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INTERNATIONAL LEGAL RESPONSES TO TERRORISM

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I. INTRODUCTION

On average, from 1993 to 1998, eleven Americans died as victims of international terrorists each year,¹ but the effect of terrorism—the quintessential “propaganda of the deed”—goes far beyond those numbers. Indeed, it may paralyze even powerful governments, as occurred to the United States when its diplomats were taken hostage in 1979.² Now, the technology of transportation about the planet has advanced to the point where it has become increasingly easy to plan and implement highly destructive terrorist actions in the territory of another state, whether the technique of destruction is by electronic or kinetic intervention, or by conventional explosive, nuclear, chemical, or biological weapons. The diffusion of modern technology, the astonishing proliferation of information about the ways and means of conducting terrorist actions, and the amplification of the damage that terrorists now seem capable of wreaking, seem likely to make terrorism more attractive to would-be users and, as a result, of vastly heightened concern to an increasingly large class of potential targets.

When the source of terrorism is foreign, or parts of the planning and implementation occur outside the target state, the responses of the targeted government are necessarily international political events.³ International law becomes

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1. See OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPT OF STATE, *PATTERNS OF GLOBAL TERRORISM 1998* p. 95 tbl.3 Total U.S. Citizen Casualties Caused by International Attacks, 1993–1998 (1999).

2. See BRUCE HOFFMAN, *INSIDE TERRORISM* 186 (1998) (observing that the United States was held “at bay” by the “militant Iranian ‘students’”).

3. I emphasize the word “necessarily.” Governmental reactions to domestic terrorism may also implicate aspects of humanitarian law or the law

engaged and, as such, it may have significant effects on the range of options available to the target state and its nationals.⁴ Yet, as we will see, the international prescriptive or law-making responses to international terrorism have manifested a remarkable resistance to comprehensive analysis and development of an appropriately diverse set of authorized responses. My remarks today are concerned, first, with inventorying the ways that international law affects the shaping of government responses to international terrorism by prescribing generally or particularly the contingencies, procedures, and scope of response—be it unilateral or multilateral—lawfully available to a target; and second, with exploring the reasons for the rather spotty record of achievement.

To make this big task more manageable, I propose to identify the key categories of potential authors of international terrorism and then to examine trends of legal decision with respect to the parameters of lawful responses that have been created for each of them. Plausible responses by targets will be appraised, not simply in terms of certain rules that are supposed to form part of a black-letter code of international law, but in terms of the acceptability of those responses, in different contexts, to the contemporary international decision process. By that decision process, I do not mean only the responses of officials of states, but the aggregate *actual* international decision process, comprised, as it is, of governments, intergovernmental organizations, non-governmental organizations, and, in no small measure, the media; in short, all the actors who participate in assessing, retrospectively or prospectively, the lawfulness of international actions and whose consequent reactions constitute, in sum, the international decision. The legal scholar, too, plays a distinctive role in this decision process, for the object of inquiry in all legal research is a complex

of armed conflict, and bring into operation the institutions charged with its oversight; the international legal and political involvement, however, is usually lower than is the case in international terrorism. *See generally* JOSEPH J. LAMBERT, *TERRORISM AND HOSTAGES IN INTERNATIONAL LAW—A COMMENTARY ON THE HOSTAGES CONVENTION 1979* (1990).

4. *See* PHILIP B. HEYMANN, *TERRORISM AND AMERICA* 52–56 (1998).

variable that is influenced by its mere observation and may be adjusted, sometimes significantly, to accord more closely to the preferences of the scholar. The New Haven School⁵ explicitly acknowledges this ineluctable feature of scholarship, insisting that it is not sufficient for the scholar simply to identify and assemble trends in decision. Trends must then be tested against the requirements of world public order as a means of assessing their adequacy. Insofar as they are found wanting, scholars should take the responsibility of proposing alternative arrangements so that a better approximation of political and legal goals can be achieved in the future.

Terrorism,⁶ like any other act of unauthorized violence, has three expanding circles of effects including: an *immediate*

5. The "New Haven School" has also been referred to as "law, science and policy," "configurative jurisprudence" and "policy-oriented jurisprudence." Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 317 & n.1 (1999). For a discussion of the New Haven School with respect to international law, see generally Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968), reprinted in MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 43 (1981); W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118 (1992); W. Michael Reisman, *International Lawmaking: A Process of Communication* (April 24, 1981), in 75 AM. SOC'Y INT'L L. PROC. 101 (1983).

6. Definitions of terrorism abound. Let me cite one useful definition, without dwelling on its details. Schmid, Jongman, and their collaborators, define terrorism as follows:

Terrorism is a method of combat in which random or symbolic victims serve as an instrumental *target of violence*. These instrumental victims share group or class characteristics which form the basis for their selection for victimization. Through previous use of violence or the credible threat of violence other members of that group or class are put in a *state of chronic fear (terror)*. This group or class, whose members' sense of security is purposefully undermined, is the *target of terror*. The victimization of the target of violence is considered extranormal by most observers from the witnessing audience on the basis of its atrocity, the time (e.g., peacetime) or place (not a battlefield) of victimization, or the disregard for rules of combat accepted in conventional warfare. The norm violation creates an attentive audience beyond the target of terror; . . . The purpose of this indirect method of combat is either to immobilize the target of terror in order to produce disorientation and/or compliance, or to

effect of killing or injuring people, who are deemed, either for all purposes or in that context, to constitute an internationally prohibited target; an *intermediate* effect of intimidating a larger number of people and thereby influencing their political behavior and that of their government; and an *aggregate* effect of undermining inclusive public order. Responses to terrorism, as to any recurring threat to public order, must address a complex network of sanctioning goals that include the following: *arresting* the immediate threat; *preventing* its recurrence; *detering* others who may conclude that it is a productive and economical political strategy; *correcting* the behavior of those who are causing the threat; *repairing* the social damage that the illicit actions have caused; and, insofar as there is a social etiology to the pattern of behavior that is deemed threatening; *reconstructing* that part of the social process that is assumed to be generating or contributing to the socially destructive behavior.⁷

As we will see, many of the international efforts to prescribe appropriate international responses to terrorism have been stalemated by conflicting priorities as to which sanctioning goals should be pursued. The United States,⁸ Europe, and Japan⁹ have generally, though not always consistently, focused on arresting, deterring, and preventing international terrorism. Key members of the Non-Aligned

mobilize secondary *targets of demands* (e.g., a government) or *targets of attention* (e.g., public opinion) to changes of attitude or behaviour favouring the short or long-term interests of the users of this method of combat.

ALEX P. SCHMID & ALBERT J. JONGMAN, POLITICAL TERRORISM 1-2 (1988) (emphasis in original).

7. For a more detailed description of these goals, See W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175, 175-76 (1995).

8. See LAMBERT, *supra* note 3, at 23 (noting U.S. legislation, presidential speeches, and military action aimed at preventing terrorism).

9. Great Britain has enacted the Prevention of Terrorism Act. See Matthew H. James, *Keeping the Peace—British, Israeli, and Japanese Legislative Response to Terrorism*, 15 DICK. J. INT'L L. 405, 420-26 (1996-97). Japan has enacted the Subversive Activities Prevention Law of 1952. See *id.* at 442-48.

Movement (NAM)¹⁰ in the United Nations have focused instead on what its members have deemed to be the causes of international terrorism, necessarily implying that in light of those causes, some of the terrorist tactics were justifiable, if not licit.¹¹ Others in the NAM have contended that, morally and legally, the weapons of the terrorists are no different from those in the arsenal of the Great Powers.¹² In a recent interview, Mu-amar Al-Qadhafi assailed what he characterized as "the American logic." "Those who use missiles or fighter planes and rockets are legitimate. Those who use explosives or small bombs are considered terrorists."¹³

Qadhafi's remarks, more striking for their candor than their originality, place a major part of the problem we are addressing in direct issue. In my view, international terrorism is usually a consciously adopted rather than spontaneous or impulsive strategy. Especially with respect to the possibility of terrorists employing weapons of mass destruction, the most urgent international sanctioning goals are arresting, deterring, and preventing. Even if one sympathized with the political claims and goals of the groups that have sought to justify terrorism in their terms, the explicit selection of unlawful targets by terrorists transforms their actions from armed conflict into international legal pathologies that require arrest and deterrence as urgent international goals.

10. The Non Aligned Movement consists of 113 nations. It was created in 1961 and today aims to represent the "interests and aspirations of the developing world." See *Non Aligned Movement* (visited Sept. 14, 1999) <<http://nonaligned.org/intro.html>>.

11. The proceedings of the Ad Hoc Committee on International Terrorism deadlocked over, among other things, the definition of terrorism. Developing states thought that the term should exclude the "acts of national liberation movements." See LAMBERT, *supra* note 3, at 36-37.

12. For example, a Cuban representative to the 27th session of the United Nations General Assembly stated that "national liberation movements could not be declared illegal while the policy of terror by States against certain peoples was declared legitimate." LAMBERT, *supra* note 3, at 31 n.91.

13. Milton Viorst, *The Colonel in His Labyrinth*, 78 FOREIGN AFF. 60, 68 (1999).

Because terrorism is, in this view, an elected political strategy rather than an individual psychopathology,¹⁴ some of the sanctioning goals may, in some cases, promise to be economically accomplished by political indulgence rather than military deprivation, as the recent transitions in South Africa and, perhaps in more incipient and still uncertain form, in Palestine and Northern Ireland suggest. A response of indulgent accommodation often seems attractive precisely because it is non-violent. Alas, in a system of global electronic simultaneity, one of the consequences of indulgent accommodation in one sub-arena may be that putative terrorists elsewhere will conclude that the tactics they are contemplating or using, rather than leading to general revulsion and condemnation, are likely to lead to success. Accommodative responses will not only not deter terrorism, but may actually encourage it.

II. OFFICIAL DEFINITIONS

Definitions establish a focus. Definitions of terrorism are particularly outcome sensitive precisely because they tend to delimit the range of lawful responses to them. For reasons we will explore in more detail in a moment, international politics has resisted a comprehensive definition. But consider some of our national legislated definitions, which also seem designed to exclude certain strategic responses. The United States Congress has defined "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents"; "international terrorism" is defined as "terrorism involving citizens or the territory of more than 1 country."¹⁵

Terrorism, as Congress defines it, is conceived of as essentially part of the arsenal of nonstate entities operating transnationally and, as such, a political rather than a military tool. By definition, this filters out a great deal of

14. This is not to say that the individual who actually engages in the terrorism has not been recruited or self-recruited for serious psychopathological reasons. My point is that the architect and financier of terrorism should be assumed to be acting rationally as well as ruthlessly.

15. 22 U.S.C. § 2656f(d)(1)-(2) (1994).

terrorism; terrorism may be a way of using what is intended to be politically consequential violence in situations that are not explicitly belligerent, while concealing the actual author and thus reducing or neutralizing the author's vulnerability to responses by the target. A government may quite rationally use terrorism, directly or through proxies, as a way of weakening an adversary; distracting its attention and resources; undermining a policy it pursues; communicating an unwillingness to acquiesce in a policy that the target is pursuing; or raising the cost of the pursuit of that policy. Some covert actions may sometimes be difficult to distinguish from terrorism, which is, by its nature, covert in planning and implementation, though certainly not in immediate outcome; indeed, governments that conceive of "covert action" as a legitimate strategic mode may conduct an operation that the target and disengaged observers characterize as terrorist because of the intentional selection of primary unlawful targets in order to influence a different audience. In belligerent situations, a government may use terrorist techniques against targets that are illicit under the law of war, gaining whatever strategic or tactical benefits the operation may yield, without incurring responsibility. Terrorism may also be used as a "trackless" vehicle for a government that wishes to inflict what amount to reprisals, but to evade responsibility for them.¹⁶ When bombs were set off in the Paris Metro shortly after French jets bombarded Pale, many observers wondered whether what France characterized as an act of terrorism of unidentified source was a reprisal or sur-reprisal by the Republika Syrpska.¹⁷ The fact that the authors of terrorist actions do not acknowledge their role does not necessarily mean that the target does not know of their provenance, nor that the authors, who seek and secure anonymity, do not gain whatever benefits they expected from their action.

