited Feb. 9, 2005).

²³⁹ See, e.g., YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 184–187 (2nd ed. 1994); RICHARD ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 136–38 (1989); see also authorities cited *id.*

²⁴⁰ U.N. CHARTER art. 51.

²⁴¹ Even if one does not limit the right of self-defense to “armed attacks,” the language of Article 51 of the United Nations Charter still reasonably suggests that a triggering event must actually have occurred, not merely be anticipated.

²⁴² Baker, *supra* note 12, at 33.

²⁴³ Where it is understood as “anticipatory self-defense,” the customary right to pre-empt has its modern origins in the Caroline incident which established that the serious threat of armed attack may justify militarily defensive action. In an exchange of diplomatic notes between the governments of the U.S. and Great Britain, then-U.S. Secretary of State Daniel Webster outlined a framework for self-defense that did not require a prior attack. Military response to a threat was judged permissible so long as the danger posed was “instant, overwhelming, leaving no choice of means and no moment of deliberation.” See HYDE *supra* note 205, at 221.

²⁴⁴ MOORE, *supra* note 176, at 409–14.

²⁴⁵ BOWETT, *supra* note 110, at 191–92; see also ERICKSON, *supra* note 239, at 142–43.

Thomas Franck accounts for the emergence of a viable doctrine of anticipatory self-defense through, “the transformation of weaponry to instruments of overwhelming and instant destruction. These [weapons bring] into question the conditionality of Article 51, which limits states’ exercise of the right of self-defense to the aftermath of an armed attack. Inevitably, first-strike capabilities begat a doctrine of “anticipatory self-defense.”²⁴⁶ Professor C. Greenwood weighs in with the observation that in a nuclear age, it is the potentially devastating consequences of prohibiting self-defense unless an armed attack has already occurred that leads one to prefer the interpretation permitting anticipatory self-defense. He argues further that,

...this view accords better with State practice and with the realities of modern military conditions than with the more restrictive interpretation of Article 51, which would confine the right of self-defense to cases in which an armed attack had already occurred—although it has to be said that, as a matter of simple construction of the words alone, another conclusion might be reached.²⁴⁷

The positions by Franck and Greenwood are supported by Professor Michael Glennon, who eloquently lays out five factual contemporary realities that the UN Charter drafters did not have the benefit of more than half a century ago when drafting the document.²⁴⁸

²⁴⁶ Thomas M. Franck, *When, if Ever, May States Deploy Military Force without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL’Y 51, 57–58 (2001).

²⁴⁷ Greenwood, *supra* note 210, at 15.

²⁴⁸ Professor Michael Glennon begins by noting that 21st century security needs are different from those imagined at the founding of the United Nations and then sets out the following five factual realities:

1. The intended safeguard against unlawful threats of force—a vigilant and muscular Security Council has yet to materialize and remains unfulfilled
2. Modern methods of intelligence collection, such as satellite imagery and communications intercepts, now make it unnecessary to sit out an actual armed attack to await convincing proof of a state’s hostile intent
3. The advent of weapons of mass destruction and their availability to international terrorists means that the first blow can be devastating—far more devastating than the pinprick attacks on which the old rules were premised
4. Terrorist organizations “of global reach” were unknown when Article 51 was drafted. They have however flourished owing to large “war chests” facilitating development and stockpiling of weaponry, acquisition of state of the art communications equipment and safe training camps. All this requires a sanctuary, which only states can provide—and which only states can take away.
5. The danger of catalytic war erupting from the use of pre-emptive force was easily understood in the Cold War but decreased considerably with the end of the Cold War thus making less sense to today, when safe-haven states and terrorist organizations are not themselves possessed of pre-emptive capabilities.