16. See generally W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION: PRACTICES, CONTEXTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW* (1992).

17. See William Drozdiak, *4 Killed in Paris As Bomb Shatters Commuter Train*, WASH. POST, June 26, 1995, at A17; *A Little Bolder*, ECONOMIST, July 29, 1995, at 4.

Terrorism may also be used by governments, as by nongovernmental entities, in an irrational fashion, simply to cause pain, express anger or frustration, or for other psychopathological reasons. For millennial terrorists, the massive destruction they can cause may, in their vision, accelerate Armageddon, which in their cosmology may be believed to presage the advent of important desirable events. Although the increasing availability and portability of weapons of mass destruction make the prospect of this irrational terrorism especially alarming, this type of terrorism may be a relatively small part of the aggregate threat. Irrationality is a frequent interpretative gloss that government officials and commentators in and outside targets put on terrorist actions that have been mounted against them or their allies. Other interpretive glosses of such terrorist actions include: madness, insanity, depravity, barbarity, sickness, and so on.¹⁸ One should resist jumping to conclusions of the irrationality of terrorists, especially in the cross-cultural environments in which terrorism takes place. The means-end rationality and means-end morality of the terrorists may be quite different from that of the target, but be cogent nonetheless.¹⁹ Bruce Hoffman, in his searching and thoughtful study of modern terrorism, remarks that the terrorists he has interviewed proved to be both rational and driven by their own moral imperatives.²⁰

Congress's definition removes state terrorism from armed conflict and from the responses that international law allows. But one cannot, as an analytical matter, remove terrorism from the field of armed conflict, because it is an irregular technique of armed conflict, sometimes intentionally used as

18. See L.F.E. Goldie, *The "Political Offense" Exception and Extradition Between Democratic States*, 13 OHIO N.U. L. REV. 53, 56 (1986) (discussing the "depravity of terroristic activities"); James, *supra* note 9, at 408 (labeling terrorism as barbaric); Ileana M. Porras, *On Terrorism: Reflections on Violence and The Outlaw*, 1994 UTAH L. REV. 119, 127-28 (1994) (discussing metaphors of terrorism as a monster or disease).

19. See Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH. J. INT'L L. 222, 228 (1993) (observing that terrorists are less "madmen" than political strategists).

20. See HOFFMAN, *supra* note 2, at 7, 30-31.

part of the ensemble of techniques that constitute contemporary *Totalkrieg*. Terrorism is unlawful under the law of armed conflict, whether because of its explicit choice of an illicit target or the context in which the terrorist operation is planned and carried out. This does not mean that rational responses to terrorism must be or should always be military but only that one should not rule out military responses *a priori*, by means of an unappraised definition.

Nor should one seek consolation in the idea, sometimes espoused by commentators—who have often not developed effective anti-terrorist programs—that terrorism is, in any case, an ineffective and essentially marginal instrument of strategy such that it provides the grist for an interesting intellectual exercise, but does not have the importance or urgency of inquiries about “real” weapons.²¹ No instrument of strategy is effective for every objective and in every context; virtually all weapons have some military and political valence in some contexts. Terrorism sometimes works, in the sense that it achieves or contributes to the specific goal for which it was deployed. Alas, more than a few governments and a few governmental officials got their start in politics by using terrorism, and then subsequently secured power and became “legitimate.”²² *Mirabile dictu*, a few have received Nobel Peace Prizes!

In any consideration of the range of lawful responses to international terrorism, the policymaker and adviser should eschew rather narrowly bounded *a priori* definitions of terrorism as well as unexamined assumptions about the marginality or inherent lack of utility of terrorism. It will be useful to look, instead, at the full range of possible authors of terrorism, assessing what contemporary international law has prescribed and *should* prescribe with respect to

21. See John Quigley, *The New World Order and the Rule of Law*, 18 SYRACUSE J. INT'L L. & COM. 75, 109 (1992); See also LAMBERT, *supra* note 3, at 24 n.57 (citing WILKINSON, *TERRORISM AND THE LIBERAL STATE* 53 (2d ed. 1986); RUBENSTEIN, *ALCHEMISTS OF REVOLUTION* 168–69, 234–35 (1987); LAQUEUR, *THE AGE OF TERRORISM* 5–6, 303 (1987)).

22. For example, Nelson Mandela was still labeled as an international terrorist even after his release from prison. See Beverly Allen, *Talking “Terrorism”*: Ideologies and Paradigms in a Postmodern World, 22 SYRACUSE J. INT'L L. & COM. 7, 8 (1996).

responses to each of them in such a way as to address the dangers international terrorism poses to world order.

III. ANTICIPATORY RESPONSES

One of the defining characteristics of a “disaster” is that the destructive event in question was unanticipated. Yet many disasters need not be surprises; political responses, whether to terrorism or any other undesired or unpleasant event, need not be *post-hoc* or reactive. The political process may prospectively identify and assign varying degrees of probability to the undesirable events and the constructive futures in which they are likely to occur. Sometimes, anticipatory proactive or reactive responses may be set in operation to minimize the likelihood of the occurrence of the undesired events, to contain their damage, or, at the very least, to prepare a variety of remedies.

These observations are hardly unique to the problem of international terrorism. A critical dimension of modern intergovernmental arrangements is Cassandraic projection and planning to forestall or to respond adequately to categories of events that are not necessarily assigned a high probability of occurrence, but are expected, if they should occur, to cause a degree of injury deemed unacceptable, either because it is irreparable or because of its projected political, social, or economic costs. Given the fragility of certain struts of modern industrial and science-based systems, we now consider advance planning for contingencies that seriously threaten them—even those that are relatively remote—a sound investment. This means that modern decision making systems must be, and to a remarkable degree are, engaged in an ongoing process of inventing futures and developing capacities for “proacting” or “prospending” to them, rather than “reacting” or “responding” to a series of actual presents.²³

23. See generally W. Michael Reisman, *New Scenarios of Threats to International Peace and Security: Developing Legal Capacities for Adequate Responses*, in *THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT: NEW SCENARIOS — NEW LAW?* 13 (Jost Delbruck ed., 1993).

Contemporary international politics incorporates the ongoing selection and adaptation of particular proactive or proresponsive strategies in the very design, construction, and modification of fundamental decision processes. Failure to develop an appropriate proactive or proresponsive capacity and strategy need not be fatal, but the failure may later entail the investment of greater resources and the shouldering of greater costs in averting a particular, hitherto unanticipated threat, or repairing the injury it has caused.

A. Political-Philosophical Problems

Yet pragmatically expanding the reactive arsenal of the international legal system so that it includes reactive and responsive, as well as proactive and proresponsive, conceptions and methods of security maintenance, also poses moral and legal challenges to key values of our civilization. The concept of justice in the liberal democratic state presupposes that both the provisional characterization of criminal behavior and the application of sanctions will only take place if the offending behavior had been clearly and authoritatively characterized as criminal at the time it occurred. One of the reasons why criminal justice must be reactive—always "behind the curve"—is that a distinctive concern of a liberal democracy is the maintenance of a private sphere which allows the individual many opportunities to experiment with different living styles, subject only to not breaking the law, *i.e.*, not violating some preexisting norm.²⁴ But the invitation to this process of delimited individuation through experimental creation of and participation in private realities will not be taken up by many if what is prohibited by law is not clear and preannounced; hence the maxims *nullum crimen sine lege*²⁵ and *nulla poena sine crimine*.²⁶

The incorporation of anticipatory and proactive sanction responses into the strategic arsenal of a democracy imports that official normative expectations need not henceforth be

24. See W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* 159 (1999).

25. No crime without law. *BLACK'S LAW DICTIONARY* 808, 963, 1242 (5th ed. 1979).

26. No punishment without crime. *Id.* at 335, 962, 1040, 1242.

“pre-announced.” The prospect that behavior that is currently lawful, or at least not unlawful, may be viewed retrospectively as unlawful and an appropriate target for community sanctions can effectively chill the making of the personal choices that are the essence of the private sphere. Proactive and proresponsive strategies against international terrorism may not seem problematic in terms of these liberal values because broad conceptions of terrorism, in many popular and academic discussions in the United States, cover a wide range of events, each of which is by definition a *mala in se*.²⁷ But the very breadth of the definition, cogent for strategic planning purposes, creates its own problems. Because some of the events covered by the definition may have been nurtured by grievances which legal institutions refuse or are unable to address or repair, robust proactive and proresponsive programs may chill the popular indignation that is a critical part of the dynamics and ever-present possibility of peaceful change in a free society.

B. Intelligence Gathering

A standard method of anticipatory response to terrorism is the gathering of intelligence. In domestic legal systems of modern constitutional democracies, intelligence gathering is an acutely sensitive issue, precisely because it has the potential for infringing on privacy and many protected rights. Hence, procedures and objectives are prescribed by statute and supervised by the judiciary.²⁸ Transnational intelligence gathering operates with considerably fewer legal and political constraints, yet may provoke crises when discovered—witness the disquiet caused by reports that the CIA used UNSCOM as a cover for electronic eavesdropping on Iraqi government communications.²⁹

27. “Wrongs in themselves; acts morally wrong; offenses against conscience.” *Id.* at 861.

28. See, e.g., 50 U.S.C. § 1802 (1994) (providing specific guidelines by which the executive branch may gather electronic intelligence without judicial authorization).

29. See Tim Weiner, *U.S. Used U.N. Team to Place Spy Device in Iraq*, *Aides Say*, N.Y. TIMES, Jan. 8, 1999, at A1 (noting that critics accused the United States of abusing its position within the multilateral framework of

Intelligence gathering may go beyond the gathering and processing of open communications and the monitoring of ostensibly private communications. Infiltration of clandestine terrorist groups is often necessary for intelligence gathering, but may slip into participating in or provoking terrorist action. International law views passive intelligence gathering as lawful in general.³⁰ More interventionist intelligence gathering is widely practiced by intelligence agencies and is normatively controversial.³¹ It may be that the international decision process accords it a higher level of tolerance if it is clear that it is directed at anticipating and preventing serious crimes that threaten minimum order.

C. *Contingent Threats of Massive Retaliation*

Threats of massive retaliation may deter planned terrorist actions that have been detected as a result of intelligence gathering. But the threats must be credible and the targeted state must live with the possibility—with its increased domestic political costs—that the threat may fail and the terrorist act may occur. The probability of failure is less likely when the anticipatory action is not merely the communication of a threat of contingent action if the terrorist act eventuates, but prompt action directed at destroying the terrorist capacity or infrastructure as soon as it becomes clear that a threat alone will not suffice.

The nub of the problem of the doctrine of anticipatory self-defense is whether there is consensus, in each instance,

UNSCOM for its own, unilateral goals; U.S. and U.N. officials, however, insisted that the eavesdropping operation was not a unilateral covert action).

30. See generally Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The Intelligence Function and World Public Order*, 46 TEMP. L.Q. 365 (1973), reprinted in MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 287 (1981); REISMAN & BAKER, *supra* note 16; Captain Robert G. Hanseman, USAF, *The Realities and Legalities of Information Warfare*, 42 A.F.L. REV. 173, 182–83 (1997).

31. See Walter Pincus, *Relaxed CIA Covert Action Rules Urged; Blue-Ribbon Panel Wants More 'Risk-Taking' Within Limits of the Law*, WASH. POST, Jan. 30, 1996, at A13 (quoting director of Council on Foreign Relations panel as saying that covert intelligence operations may seem controversial but should be objectively evaluated for use by the CIA).

on the circumstances and contingencies in which preemptive action may be taken. Even those who support the lawfulness of unilateral preemptive action acknowledge its potential for abuse in an international political system that lacks effective decision institutions and perforce assigns the competence to make decisions, in the first instance, to the interested and acting state itself. The difficulties of application are manifest in a number of recent incidents.

D. *Preemptive Actions*

The most aggressive anticipatory action against terrorism is the preemptive strike. Consider a scenario in which intelligence gathering activities reliably establish that a rogue state is producing biological weapons at a clandestine factory which are to be used in a terrorist action against the United States. Is it lawful to destroy the factory, whether by air attack or the infiltration and exfiltration of agents in a covert operation? Clearly, authorization by the Security Council, acting under Chapter VII of the United Nations Charter,³² would fulfill the *jus ad bellum* (right to initiate armed conflict) requirement, though it would not, in and of itself, fulfill the requirements of the ongoing *jus in bello*. Yet elaborate discussions in the Security Council with a view to agreeing on some coordinated response or authorization for a unilateral action are implausible in this hypothetical because they would alert the rogue state, allowing it the time to take evasive action and increasing the likelihood and extent of casualties which would be suffered by the state contemplating the preemptive action.

In 1981, Israel destroyed the Iraqi nuclear reactor near Baghdad in a preemptive attack.³³ There was general condemnation in the United Nations, though the United States ultimately blocked inclusion of the word "aggression" in the drafting of a Security Council Resolution.³⁴ Within a decade, many of the states who had voted to condemn Israel

32. U.N. CHARTER arts. 39-51.

33. See *Situation Between Individual Arab States and Israel*, 1981 U.N.Y.B. 275, U.N. Sales No. E.84.I.1 (reviewing the facts of the attack).

34. See *U.N. SCOR Resolution, 487* 1981 U.N.Y.B. 282, U.N. Sales No. E.84.I.1.

in the General Assembly, including many of the members of the Arab League, must surely have revised their view of the action. Scholars still debate the lawfulness of the Israeli action,³⁵ though I believe that now the general consensus is that it was a lawful and justified resort to unilateral, preemptive action. The attack is also instructive in that it cautions scholars to defer inferences about international decisions with respect to the lawfulness of unilateral preemptive actions until a certain period of time has elapsed. In the nature of these attacks, the targeted state is often able to command instant sympathy, while the preemptive attacker may require more time to publicize its intelligence information and elaborate its justifications, both of which may ultimately prove to be more persuasive to the international decision process.

While the United States has not expressed a clear policy objective with respect to its current aerial actions against Iraq,³⁶ it appears that, with the collapse of UNSCOM, the United States and the United Kingdom have assumed responsibility for an active and continuing preemptive strategy against Saddam Hussein's development of weapons of mass destruction.³⁷ Even discounting for the fact that Iraq has been inept in developing sympathy for itself, it is significant that the actions have not aroused sustained, strong international condemnation. Though the current Iraqi incident has many unique features, are we witnessing the consolidation of a more permissive norm with respect to unilateral preemptive action against a terrorist state which is demonstrably embarked on a program for the production of weapons of mass destruction³⁸ and whose prior conduct

35. See generally 1 ANTHONY D'AMATO, *Pre-Emptive Strikes Against Nuclear Installations*, in *INTERNATIONAL LAW AND POLITICAL REALITY* 247 (1995).

36. See Karen DeYoung, *Baghdad Weapons Programs Dormant; Iraq's Inactivity Puzzles U.S. Officials*, WASH. POST, July 15, 1999, at A19.

37. See Paul Richter, *No End Is in Sight to U.S. Air Campaign Over Iraq; Military: Attacks in 'No-Fly' Zones Continue in Low-Key Fashion So As Not to Stir Criticism Here and in Arab World*, L.A. TIMES, Mar. 3, 1999, at A1.

38. See ANDREW COCKBURN & PATRICK COCKBURN, *OUT OF THE ASHES: THE RESURRECTION OF SADDAM HUSSEIN* 89-93 (1999); See generally SCOTT RITTER, *ENDGAME: SOLVING THE IRAQ PROBLEM — ONCE AND FOR ALL* (1999).

indicates the likelihood that it is predisposed to use them aggressively?

Even if subsequent events sustain this normative hypothesis, it has not been applied to unilateral preemptive actions against terrorist groups who are not directly affiliated with the government of the territory. While the United States attack on Khartoum (an issue we will discuss in more detail later) appears to have been (formal justifications notwithstanding) essentially retaliative,³⁹ the bombardment of training camps in Afghanistan was justified in pro-active terms: the attack, it was claimed, prevented terrorist attacks against U.S. installations that were then being prepared and would have been launched from those camps.⁴⁰ The initial reactions to the United States' bombardment were, on the whole, critical, though assessments of lawfulness of unilateral actions generally require, as I said, a longer temporal perspective. Had the neutralization been accomplished by covert means, it would not have excited the condemnation of an overt raid, but would not, for that reason alone, have been lawful, unless the international community had reached a consensus that unilateral actions were warranted in order to preempt a terrorist action.⁴¹

International legal scholars often appraise lawfulness in ways different from that of the general public or its lay opinion leaders. The international legal test of lawfulness of the preemptive actions under discussion here would presumably turn on two sets of questions: first, the right to act (*jus ad bellum*); and, if that were established, the necessity and proportionality of the action, as well as the capacity of the weapons chosen for the action to discriminate between belligerents and nonbelligerents. Like any other unilateral action, necessity, in this context, would include the absence of a plausible and timely international institutional alternative.

39. See Dudley Althaus, *Inside Sudan's Civil War; Conflict 'A Checkmate That Only Produces Dead Civilians,'* HOUS. CHRON., Aug. 29, 1999, at Special 8.

40. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161-63 (1999).

41. See REISMAN & BAKER, *supra* note 16, at 27-28, 73-77.

In the current bombing of Iraq in response to alleged Iraqi challenges to the no-fly zones, United States spokespersons have indicated satisfaction with "degradation" rather than "destruction;"⁴² this would not appear to be a useful standard for preemptive operations against states involved in planning and preparing specific terrorist actions. In fact, U.S. objectives, as some have speculated, may now have transformed to insisting on a change in the leadership of Iraq, ostensibly as a general and more durable solution to its terrorist programs, rather than preemption by means of the destruction or degradation of its particular arsenals for terrorism.⁴³

E. Internationally Cooperative Anticipatory Responses

1. Tagging Explosive Materials

In 1996, the General Assembly, in Resolution 51/210, entitled Measures to Eliminate International Terrorism, called upon all states

[t]o accelerate research and development regarding methods of detection of explosives and other harmful substances that can cause death or injury, undertake consultations on the development of standards for marking explosives in order to identify their origin in post-blast investigations, and promote cooperation and transfer of technology, equipment and related materials, where appropriate.⁴⁴

A number of international and domestic legislative efforts have focused on tagging explosive materials as a way of facilitating law enforcement. The Convention on the Marking of Plastic Explosives for the Purpose of Detection of 1991 mandates the use of chemical markers in the manufacture of plastic explosives to facilitate detection by electronic

42. See Harry Levins, *What Clinton Said — And Its Context*, ST. LOUIS POST-DISPATCH, Dec. 17, 1998, at A10.

43. See generally COCKBURN & COCKBURN, *supra* note 38; see also Rick Atkinson, *Is Mission 'Pinprick' or Punitive*, WASH. POST, Dec. 18, 1998, at A55.

44. G.A. Res. 51/210, U.N. GAOR 6th Comm., 51st Sess., 88th plen. mtg., at 3(b), U.N. Doc. A/51/631 (1996).

equipment and search dogs.⁴⁵ The Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials was adopted in 1997.⁴⁶ Domestically, the Antiterrorism and Effective Death Penalty Act requires *inter alia* that plastic explosives manufactured in or imported into the United States contain a tag or "detection agent" to facilitate identification of the user.⁴⁷

2. Regulation of the Sale of Materials With a High Terrorist Potential

Similarly, a number of conventions have focused on limiting terrorist access to highly dangerous materials through various forms of regulation. The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 1993 entered into force on April 29, 1997.⁴⁸ The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons was concluded in 1972.⁴⁹

The Convention on the Physical Protection of Nuclear Materials of 1980 is one of the few to which the United States is a party.⁵⁰ Note may also be taken of the U.S. government's

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

46. Organization of American States: Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, Nov. 14, 1997, 37 I.L.M. 145.

47. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 603, 110 Stat. 1214, 1289.

48. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 804.

49. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583.

50. See *Measures to Eliminate International Terrorism: Report of the Secretary-General*, U.N. GAOR, 48th Sess., U.N. Doc. A/48/267 (1993) (indicating that the United States signed the Convention on the Physical Protection of Nuclear Material on March 3, 1980).

efforts to police the sale and transfer of dual-use pathogens used in biological warfare.⁵¹

3. *Multilateral Conventions*

Another anticipatory method for dealing with international terrorism involves multilateral initiatives to create a supportive normative environment for the prevention of terrorism or apprehension of those who have engaged in it. Thanks to political divisions over what constitutes terrorism, this approach has not been marked with great success until now. As early as 1937, the Convention for the Prevention and Punishment of Terrorism allowed a state to decline extradition for acts it determined fell within the political offense exception.⁵²

Conventional initiatives have been a major focus of international activity since the 1970s and have produced a great deal of paper, but not a great deal of useful law. The Hague Convention of 1970 against the capture of civil aircraft and the Montreal Convention of 1971 on illegal acts against civil aircraft are essentially extradition and judicial assistance treaties.⁵³ As the *Lockerbie* case in the International Court⁵⁴ and thereafter in the United Nations made clear, these treaties by themselves are of little use if the terrorism in question is state-sponsored and the terrorist state is expected to cooperate in its own investigation and conviction. If, as parallel indictments in the United States

51. See PHILIP B. HEYMANN, *TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY* 91 (1998).

52. See *Convention for the Prevention and Punishment of Terrorism*, 7 INTERNATIONAL LEGISLATION 862, 868 (Manley O. Hudson ed., 1941); See generally CHRISTINE VAN DEN WIJNGAERT, *THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION* 148-49 (1980) (explaining that the political offense exception makes extradition subject to the "domestic law of each contracting party").

53. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1644, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 568.

54. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3 (Provisional Measures Order of Apr. 14).

and the United Kingdom contend,⁵⁵ the government of Libya was the author of the destruction of Pan Am 103, in which 188 Americans were killed,⁵⁶ a legal regime that requires voluntary Libyan cooperation in investigation and trial of the perpetrators will fail. We may refer to this as the "Lockerbie problem."