The arguments by these scholars are particularly strong when one considers that shortly after the birth of the UN Charter, the Atomic Energy Commission suggested in its First Report in December 1946 that preparation for atomic warfare in breach of a multilateral treaty or convention would, in view of the appalling power of the weapon, have to be treated as an “armed attack” within Article 51 of the UN Charter.²⁴⁹

More specifically, the AEC made the following recommendations to the Security Council about the control of nuclear energy and nuclear weapons: “The development and use of atomic energy are not essentially matters of domestic concern of the individual nations, but rather have predominantly international implications and repercussions.”²⁵⁰

The impact of WMDs on the modern self-defense doctrine appears to be the basis on which some commentators have concluded that a doctrine permitting certain anticipatory self-defense actions is available for states to utilize.²⁵¹ Truly anticipatory self-defense would permit the use of force “[i]f a state has developed the capability of inflicting substantial harm upon another, indicated explicitly or implicitly its willingness or intent to do so, and to all appearances is waiting only for the opportunity to strike.”²⁵²

It cannot be supposed that the inviolability of territory is so sacrosanct as to mean that a state may harbor within its territory the most blatant preparation for an assault upon another state’s independence with impunity; the inviolability of territory is subject to the use of that territory in a manner which does not involve a threat to the rights of other states.²⁵³ Supporting this position further is the argument that there is no requirement under the literal

Michael J. Glennon, *Preempting Terrorism; The Case for Anticipatory Self-Defense*, WEEKLY STANDARD, Jan. 28, 2002, at 24, 26.

²⁴⁹ See generally Claud H. M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, in 2 RECUEIL DES COURS [ANTHOLOGY OF THE COURSES] 451, 498 (1952) (recounting the Atomic Energy Commission’s suggestions to the UN Security Council).

²⁵⁰ Leo Van Den Hole, *Anticipatory Self-Defense Under International Law*, 19 AM. U. INT’L L.R. 69, 91(2003).

²⁵¹ ERICKSON, *supra* note 239, at 149 (“[A]nticipatory self-defense can be a legal justification for the use of armed force.”).

²⁵² See Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. LAW & PUB. POL’Y. 539, 552 (2002).

²⁵³ BOWETT, *supra* note 110, at 141, 191–92.

letter of Article 51 that a foreign government itself directly undertake the attack to which a state responds.

Operation “Iraqi Freedom”

Even as the U.S. moved against Afghanistan, the highest levels of military, legal, and diplomatic policymakers in Washington began debating how the U.S. should confront states that sponsor terrorism and proliferate WMDs. The immediate focus of that debate centered on U.S. policy towards Iraq. The magnitude of the September 11 attacks had altered the equation dramatically. The possibility of collusion between a rogue, troublesome nation with potential access to WMDs and terrorists was sufficient to send pulses racing in Washington.

Based on the general support and cooperation that the U.S. received in the military campaign against the Taliban regime in Afghanistan, the U.S. began to capitalize on this goodwill. It argued that it was legally justified in exercising a right of anticipatory self-defense by attacking hostile “rogue” states and states that harbor terrorists.²⁵⁴ No longer was terrorism merely a sporadic series of pinpricks, but in view of the possibility of WMDs ending up in the hands of terrorists from rogue states, terrorism could inflict catastrophic destruction²⁵⁵ and thus posed a threat to the security and survival of the U.S. This stance is strongly captured in the National Security Strategy document released about five months before the Iraqi invasion.²⁵⁶ The U.S. saw the use of military action to remove the threat of

²⁵⁴ No doubt the U.N. Charter is not a suicide pact. In any case, the International Court of Justice considered this proposition in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 96 (July 8), noting that it would not lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake.

²⁵⁵ See President’s Address to the U.N. General Assembly, *supra* note 238: “[I]f an emboldened regime were to supply [weapons of mass destruction] to terrorist allies, then the attacks of September 11th would be a prelude to far greater horrors”.

²⁵⁶ “For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.” George W. Bush, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15–16 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Feb. 9, 2005, 2004).

chemical, biological, and nuclear proliferation in Iraq as a strategic imperative arguing rather strongly that the risk of inaction in the face of such a threat is intolerable.

The military action in Iraq following the “Axis of Evil” speech by President Bush, provoked strong opposition given its definite overtones of unilateral military action by the U.S. against countries that support terror.²⁵⁷ This was in spite of U.S. insistence that the act was a strategic imperative in its strategy of “offensive defense.”²⁵⁸ Unlike Al Qaeda and the Taliban in Afghanistan, however, Iraq did not bear responsibility for a recent terrorist attack against the U.S.²⁵⁹ The absence of such an attack limited the application of any new rule of international law to Iraq.