In 1972, the U.N. Secretary General initiated legal efforts with a view toward conclusion of a comprehensive treaty banning terrorism.⁵⁷ The United States vigorously supported the initiative, but it was effectively resisted by the NAM, which proposed instead a study of the underlying causes of terrorism.⁵⁸ The NAM was concerned to exclude from international criminalization violent actions, whatever their nature, that were undertaken by groups fighting in the "struggle of national liberation movements."⁵⁹ As a statement of the Government of Cyprus put it, there was a distinction to be drawn between "international terrorist acts, which the international community abhors, and militant forms of liberation activity by people struggling for their inalienable rights to freedom, independence and sovereignty, which are internationally accepted as legitimate liberation struggles."⁶⁰ This terrorist parallel to *bellum justum* (just war) precluded

55. See *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748 (2d. Cir. 1998). ("The two men named as defendants in this suit, both of whom are Libyan, have been indicted in the United States and the United Kingdom in connection with the bombing.") *Id.* at 754.

56. See George D. Moffett III, *U.S. Seeks Means to Justice in Bombing of Flight 103*, CHRISTIAN SCI. MONITOR, Nov. 18, 1991, at 4.

57. See *Report of the Ad Hoc Committee on International Terrorism (1973)*, 1 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 329, 331 (Robert A. Friedlander ed., 1979) [hereinafter *Report of the Ad Hoc Committee*].

58. See NOEMI GAL-OR, INTERNATIONAL COOPERATION TO SUPPRESS TERRORISM 84-85 (1985) (noting that discussion shifted from prevention of terrorism to causes of terrorism); *Questions Relating to International Terrorism*, 1972 U.N.Y.B. 639, 645, U.N. Sales No. E.74.I.1 (noting that the third draft, sponsored by the nonaligned movement encouraged all states to seek "just and peaceful solutions" to causes of terrorism).

59. *Report of the Ad Hoc Committee*, *supra* note 57, at 350. See *Questions Relating to International Terrorism*, *supra* note 58, at 645.

60. Bradley Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 OHIO N.U. L. REV. 117, 134 n.85 (1986) (citing *Observations of States Submitted in Accordance with General Assembly Resolution 3034 (XXVII) to the Ad Hoc Committee on International Terrorism*, U.N. Doc. A/AC.160/1 *et seq.* (1973)).

agreement on a common understanding of terrorism, since the discussion had shifted from the lawfulness of a technique to the lawfulness of the purpose for which it was deployed, on which there was fundamental disagreement.

Viewed in this fashion, enough states in the United Nations believed that terrorism used for so-called "national liberation" was lawful, for Oscar Schachter to conclude that "no single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multilateral treaty."⁶¹ During this period, an ad hoc committee established by the United Nations produced a number of nonbinding recommendations admonishing states, in general terms, to "refrain from . . . terrorist acts in another State . . ."⁶² In the meanwhile, a majority of the Security Council criticized Israeli and United States anti-terrorist retaliatory strikes, while the General Assembly, though calling on all states to "refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts,"⁶³ tended to be critical of all retaliatory actions, even, apparently, when they were the only meaningful option available to the victim.

Because of this fundamental fault-line in the political topography, a series of conventions were produced for specific crimes: the Diplomats and Internationally Protected Persons Convention of 1973,⁶⁴ the Hostage Convention of 1979,⁶⁵ the Protection of Nuclear Materials Convention of

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

62. *Report of the Ad Hoc Committee*, *supra* note 57, at 339.

63. G.A. Res. 40/61, U.N. GAOR 6th Comm., 40th Sess., 108th plen. mtg., Supp. No. 53, at 302, U.N. Doc. A/40/1003 (1985), *reprinted in XXIV UNITED NATIONS RESOLUTIONS* 507 (Dusan J. Djonovich ed., 1988).

64. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, G.A. Res. 3166 (XXVIII), U.N. GAOR 6th Comm., 27th Sess., 2202d plen. mtg., Supp. No. 30, U.N. Doc. A/9407 (1973).

65. International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. GAOR 6th Comm., 34th Sess., 105th plen. mtg., Supp. No. 46, at 245, U.N. Doc. A/34/819 (1979).

1980,⁶⁶ the Protocol to the Montreal Convention of 1988 (extending its reach to acts of violence in airports),⁶⁷ the Navigation Security Convention of 1988,⁶⁸ the Protocol on Platforms on the Continental Shelf,⁶⁹ and the Terrorists Explosives Convention of 1997.⁷⁰ Each, as its title indicates, addressed a particular type of terrorist action, but none essayed a more general definition of terrorism. As for mode of implementation, each was essentially an extradition treaty.

In 1986, Syria called for a diplomatic conference to define terrorism and distinguish it from actions in pursuit of national liberation.⁷¹ The proposal was enthusiastically supported by the Arab states, but staunchly opposed by the West. The prescriptive stalemate was broken in the early 1990s when Algeria, and then other North African states, now compelled to view terrorism from the victims' perspective, broke ranks with the NAM and called for a more comprehensive diplomatic approach.⁷² Even then, however, resistance to a general definition persisted and it continued to be easier to address particular acts. A qualitative change was, nonetheless, registered and its first explicit manifestation was a declaration in 1994, followed by a

66. See *Measures to Eliminate International Terrorism: Report of the Secretary-General*, U.N. GAOR, 48th Sess., U.N. Doc. A/48/267 (1993) (citing Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980).

67. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 27 I.L.M. 628 (1988).

68. See *Measures to Eliminate International Terrorism*, *supra* note 66 (citing Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988).

69. See *id.* (citing Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988).

70. International Convention for the Suppression of Terrorist Bombings, 37 I.L.M. 249 (1998).

71. See *Syria Calls for Definition of Terrorism*, XINHUA GEN. OVERSEAS NEWS SERVICE, Dec. 18, 1986, available in LEXIS, News Library, Wire Service Stories File.

72. See Lachlan Carmichael, *OIC Considers Unprecedented Plan to Stop Moslem Extremism*, AGENCE FR. PRESSE, Dec. 11, 1994, available in LEXIS, News Library, Wire Service Stories File (noting that Egypt, Algeria, Tunisia, and Turkey called on members of the Organization of the Islamic Conference to "refuse to support or finance Moslem militant groups").

declaration in 1996.⁷³ Both were nonbinding instruments. The 1994 Declaration declared:

1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States;

2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;

3. Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;

4. States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their

73. Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, U.N. GAOR 6th Comm., 49th Sess., 84th plen. mtg., U.N. Doc. A/49/743 (1994); Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 51/210, U.N. GAOR 6th Comm., 51st Sess., 88th plen. mtg., U.N. Doc. A/51/631 (1996).

territories directed towards the commission of such acts.⁷⁴

The 1996 declaration continued the trend of reprehending, by implication, unilateral, forceful action.

The 1994 declaration was accompanied by a request that the Secretariat study the way terrorism was treated in national laws and treaties.⁷⁵ An ad hoc committee was established,⁷⁶ but again, its mandate was focused on a particular pathology rather than the general problem. The first result of this effort, the Convention for the Suppression of Terrorist Bombings, adopted in 1997, may represent a sea-change, for it criminalizes a general technique,⁷⁷ which it explicitly insulates from characterization "as a political offence or as an offence connected with a political offence or as an offence inspired by political motives."⁷⁸ Article 11 continues: "A request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives."⁷⁹

The Convention now has forty-two signatures and one ratification;⁸⁰ twenty-two ratifications are required for entry

74. See G.A. Res. 49/60, *supra* note 73.

75. See *id.*

76. See G.A. Res. 51/210, *supra* note 73.

77. United Nations: International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, 37 I.L.M. 249:

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility: (a) With the intent to cause death or serious bodily injury; or (b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

Id. at 253.

78. *Id.* at 257.

79. *Id.*

80. See *Ad Hoc Committee on Instruments to Combat International Terrorism Begins Third Session*, M2 PRESSWIRE, Mar. 16, 1999, available in

into force.⁸¹ In 1996, the Assembly adopted a resolution calling for a convention on nuclear terrorism.⁸² Article 12 of this draft convention relieves the state from an obligation to extradite if the purpose of the prosecution arises from, *inter alia*, the “political opinion” of the person sought.

All of these instruments are essentially extradition and judicial assistance treaties and, with the exception of the 1998 Terrorist Bombing Convention, would apparently allow extradition to be refused on the basis of the political offense exception. These instruments also purport to prohibit direct action in the territory of a state that may harbor a terrorist. In this respect, they do not address the “Lockerbie” problem. This is not a minor technical defect. Even when a terrorist is apprehended in a state that does not practice terrorism, there may still be substantial resistance to extraditing, as the rather bizarre case of the pursuit and apprehension of Abdullah Ocalan, the leader of the PKK (a Kurdish separatist organization in Turkey), demonstrates. Italy refused to extradite Ocalan to Turkey,⁸³ and Germany, despite an outstanding warrant for his arrest there, declined to request extradition,⁸⁴ presumably because of fear of the reactions of its sizable Turkish and Kurdish minorities.⁸⁵ Ocalan was finally apprehended in Nairobi, Kenya by means of a unilateral covert action, whose details and participants remain obscure, and returned to Turkey, where he was tried and condemned to death.⁸⁶ The Ocalan case demonstrates that some states, even those prominently involved in efforts

LEXIS, News Library, ALLNWS File (noting that since this Article was written, the numbers have changed to forty-three signatures and two ratifications).

81. See United Nations: International Convention for the Suppression of Terrorist Bombings, *supra* note 77, at 260.

82. See G.A. Res. 51/210, *supra* note 73.

83. See Stephen Kinzer, *A Kurd's Arrest Slows Turkey's Path to Europe*, N.Y. TIMES, Nov. 29, 1998, at WK10.

84. See CNN, *Germany Risks Importing Turk War With Ocalan* (last modified Nov. 25, 1998) <<http://cnn.com/WORLD/europe/9811/25/BC-GERMANY-TURKEY-OCALAN.reut/index.html>>.

85. See *id.*

86. See Amberin Zaman, *Rebel Kurd Urges End to Revolt: Ocalan Entreaties Dismissed by Turks*, WASH. POST, Aug. 4, 1999, at A15 (noting that Ocalan's case is being reviewed by an appeals court which will likely uphold the death sentence).

to create international regimes against terrorism, may still grant or withhold rendition of terrorists in particular cases, depending on whether they seek some other accommodation from the state seeking the terrorist.

4. *Bilateral Agreements and Understandings*

Cooperation between limited numbers of states sharing a certain community of interest may provide a more promising avenue of anticipatory action. The sharing of intelligence within NATO, for example, and memoranda of understanding between the intelligence agencies of its members, could lead to concerted international action in anticipation of terrorism. But even states with apparently converging or complementary interests in the suppression of terrorism and intricate networks of treaty relationships may not agree on action in concrete situations. When President Reagan ordered U.S. forces to seize Abu Abbas, the architect of the Achille Lauro terrorist action,⁸⁷ and U.S. planes forced the Egyptian plane carrying him down in Italy, Italian troops protected him and Italy ultimately allowed him to proceed to Yugoslavia.⁸⁸ We will consider this incident in more detail in a moment.

Yoram Dinstein has observed that

[u]ntil a few years ago, the International Criminal Police Organization (Interpol) was unauthorized to act as a clearinghouse for exchanges of information between law enforcement agencies as regards political terrorists. Such exchanges, based on the collation of intelligence data from independent sources worldwide, are indispensable to police monitoring of terrorist organizations.⁸⁹

87. See W. Michael Reisman, *An International Farce: The Sad Case of the PLO Mission*, 14 YALE J. INT'L L. 412, 414 & n.13 (1989) (citing Gooding, *Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers*, 12 YALE J. INT'L L. 158, 164-68 (1987); McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691 (1985)).

88. See John M. Goshko, *PLO Agrees to Settlement of Lawsuit Over Achille Lauro Slaying*, WASH. POST, Jan. 19, 1996, at A6.

89. Yoram Dinstein, *International Cooperation in the Prevention and Suppression of Terrorism* (April 12, 1986), in 80 PROC. AM. SOC'Y INT'L L. 386, 399 (1986).

That impediment has been removed. Article K.1(9) of the Treaty on the European Union provides for “police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking, and other serious forms of international crime, including customs cooperation in connection with a Union-wide system for exchanging information with a European Police Office (Europol).”⁹⁰

IV. RESPONSES AFTER THE FACT

Until now we have considered anticipatory options that can deter, prevent, or minimize international terrorism and the legal arrangements relating to them. Let us turn our attention to responses after the fact and the international legal arrangements that facilitate or hinder them in terms of the different authors of international terrorism.

A. *Responses When a Government Is the Author*

On December 27, 1985, bombs struck airline offices in Rome and Vienna, killing twenty civilians, including five Americans, and injuring eighty others.⁹¹ No conclusive evidence linked Libya to the attacks, but the passports employed by the Arab attackers were traced to Libya.⁹² Colonel Muammar el Qadhafi, while disclaiming responsibility for the bombings, “referred to the attacks as ‘heroic’.”⁹³ President Reagan attributed the assaults to the Abu Nidal terrorist organization, which received support from Libya.⁹⁴ Following this incident, U.S.-Libya relations deteriorated; President Reagan broke off economic relations with Libya and encouraged other nations to impose economic sanctions.⁹⁵ Approximately one year later, further hostilities ensued in connection with Libyan pretensions to the Gulf of

90. John P. Flaherty & Maureen E. Lally-Green, *The European Union: Where is it Now?* 34 DUQ. L. REV. 923, 983–84 (1996).

91. See Gregory Francis Intocchia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT’L L. 177, 182 (1987).

92. See *id.*

93. *Id.*

94. See *id.*

95. See *id.* at 182–83.

Sidra (international waters to which Libya has intermittently claimed exclusive ownership).⁹⁶

On March 24, 1986, several close confrontations between the U.S. Navy and Libyan forces culminated in an exchange of fire.⁹⁷ Libya launched six missiles at U.S. fighter planes engaged in a naval exercise within what Libya considered its territorial waters; in response, the United States attacked Libyan patrol boats and missile sites.⁹⁸

Tensions thus were taut when, scarcely two weeks later, on April 4, 1986 (April 5 in Germany), a bomb exploded in La Belle Discotheque, a nightclub in West Berlin frequented by American GIs, killing three and wounding over 150 others, including fifty to sixty Americans.⁹⁹ While Colonel Qadhafi again disclaimed responsibility,¹⁰⁰ American and German officials remarked that "state-sponsored international terrorists were responsible for the attack,"¹⁰¹ and senior American officials noted "clear indications of Libyan responsibility."¹⁰²

In the immediate aftermath of the attack, media reports indicated that Washington had recently become aware that Libya was urging its allies and agents to retaliate against the United States for what Qadhafi claimed was a "U.S. campaign against him."¹⁰³ Shortly thereafter, President Reagan disclosed that the National Security Agency (NSA)—the United States' electronic espionage body—had intercepted and decoded several exchanges between Tripoli and the

96. Bernard Weinraub, *U.S., Citing Libyan Fire, Reports Attacking A Missile Site and Setting 2 Ships Ablaze*, N.Y. TIMES, Mar. 25, 1986, at A1.

97. *See Attacks Climaxed 3 Months of Tension U.S. Warplanes Finally Crossed 'Forbidden Line'*, TORONTO STAR, Mar. 25, 1986, at A14.

98. *See* Weinraub, *supra* note 96.

99. *See id.* at 185 (citing John Tagliabue, *2 Killed, 155 Hurt in Bomb Explosion at Club in Berlin*, N.Y. TIMES, Apr. 6, 1986, at § 1, p. 1; Department of Defense Security Review); George C. Wilson & Don Oberdorfer, *Bomb Explodes in Berlin Disco Frequented by GIs*, WASH. POST, Apr. 5, 1986, at A1.

100. *See* Intoccia, *supra* note 91, at 185 (citing Edward Schumacher, *Libya Says U.S. Attack Would Bring Response*, N.Y. TIMES, Apr. 10, 1986, at A8).

101. *West Berlin Blast Kills U.S. Soldier 155 Injured in Disco Attack; Libyans [sic] Link is Suspected*, ATLANTA J. & CONST., Apr. 6, 1986, at A1.

102. *See id.*

103. *See* George C. Wilson & Don Oberdorfer, *Blast in W. Berlin Club Kills 2, Injures 80; Many of Victims at Disco Believed to be American Servicemen*, L.A. TIMES (HOME EDITION), Apr. 5, 1986, at pt.1, p.2.

Libyan People's Bureau in East Berlin, including an order from Tripoli to the Bureau to carry out "a terrorist attack on Americans";¹⁰⁴ a response confirming that the attack would occur the following day (April 5); and a confirmation of the attack, noting the mission's "great success"¹⁰⁵ and assuring Tripoli that the terrorist operation "could 'not be traced to the Libyan People's Bureau."¹⁰⁶ In November 1997, the United States took the unprecedented step of permitting these decoded NSA interception transcripts to be made public in a foreign trial.¹⁰⁷

President Reagan responded promptly to this paradigmatic state-authorized terrorist attack.¹⁰⁸ On April 14, 1986, U.S. fighter planes bombed "military and paramilitary targets in Libya, including airfields, intelligence facilities, and terrorist training camps."¹⁰⁹ The attacks caused substantial destruction to Libya's military infrastructure, but also killed an unknown number of civilians.¹¹⁰ Following the strikes, President Reagan proclaimed, "Today, we have done what we had to do. If necessary, we shall do it again."¹¹¹

Both Congress and the U.S. citizenry overwhelmingly endorsed the President's action. Seventy-seven percent of the population, according to a *New York Times* poll, supported the bombing, though forty-three percent were concerned that the raid would exacerbate U.S.-Libya tensions and generate

104. Bob Woodward & Patrick E. Tyler, *Libyan Cables Intercepted and Decoded*, WASH. POST, Apr. 15, 1986, at A1.

105. *Id.*

106. *Id.*

107. See Bill Gertz, *U.S. Intercepts from Libya Play Role in Berlin Bomb Trial*, WASH. TIMES, Nov. 19, 1997, at A13.

108. See Stuart G. Baker, Note, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99, 104 (1994) (citing David Turndorf, Note, *The U.S. Raid On Libya: A Forceful Response to Terrorism*, 14 BROOK. J. INT'L L. 187, 187 n.1 (1988)).

109. *Id.*

110. See *id.* at 104-05 (noting that between 45 and 100 civilians were killed).

111. President Ronald Reagan, Address (Apr. 14, 1986), in WASH. POST, Apr. 15, 1986, at A23.

further acts of terrorism.¹¹² Indeed, thousands of Americans canceled travel plans to Europe.¹¹³ Congress also expressed support for the President's decision, and shortly after the raid, it passed several new acts aimed at terrorist activities. Bills were introduced that would have authorized the President to retaliate in the face of terrorism without prior consultation with Congress and to permit the President to order assassination of a foreign head of state under certain circumstances.¹¹⁴

International response was not enthusiastic. "The immediate European reaction was consternation. While Britain had allowed American F-111s to fly from bases in the U. K. . . . France had refused to allow the U.S. aircraft to overfly French territory."¹¹⁵ In fact, with the exception of Britain, Israel, and South Africa, and to a lesser extent, Canada, many of the United States' allies opposed the raid and questioned its legality.¹¹⁶ In West Germany, Italy, Sweden, and even Great Britain, demonstrators marched and burned American flags in protest.¹¹⁷ "The Soviet Union deplored the raid and canceled a pre-summit meeting with the United States";¹¹⁸ China decried the attack as a violation

112. See Intocchia, *supra* note 91, at 187 (citing Adam Clymer, *Tension in Libya: Polling the American Public; A Poll Finds 77% in U.S. Approve Raid on Libya*, N.Y. TIMES, Apr. 17, 1986, at A23).

113. See *id.* (citing Joseph Treaster, *Tour Bookings to Caribbean Rise Along With Americans' Fear of Europe*, N.Y. TIMES, Apr. 20, 1986, § 1, at 14).

114. See *id.* (citing Linda Greenhouse, *Tension Over Libya: Tough Words From Moscow: Bill Would Give Reagan a Free Hand on Terror*, N.Y. TIMES, Apr. 18, 1986, at A9).

115. James Adams, *How Europe Got Tough On Terrorism; Sharing Data and Surveillance Cast a Light into the Shadows*, WASH. POST, Feb. 14, 1988, at C1.

116. See Baker, *supra* note 108, at 105 (citing Andrew H. Malcolm, *While Across the Atlantic, Anglophilia Rules*, N.Y. TIMES, Apr. 26, 1986, at A4; *U.S. Jets Bomb Libyan Targets; Reagan Cites 'Self-Defense' Against Terrorism, Vows Further Raids if Needed*, 1986 FACTS ON FILE 257, 260; *Israelis Praise it While Arabs Vow to Avenge it*, CHIG. TRIB., Apr. 16, 1986, at A9; Kiki Bhatia, *The Reluctant Cowboy*, HERITAGE FOUND. POL. REV., Fall 1988, No. 46 at 55-56, 258, 260).

117. See Intocchia, *supra* note 91, at 188 (citing *Tension Over Libya: Thousands Take to the Streets; Anti-U.S. Protests Spread as Europeans Criticize Raid*, N.Y. TIMES, Apr. 20, 1986, § 1, at 14).

118. Baker, *supra* note 108, at 105 (citing Kiki Bhatia, *The Reluctant Cowboy*, HERITAGE FOUND. POL. REV., Fall 1988, No. 46 at 55-56).

of Libya's national sovereignty;¹¹⁹ and "Third World nations uniformly condemned the raid."¹²⁰ Though the Organization of Petroleum Exporting Countries (OPEC) refused Libya's request to impose an oil embargo on the United States, eight of its thirteen members voted to condemn the raid.¹²¹

The United Nations likewise evinced unambiguous disapproval; Secretary General Perez de Cuellar condemned the act.¹²² The General Assembly passed a resolution, supported by seventy-nine member states, denouncing the raid,¹²³ and the Security Council attempted to issue a resolution (vetoed by the United States, Great Britain and France) stating that the U.S. attack violated the U.N. Charter and rejecting President Reagan's invocation of Article 51 as justification.¹²⁴

In this incident, as in others, an elongation of the time horizon yields a different picture of international responses. After the immediate reaction to the raid and the regional and national condemnations, Western European nations began to adopt economic and diplomatic sanctions against Libya.¹²⁵ The EEC proposed new anti-terrorist measures, several of which involved increased cooperation and exchange of information between the United States and the European Community.¹²⁶ Less than a year later, when the United

119. See *id.* (citing *Israelis Praise it While Arabs Vow to Avenge it*, CHIG. TRIB., Apr. 16, 1986, at A9).

120. *Id.* at 106 (citing Gregory Francis Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 189 (1987)).

121. See Intoccia, *supra* note 91, at 189 (citing John Tagliabue, *Attack on Libya: A Call for an Oil Embargo; OPEC Ministers Reject Libya Appeal*, N.Y. TIMES, Apr. 16, 1986, at A20).

122. See Baker, *supra* note 108, at 106 (citing *Israelis Praise it While Arabs Vow to Avenge it*, CHIG. TRIB., Apr. 16, 1986, at A9).

123. G.A. Res. 41/38, U.N. GAOR, 41st Sess., 78th mtg., 1986 U.N.Y.B. 257, U.N. Sales No. E.90.I.1.

124. See Baker, *supra* note 108, at 106 & n.42 (citing Ivan Zverina, *U.S., Britain, France Veto U.N. Condemnation of Raid on Libya*, UPI, Apr. 21, 1986, available in LEXIS, Nexis Library, UPI File).