The decision to attack was done over the loud objections of a skeptical international community that doubted the existence of the WMDs and many international scholars who were worried by the effect of failure by the U.S. to secure a Security Council mandate. Military action against Iraq, not surprisingly, split the international community and inflamed the world’s major powers since it raises debate both as a matter of policy and legality. Considering that the use of armed force can only be justified under international law when used in self-defense, can the U.S. go beyond the rhetoric and actually carry the “War on Terror” to those rogue nations who are identified as supporters and sponsors of terrorist activities, but have not actually physically engaged in an act of aggression against the U.S.?²⁶⁰

The convergence of international terrorism and weapons of mass destruction presents a grave threat to international peace, security, and prosperity and indeed to the very survival of nations. What is disturbing about the U.S. stance is the fact that anticipatory self-defense is being touted as an appropriate vehicle in the war against international terrorism even though Article 51’s “armed attack” requirement supercedes any pre-existing right of anticipatory

²⁵⁷ The President’s State of the Union Address, 29 January 2002, at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (last visited Feb. 21, 2005).

²⁵⁸ *Id.* at 3.

²⁵⁹ KENNETH M. POLLACK, *THE THREATENING STORM: THE CASE FOR INVADING IRAQ* 157 (2002).

action.

Overall, the “Bush Doctrine” of preventive self-defense threatens to upset the international regime on the use of force. In any case, whatever legal and political capital that the U.S. and its military campaign fuelled in the run up to “Operation Enduring Freedom” was effectively squandered away in the rash and ill-advised “Operation Iraqi Freedom”.²⁶¹ Should the “Bush Doctrine” form the basis of new state practice, the existing system would be transformed from its tenuous law-based framework to a balance of power system.²⁶² Once the door to pre-emptive strikes is open, it can hardly be closed again, and any nation in the world will be able to take advantage.

E. CONCLUSION

The September 11 terrorist attacks reinforced the proposition that the UN Charter system is ill-equipped to deal with contemporary security threats with its emphasis on a law enforcement paradigm whose success relies ultimately on the cooperation of states. It is a reality that criminal prosecutions are generally ineffective in deterring fundamentalist terrorist groups able to recruit individuals as prepared for sacrifice as good soldiers. A purely law enforcement approach cannot be expected to deal with this threat nor shut down terrorist organizations operating in hostile and uncooperative states.

After September 11, states simply may believe, more than before, that they are justified in acting outside the UN system.

A collective, institutional response to terrorism may be more effective than ad hoc unilateralism or narrow coalition building. It may be difficult to prevent ad hoc unilateralism from devolving into self-interested opportunism. Who defines what an armed attack is? A “threat to the peace”? Who defines when, where, how, and why the use of force can be initiated to contain (or punish) rogue states? If the

²⁶⁰ Addicott, *supra* note 28.

²⁶¹ Jackson Nyamuya Maogoto, *Rushing to Break the Law? The Bush Doctrine of Pre-Emptive Strikes and the UN Charter on the Use of Force*, 7 U. W. SYDNEY L.R. 1, 14 (2003).

²⁶² *Id.*, at 34.

US can use extensive military force to respond to terrorism, there is no principled basis to deny others that entitlement.²⁶³

Despite the horror of September 11, an unbridled use of military force is too all-encompassing to conform to even an expansive reading of the UN Charter. The current climate dictates that the need to realign the existing rules on the use of force to match the altered international security environment. Measures from another era that simply impose a limit on the use of force that frustrates a nation's ability to defend itself will result in the UN being marginalized as states fall back on the expansive right of self-preservation and inevitably place their own survival above adherence to an international law system that cannot guarantee their security and the safety of their citizens. The restrictive international regime on the use of force will remain relevant only if the international community explores and develops new avenues for dealing with the threat of international terrorism.

²⁶³ Mark Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 32–33 (2002).