125. See Karen DeYoung, *Britain Departs 21 Libyans: Other EC Nations to Reduce Number of Qaddafi Envoys*, WASH. POST, Apr. 23, 1986, at A1; David Lamb, *U.S. Wins a Few Upping the Stakes on Terrorism*, L.A. TIMES, Oct. 11, 1987, at 1.

126. See *U.S. Will Approve Anti-Terror Measures*, SEATTLE TIMES, Nov. 25, 1986, at B3.

States denounced Syria as an exporter of terrorism, European states responded quickly with economic and political sanctions.

When Pan Am 103 was destroyed by a bomb planted by Libyan agents, there was no retaliation.¹²⁷ Rather, President Bush, Reagan's successor, authorized economic sanctions and a domestic judicial approach.¹²⁸ In 1993, President Clinton ordered the bombardment by cruise missile of intelligence headquarters in Baghdad because of the aborted effort of Iraq to assassinate former President Bush on his visit to Kuwait.¹²⁹ Although this was a "response" rather than an anticipatory action, it may have signaled a change in U.S. policy with respect to a military-political rather than legal-judicial approach to international terrorism, which culminated in the bin Laden incident.

General Assembly Resolution 2625, which sought to codify fundamental principles of international law under the rubric "Friendly Relations," affirmed that:

Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.¹³⁰

The Declaration on the Strengthening of International Security reaffirms that prohibition. The governing principle of law here was stated precisely by the General Assembly in its Declaration of 1996:

127. See *Attacking Terrorism*, GRAND RAPIDS PRESS, Aug. 23, 1998, at A5 (noting that President Reagan refrained from retaliating militarily because too many civilians would be at risk); Samson Mulugeta, *For Kin, A Demand for Justice*, NEWSDAY, Apr. 6, 1999, at A3.

128. See Jim Hoagland, *Punishing Foreign Thugs*, WASH. POST, May 24, 1993, at A19.

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

130. G.A. Res. 2625 (XXV), U.N. GAOR 6th Comm., 25th Sess., 1883d plen. mtg., Supp. No. 28, U.N. Doc. A/8082 (1970).

States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts.¹³¹

That principle of law notwithstanding, the international legal analysis of incidents like the bombing of the Berlin disco and the abortive assassination attempt of President Bush must grapple with the continuing problem of determining the threshold for response to acts of violence. Article 51 of the United Nations Charter confirms the “inherent right of individual or collective self-defence if an armed attack occurs”¹³² The trigger for self-defense, its threshold, is an “armed attack.”¹³³ Terrorists’ acts, such as those in the Berlin disco bombing, unquestionably violate international law. But not all prohibited uses of force constitute “armed attack” and warrant, as a result, unilateral action under Article 51 of the Charter. The General Assembly’s Definition of Aggression provides, in Article 3(g) that

Any of the following acts . . . qualify as an act of aggression: . . . The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.¹³⁴

It is not at all certain that the Assembly’s Definition was designed to include acts of terrorism which would then warrant a unilateral forceful response. The intention appears to have been not to characterize such actions as “armed

131. G.A. Res. 49/60, *supra* note 73.

132. U.N. CHARTER art. 51.

133. *Id.*

134. G.A. Res. 3314(XXIX), U.N. GAOR 6th Comm., 29th Sess., 2319th plen. mtg., Supp. No. 31, at 142, U.N.Doc. A/9631 (1974).

attack” unless they amounted to an actual armed attack conducted by regular forces, as described in Article 3(a) of the Definition. In the *Nicaragua* case, the International Court purported to make the General Assembly’s Definition congruent with customary international law and, indeed, tightened it even further.¹³⁵ In the court’s view, acts of armed bands must “occur on a significant scale” before they would constitute an armed attack and bring into operation an individual or collective right of self-defense.¹³⁶ The court explained that acts which were plainly part of a program of violence against another state but did not amount to armed attack were unlawful and gave rise to claims, but did not warrant unilateral acts undertaken under Article 51 of the Charter.¹³⁷

Thus, a significant stream of contemporary international law would preclude highly coercive and unilaterally initiated acts by a state that had been a target of terrorism against the state that was the author of the terrorism. This approach is, unquestionably, based on a policy decision which seeks to minimize violence and believes that there will be less transnational violence if coercive unilateral responses to terrorism are prohibited than if terrorist acts give rise to individual or collective self-defense rights under Article 51. The net result, however, is to permit more of what is generally and misleadingly referred to as low-intensity warfare—of which state-authorized terrorism is a part—by insulating it from highly coercive responses, the expectation of which might have deterred it in the first place. The court’s approach to a right of unilateral response would seem to depend on the amount of destruction wrought: if a terrorist attack, whatever its intention, succeeded in killing only two people, it would not warrant unilateral response, but if it killed thousands, whatever its intention, it would. An approach which invites quibbles about how many victims of a terrorist attack warrant a military action in self-defense does not seem to be a satisfactory criterion for legal decision.

135. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 103–04 (June 27).

136. *Id.* at 104.

137. *See id.* at 110, 120–23.

Conclusions that security is in such serious jeopardy that intense, unilateral, coercive action is required must realistically be based on the assessment of a much wider range of factors.

The U.S. government has rejected the threshold limitation in both the General Assembly Definition and the judgment of the International Court in *Nicaragua*,¹³⁸ but it has proved difficult to maintain a consistent position. In 1985, when Israeli planes bombed PLO headquarters in the suburbs of Tunis, the White House and the Secretary of State initially defended the action as "a 'legitimate response' against terrorist attacks."¹³⁹ Within a few days, however, the White House qualified its position.¹⁴⁰ The bombing was "understandable as an expression of self-defense but . . . cannot be condoned."¹⁴¹ The Security Council condemned the Israeli action by a vote of fourteen to zero and the United States abstained.¹⁴² But the United States destroyed Iranian oil platforms when Iranian vessels harassed neutral shipping in the Gulf and the United States directed cruise missiles against the Ministry of Intelligence in Baghdad when Baghdad mounted an assassination attempt against former President Bush on his visit to Kuwait.¹⁴³

The response to the destruction of Pan Am 103 over Lockerbie, Scotland is a sharp contrast to the response to the destruction of the Berlin disco. Although the United States ultimately concluded that Libya was the author of the downing of the civilian aircraft, the United States did not respond militarily, pursuing instead economic sanctions and a criminal law strategy, initially in American and Scottish

138. See *U.N. Upholds Court's Ruling Against U.S. in Contra Case*, SAN DIEGO UNION-TRIB., Oct. 26, 1988, at A3 (noting that the United States rejected the ICJ's judgment that U.S. "support of Contras was a breach of international law").

139. Gerald M. Boyd, *U.S. Advocates Restraint*, DALLAS MORNING NEWS, Dec. 29, 1985, at A27.

140. *Id.*

141. *Id.*

142. See *Israel Ignores U.S. Criticism, Quells Protest*, HOUS. CHRON., Dec. 24, 1987, at A1.

143. See Plaxe, *supra*, note 129.

courts, later in a special tribunal sitting in The Hague.¹⁴⁴ While many strategic calculations that were unique to that case may have entered into that decision, it inevitably tends to reinforce the position that contemporary international law prohibits unilateral military reaction to an act of terrorism that was authored by or emanated from another state.

The position espoused by the General Assembly and held by the International Court may be ripe for reconsideration, in light of the fact that it tends to insulate states that are the authors of terrorism from effective reaction, thereby encouraging further state-sponsored terrorism. State-sponsored terrorism is the most noxious and dangerous of its species, yet its authors and architects evade all deterrence and prospect of punishment if the fiction is that states are not involved and only their agents are deemed responsible for the terrorism. This is not to say that in each case in which a state is identified as the author of a terrorist act against another state, the appropriate response is military or exclusively military. The point is that a policy of deterrence will be more effective if state terrorism activates an internationally lawful option of overt coercive responses, including a military response, always, of course, consistent with the *jus in bello*. We will consider the tactical questions this proposal raises in a moment.

When a military response is elected, it will be subject to the criteria of lawfulness of necessity, proportionality, and the need to demonstrate the election, in each context, of the weapon most capable of distinguishing between combatants

144. Three years after Pan Am Flight 103 exploded over Lockerbie, "two Libyans—Abdel Basset al-Megrahi and Lamén Khalifa Fhiman—were indicted in both the United States and the United Kingdom for their alleged participation in placing a bomb on board the" airplane. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 174 (1999). Libya, however, refused to surrender the two suspects for trial in the United States or the United Kingdom. Between 1992 and 1993, "the U.N. Security Council passed three resolutions, first asking and then demanding that the Libyan Government surrender the two suspects." *Id.* Libya repeatedly refused to comply with these, instead proposing that the suspects be tried by international or Scottish judges sitting in The Hague. Although initially refusing the Libyan proposal, the United States and the United Kingdom eventually arranged for trial in the Netherlands with Scottish judges and under Scottish law. See *id.* at 174–78.

and non-combatants, while accomplishing its mission. Note, in this regard, that the design of a military action in anticipation of a terrorist action must, by its nature, be different from a military action in response. Most United States military responses, whether in Lebanon after the murder of the Marines in Beirut or in Iraq before the Iraqi government could mount its assassination attempt against former President Bush, have essentially been so measured as to have been symbolic. But if a state *anticipates* a terrorist action against its territory or its nationals and acts to prevent it, yet refrains from destroying the agents, material, and apparatus of planning, a measured, symbolic anticipatory action could prove to be only provocative and lead to an even nastier terrorist action, initiated now with a reinforced sense of justification.

United States courts have, on the whole, been reluctant to exercise civil jurisdiction with respect to terrorist activities initiated abroad but directed at the territorial United States or U.S. installations. In *Smith v. Libya*,¹⁴⁵ for example, suit was brought, initially in Washington, D.C. and later transferred to the Eastern District of New York, against Libya by the husband of a victim of Pan Am 103, which had, as mentioned earlier, been destroyed over Lockerbie, Scotland.¹⁴⁶

Libya argued absence of jurisdiction, in that, *inter alia*, the destruction occurred outside the United States.¹⁴⁷ United States courts rejected the claimant's notion that a bomb planted on an American carrier bound for the United States was, in effect, a missile directed at the United States. Similarly, in *Tel Oren*,¹⁴⁸ the D.C. Circuit Court refused, in three separate and conflicting opinions, to permit the families of victims of a terrorist attack sponsored by Libya to pursue civil remedies in United States courts.¹⁴⁹ Nor has the federal

145. *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1997).

146. *See id.* at 241.

147. *See id.* at 246-247.

148. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

149. *See id.* at 775, 799, 823.

government supported the efforts of the families of victims of Pan Am 103 to sue Libya as the tortfeasor.¹⁵⁰

B. Responses When the State Provides Refuge to Terrorists

The 1994 Declaration on Measures to Eliminate Terrorism, it will be recalled, also enjoined states to "refrain . . . from acquiescing in or encouraging activities within their territories directed towards the commission of" terrorist acts.¹⁵¹ Certain governments act as hosts for terrorists, whether for material gain, the contingent performance of services, or ideological affinity. Sometimes, the terrorists in a particular state will remain inactive for extended periods, but that should not make their presence there any less cognizable under international law. The terrorists are being kept, like any other weapon in an arsenal, from side-arms to nuclear missiles in a silo, for future contingencies. As such, they should be viewed as active weapons whose *per se* unlawfulness, in contrast to the other weapons mentioned, makes their mere retention by a government a continuing violation of international law.¹⁵²

When a state provides refuge to terrorists, it may appear that there is a clear distinction between the terrorists and their hosts, though in many circumstances the host government's secret service may closely follow the activities of the terrorists and prohibit certain types of actions that are deemed dangerous for the host state. In other circumstances, the terrorists are, appearances notwithstanding, instruments of the host state and function like the so-called government-in-exile,¹⁵³ an ostensibly independent entity actually subject to whatever degree of control the host state government wishes to exercise. In this latter instance, the host state may

150. See *Smith*, 101 F.3d at 241.

151. See *Measures to Eliminate International Terrorism*, *supra* note 66.

152. *But see* Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion), 110 I.L.R. 165 (I.C.J. 1996). ("There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons . . .").

153. See W. MICHAEL REISMAN, *Governments-in-Exile: Notes Toward a Theory of Formation and Operation*, in GOVERNMENTS-IN-EXILE IN CONTEMPORARY WORLD POLITICS 238, 238 (Yossi Shain ed., 1991).

be, in effect, the author of the terrorist acts of these groups and the analysis conducted above would apply.

The Declaration on Friendly Relations imposes a general duty on states "to refrain from . . . acquiescing in organized activities within its territory directed toward the commission of such acts" ¹⁵⁴ We are concerned here with the policies that have been prescribed in contemporary international law with respect to a state in whose territory terrorist acts are planned when the state has the capacity to prohibit such action. The problem of the feckless state whose territory is used as a base for terrorist acts against other states and their nationals will be taken up below.

The trend of decisions with respect to circumstances in which a government is the author of terrorism has some implications for the problem of a state providing refuge to terrorists. The U.S. defense of the bombardment of Khartoum and Afghanistan did not make reference to particular cases or incidents that might have served as precedents, but confined itself to a statement of general principles. The most instructive incident with respect to this particular factual problem continues to be the *Caroline*. In 1837, a rebellion against the crown in Canada excited considerable sympathy and acts of support for the Canadian rebels in the United States. ¹⁵⁵ The U.S. government tried to limit support for the rebels, but it was not successful given the very large number of American citizens who supported the rebellion. ¹⁵⁶ Ultimately, the insurgency was suppressed and many of the insurgents fled to the United States. ¹⁵⁷ In Buffalo, New York, two rebel leaders spoke to large public meetings where they requested that an American force be mounted to assist the rebellion. ¹⁵⁸ In December, a large group, made up mainly of Americans, looted the New York State arsenal and created,

154. G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., 1883d plen. mtg., Supp. No. 28, U.N. Doc. A/8028 (1970).

155. See R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82 (1938) (citing H. Ex. Doc. No. 74, 25th Cong., 2d Sess.).

156. See *id.*

157. See *id.*

158. See *id.*

on Navy Island, a provisional government for the purpose of supporting the Canadian insurrection.¹⁵⁹

These rebels constantly were resupplied with ammunition from the State of New York.¹⁶⁰ The *Caroline* was particularly instrumental in transporting supplies, making at least two trips between Fort Schlosser in New York and Navy Island.¹⁶¹ With these supplies, the rebels engaged in repeated acts of war-like aggression, both on the Canadian shore and on British boats passing the Island.¹⁶² Before responding to this aggression, the British Lieutenant General tried to discuss the matter with the governor of New York. The dialogue he attempted to initiate, however, received no response.¹⁶³

The commander of the British forces on the Canadian side of the river dispatched an expedition to the American side.¹⁶⁴ A force of some eighty men boarded the *Caroline*, which was soon abandoned by its crew and passengers.¹⁶⁵ The British boarding party thereupon set fire to the *Caroline*, cut it loose from the dock, and towed it into the current of the river, where it went over the falls and broke up.¹⁶⁶ Two Americans were killed in the action.¹⁶⁷

When the United States Secretary of State protested to the British Ambassador in Washington,¹⁶⁸ the British responded with three defenses: first, the "piratical character of the vessel"; second, that the laws of the United States were not being enforced at the critical moment; and third, "self-defence and self-preservation."¹⁶⁹ The allegation of piracy soon disappeared from the United States-British dialogue

159. *See id.* at 83.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.* (citing Lieutenant Governor Head to Governor Marcy, Dec. 13, 1837, H. Ex. Doc. No. 302, 25th Cong., 2d Sess.).

164. *See id.* at 83-84.

165. *See id.* at 84.

166. *See id.*

167. *See id.*

168. *See id.* at 85 (citing note from Mr. Forsyth to Mr. Fox, Dated Jan. 5, 1838, H. Ex. Docs. 302 & 73, 25th Cong., 2d Sess.).

169. *Id.* (citing H. Ex. Doc. 302, 25th Cong., 2d Sess.; Public Record Office, F.O. 5. 322).

and attention focused on “self-defence and self-preservation.”¹⁷⁰ The legal officers of the Foreign Office reported to the Foreign Minister in a first report in 1838, that

[A]lthough it is much to be regretted that any act of hostility should have occurred within the limits of the Territory of the United States, We think that the conduct of Captain Drew and his men, in capturing the steamboat “*Caroline*” was, under the circumstances, perfectly justifiable by the Law of Nations.¹⁷¹

The following year, the legal officers issued a second report, which essentially followed the first, but emphasized the preventive character of the action:¹⁷²

We feel bound to suggest to your Lordship that the grounds on which we consider the conduct of the British Authorities to be justified is that it was absolutely necessary as a measure of precaution *for the future* and not as a measure of retaliation *for the past*.¹⁷³

The United States continued to press for redress.¹⁷⁴ In 1842, Secretary of State Webster sent a note to his British counterpart, in which he called on the British Government to show

[A] necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that

170. *Id.* at 86–87.

171. *Id.* at 87.

172. *See id.* at 88 (citing to Report of March 25, 1839, Signed by J. Dodson, I Campbell, R. M. Rolfe, F. O. 83. 2207).

173. *Id.* at 87 (quoting Report of March 25, 1839, Signed by J. Dodson, I. Campbell, R. M. Rolfe, F. O. 83. 2207) (emphasis in original).

174. *See id.* at 88.

necessity, and kept clearly within it. It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that day-light could not be waited for; that there could be no attempt at discrimination between the innocent and the guilty; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in the darkness of the night, while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this, the Government of The United States cannot believe to have existed.¹⁷⁵

Lord Ashburton largely accepted the legal formula proposed by Webster, but argued, on the facts, that the British action fulfilled Webster's strictures.¹⁷⁶

I might safely put it to any candid man, acquainted with the existing state of things, to say whether the military commander in Canada had the remotest reason, on the 29th day of December, to expect to be relieved from this state of suffering by the protective intervention of any American authority. How long could a Government, having the paramount duty of protecting its own people, be reasonably

175. *Id.* at 89 (quoting Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, Vol. 30, p. 193).

176. *See id.* at 89 (citing Lord Ashburton to Mr. Webster, July 28, 1842, Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, Vol. 30, p. 195).

expected to wait for what they had then no reason to expect?¹⁷⁷

Ashburton also contended that the manner of attack at night was designed to minimize loss of life and that the mode of destruction of the vessel—sending it over the falls—was selected to minimize any injury to American property.¹⁷⁸ In a letter of August 6, 1842, Secretary of State Webster accepted the British apology.¹⁷⁹ No redress was arranged.¹⁸⁰

It was common ground between the parties in the *Caroline* incident that the United States government had tried to restrain the private, or to use a more modern term, “non-governmental,” initiatives to provide material support to the insurrection in Canada, but it had been unsuccessful. If the United States had been unaware of the expedition that was being mounted by some of its nationals and the United Kingdom calculated (1) that the United States, if notified, would act to prevent the action; and (2) that there was time to notify the United States and await its expected action, then according to the position common to Webster and Ashburton, the United Kingdom would have been obliged to refrain from unilateral action and, instead, to refer the matter to the United States. If the non-governmental support for the insurrection had already been accomplished and it was reasonable to expect that the United States, if supplied with the information, would act judicially and effectively against the private interventionists, unilateral British punitive action would not have been lawful. Transposed to the problem we are addressing here and formulated affirmatively rather than negatively, the *Caroline* doctrine, as agreed by Webster and Ashburton, would allow a target state to act unilaterally against a planned terrorist act emanating from the territory of another state, if it were clear that either of two conditions obtained: (1) the state from whose territory the action was

177. *Id.* at 90 (quoting Lord Ashburton to Mr. Webster, July 28, 1842, Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, Vol. 30, p. 195).

178. *See id.*

179. *See id.* at 91 (citing Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, Vol. 30, p. 201).

180. *See id.*

emanating could not, even with the information supplied to it by the target, respond in timely fashion to prevent the terrorist act because of a shortage of time; or (2) the state from whose territory the action was emanating could not, even with adequate notice, act effectively to arrest the terrorist action. A military action against terrorists in another state would be justified only if it could be related to deterrence of further terrorist actions. In any event, as Lord Ashburton allowed, any unilateral action that was otherwise lawful would still have to be conducted in ways that minimized the damage suffered by the state in whose territory it was conducted.

Of late, the United States appears to be relying on the British claim in the *Caroline*.

On August 7, 1998, bombs exploded at the U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing nearly three hundred people, including twelve Americans. Investigation into the coordinated attacks led U.S. officials to suspect the involvement of Osama bin Laden, a wealthy Saudi expatriate living in Afghanistan, who reportedly had developed an extensive network of terrorists committed to acts of violence against the United States and its nationals.¹⁸¹

“On August 20, 1998, the United States launched seventy-nine Tomahawk cruise missiles against paramilitary training camps in Afghanistan,”¹⁸² which were associated with three militant Islamic terrorist groups, including that of bin Laden, “and against a Sudanese pharmaceutical plant that the United States identified as a chemical weapons facility,”¹⁸³ which had had ties with bin Laden. President Clinton explained that he had ordered the strikes at targets

181. Professor Sean Murphy has prepared a detailed account of the United States' reaction and the international appraisal and I have relied on it here. Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L L. 161, 161 (1999).

182. *Id.*

183. *Id.*

in Afghanistan and Sudan “because of the threat they present to our national security.”¹⁸⁴

I ordered this action for four reasons: First, because we have convincing evidence these groups played the key role in the Embassy bombings in Kenya and Tanzania; second, because these groups have executed terrorist attacks against Americans in the past; third, because we have compelling information that they were planning additional terrorist attacks against our citizens and others with the inevitable collateral casualties we saw so tragically in Africa; and fourth, because they are seeking to acquire chemical weapons and other dangerous weapons.¹⁸⁵

At a White House press conference on August 20, 1998, National Security Adviser Samuel Berger referred to the Anti-Terrorism and Effective Death Penalty Act of 1996, in which Congress finds that “the President should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens”¹⁸⁶

The United States also notified the U.N. Security Council of the missile attacks, stating arguments redolent of the *Caroline*:

These attacks were carried out only after repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the bin laden organization. That organization has issued a series of blatant warnings that “strikes will continue from everywhere” against American targets, and we have convincing evidence

184. *Id.*

185. President William Jefferson Clinton, Remarks on Departure for Washington, D.C., from Martha’s Vineyard, Massachusetts, 34 WEEKLY COMP. PRES. DOC. 1642 (Aug. 20, 1998).

186. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 324(4), 110 Stat.1255 (codified at 22 U.S.C.A. § 2377 note 4 on Congressional Findings).

that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing. In doing so, the United States has acted pursuant to the right of self-defence confirmed by Article 51 of the Charter of the United Nations. The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and proportionality.¹⁸⁷

The Government of the Sudan protested the missile strike on Sudan as did the Taliban Islamic movement, along with Iran, Iraq, Libya, Pakistan, Russia, and Yemen, Palestinian officials, and certain Islamic militant groups.¹⁸⁸ The Secretariat of the League of Arab States condemned the attack on Sudan as a violation of international law, but was silent as to the attack on Afghanistan.¹⁸⁹ Australia, France, Germany, Japan, Spain, and the United Kingdom expressed varying degrees of support for the United States' action.¹⁹⁰

Apparently, the United States has assumed that bin Laden is an independent terrorist, finding refuge in a third country, rather than an independent contractor who has been retained by a particular state.¹⁹¹ I will return to this issue in a moment.

187. Bill Richardson, Letter Dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council (Aug. 20, 1998), U.N. Doc. S/1998/780 (1998), available at <http://www.undp.org/missions/usa/s1998_780.pdf> (visited October 24, 1999).

188. See Douglas Jehl, *U.S. Raids Provoke Fury in Muslim World*, N.Y. TIMES INT'L, Aug. 22, 1998, at A6; Michael Wines, *Russia Is Critical*, N.Y. TIMES INT'L, Aug. 22, 1998, at A6.

189. See Ali Suliman, SAID, Letter Dated 21 August 1998 from the Charge D'Affaires A. I. of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council (Aug. 21, 1998), U.N. Doc. S/1998/789 (1998).

190. See William Drozdiak, *Chorus of Cheers from U.S. Allies*, WASH. POST, Aug. 21, 1998, at A20.

191. See Benjamin Weiser, *U.S. Closer to Tying Bin Laden to Embassy Bombings*, N.Y. TIMES, Oct. 8, 1998, at A3 (noting that an indictment of a

C. *Responses When the State From Whose Territory the Attack Emanates Is Unable to Exclude or Control Terrorists*

International law does not ordinarily distinguish between states that are capable of controlling their territory and those that are not. In fact, a significant number of governments have control of only parts of their territories; some governments control no more than two or three districts in the capitol.¹⁹² Other states may exercise nominal control in their territory, but their public officials may be corrupted. In states plagued by what are now referred to as narco-terrorists, the corruption of officials may reach the very highest levels of government.¹⁹³ States such as these prove particularly attractive to private armies, which require, in order to flourish and to pursue their special interests, space in which they are beyond the reach of governments. So the ineffective or failed state is an ideal incubator; it is itself unable to restrain the private army that uses terrorism, yet its state status insulates the private army from other states upon whom the private army may prey.

For many policy reasons, international decision makers have been reluctant to limit the status or sovereign prerogatives of ineffective states or to deprive them of the ordinary perquisites of statehood. But when the territory of such states becomes the power base of international terrorist organizations and the launchpad for their activities against other states, the target state's insistence that the host state fulfill its international legal obligations is simply beyond its capacities; this is in contrast to the state which can, but will not, fulfill those obligations. To what extent, in these circumstances, may the target state, either in anticipation of or in reaction to terrorist action emanating from the

suspected bin Laden cohort describes his organization, Al Qaeda, as independent).

192. See DESMOND MCFORAN, *THE WORLD HELD HOSTAGE: THE WAR WAGED BY INTERNATIONAL TERRORISM*, 46-47 (1986) (stating that the PLO operated as a "state within a state" in Lebanon and controlled the port of Beirut).

193. See William R. Long, *Drug Lord Evades Capture As He Terrorizes Colombia*, L. A. TIMES, May 27, 1990, at A1. ("It's not easy to catch Escobar. He has people infiltrated in different agencies. He owns politicians.").

ineffective state, intervene militarily in the territory of that state to destroy the terrorist infrastructure?

Legal inquiries into this area frequently commence with an analysis of the rights of the state from which the terrorists operate and thus assume that the question is essentially one of the violation by the target state of the sovereignty of the state that is hosting the terrorists. But that is only one-half of the normative picture. It is important to recall that the host state also has important obligations to other states which are the very basis of its claim to territorial sovereignty. From this latter perspective, the sovereignty deferences that are accorded to actions within the territory of a state by other states are conditional and synallagmatic. In *Island of Palmas*, Max Huber, the sole arbitrator, stated that:

Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.¹⁹⁴

In his dissent to the *Lotus* judgment, Judge John Bassett Moore stated that “[i]t is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people”¹⁹⁵ Thus, the issue is not simply what is owed to a state that acts as a haven for terrorists, but what are the international legal consequences and permissible responses when that state violates the obligations that it owes to other states who have theretofore respected and deferred to its sovereignty and are now suffering a consequential injury.

Some states have had to deal with terrorism emanating from ineffective states on a long-term basis and have experimented with a number of strategic devices. Israel, for example, had to contend with terrorist attacks emanating from Lebanon through long periods in which the government

194. *Island of Palmas Case (U.S. v. Neth.)* 2 R.I.A.A. 829, 839 (1928).

195. *S.S. Lotus (Fr. v. Turk.)* 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., dissenting).

of Lebanon controlled little more than several districts in Beirut.¹⁹⁶ When Israeli punitive raids proved ineffective and occupation of Beirut secured a withdrawal of the PLO from Lebanon, yet provoked a major international condemnation, Israel withdrew to its own territory but established a permanent nine-mile wide defense zone in the area of southern Lebanon adjoining its own northern border.¹⁹⁷ This self-styled defense zone, now concerned with fending off attacks by Hezbollah forces,¹⁹⁸ created an anomalous international legal situation that has spawned profound international legal problems. Within this zone, Israeli forces, and the Israeli-supported Lebanese paramilitary—the so-called Southern Lebanese Army (SLA)—have waged an ongoing battle with certain Lebanese terrorist organizations, principally the Hezbollah, or “Party of God,” a militant Shi’ite faction with ties to Iran and Syria.¹⁹⁹ Though punctuated by periodic cease-fires, this irregular war has persisted since 1978, incidentally claiming the lives of civilians as well as of members of the U.N. Interim Force in Lebanon (UNIFIL), a peace-keeping mission established in 1978 to “restor[e] international peace and security and assis[t] the Government of Lebanon in ensuring the return of its effective authority in the area”²⁰⁰

While Israel has disavowed territorial designs, it has insisted, until recently, upon the necessity of maintaining a military presence in this region as a critical “buffer zone” to protect civilians in northern Israel from Hezbollah terrorist attacks. Until Lebanon can effectively control its national

196. See MCFORAN, *supra* note 192, at 45–46. (“[T]he Lebanese Government’s inability to rectify the situation, resulted in Lebanon sacrificing its sovereignty to the Palestinian terrorists.”).

197. See Aliza Marcus, *War Weary Israelis Count Growing Cost of Lebanon in Lives*, SUNDAY TELEGRAPH LONDON, Apr. 5, 1998, at 30 (noting that the Israeli army left Lebanon “amid international condemnation”); Larry Kaplow, *Despite Peace Initiatives, War a Way of Life in Lebanon No End in Sight: Israelis and Hezbollah Appear No Closer to Finding Solution as Lebanese Settle into Grim Daily Routine*, ATLANTA J. & CONST., Jan. 24, 1999, at C11.

198. See Alan Cooperman, *Radicals on a Roll: Stung by Hezbollah, Israel Debates a Lebanese Exit*, U.S. NEWS & WORLD REP., Sept. 22, 1997, at 38.

199. See Storer H. Rowley, *As Shells Fall Lebanon Fury Toward Israel Explodes*, CHICAGO TRIB., Jun. 1, 1998, at 6.

200. S.C. Res. 425, U.N. SCOR, 33d Sess., 2074th mtg. (1978).

territory and preclude its use as a base for terrorist operations, Israel contended that it had "no alternative but to make its own security arrangements by means of the security zone and its alliance with [the] SLA."²⁰¹ The U.N. Secretary General has insisted that Israel's continuing presence "escalate[s] the level of violence," and both Lebanon and Syria have claimed that Israeli withdrawal would end the conflict.²⁰²

Short of the extended anti-terrorist intervention such as one encounters in Israel's self-styled defense zone in Lebanon, there are many examples of short-term pursuits into the territory of ineffective states in order to evict or interdict terrorists. During the Vietnam war, the North Vietnamese used Cambodian territory for a variety of military purposes.²⁰³ The U.S. aerial and ground interventions into Cambodia were widely criticized at the time,²⁰⁴ though, in retrospect, much of the criticism seems to have been part of a larger objection to U.S. pursuit of the war as a whole. Similarly, South African pursuit of African National Congress (ANC) personnel in Angola was condemned, though again, the international legal condemnation seemed to arise more from revulsion at South Africa and the fact that the international community had virtually unanimously condemned its *apartheid* system²⁰⁵ than a considered legal judgment of the lawfulness of pursuing terrorists into the territory of the state in which they have found haven. In contrast, in early 1999, after the massacre of tourists, including Americans, in Uganda by Hutu guerrillas, who operated from the Democratic Republic of the Congo, there appears to have been no protest over Ugandan President

201. S.C. Res. 583, U.N. SCOR, 2681st mtg., 1986 U.N.Y.B. 295, 296, U.N. Sales No. E.90.I.1.

202. *Id.*

203. See Fay Willey et al., *Who Are the Khmer Rouge?*, NEWSWEEK, Mar. 10, 1975, at 26 (stating that North Vietnamese units were protecting supply routes to South Vietnam from within Cambodia).

204. *See id.*

205. See G.A. Res. 45/150, U.N. GAOR 3d Comm., 45th Sess., 69th plen. mtg., U.N. Doc. A/RES/45/150 (1990).

Musaveni's decision to pursue the guerrillas into Congolese territory and to kill them.²⁰⁶

The design of a remedy, especially a unilateral action of self-help, invariably raises many acute policy issues. To say that the haven state has failed to fulfill obligations it owes to the government and nationals of the injured state does not automatically transfer into a right of unilateral action. The normal reluctance of a legal system to assign to individual members of the community competences unilaterally to use high coercion becomes even greater when there are deep divisions about whether the behavior in question constitutes a violation of law. As we saw, there has been a deep division in the international community about what terrorism is to mean, to the point that the term is used quite differently by different participants. In addition to lack of agreement about the content of the term, violent unilateral remedies can sometimes aggravate a situation and may create other acute international political and legal problems.

One can perhaps express the normative code for unilateral action here by looking to cognate areas of international law. A prerequisite to the exercise of the right of diplomatic protection of nationals is the exhaustion of local or domestic remedies. The exception to this sound policy is that "[a] claimant in a foreign State is not required to exhaust justice in such a State when there is no justice to exhaust."²⁰⁷ It would appear reasonable to insist on notification, protests, and demand for cooperative action when the haven state is functional and there is a plausible prospect of an effective response. In circumstances in which those conditions do not obtain, unilateral action would appear justified, but would, as anywhere else, have to meet the conditions of any lawful use of force. In particular, any action would be required to be conducted in a way that demonstrated efforts to protect the international rights of the injured state.

206. See *Uganda Chief Says Tourists' Killers Will Be Caught Dead or Alive*, N.Y. TIMES INT'L, Mar. 4, 1999, at A3.

207. Green Haywood Hackworth, V DIGEST OF INTERNATIONAL LAW 511 (1943) (quoting Mr. Fish, Secretary of State, to Mr. Pile, May 29th, 1873, Moore, Digest, VI, 677).

D. Responses When the Author Is Not a State

It is important to distinguish between private "contractors" and autonomous private operators. Carlos and the leadership of the Abu Nidal group have ideologies and psychologies that predispose them to terror and, apparently, give them satisfaction when they conduct terrorist operations. But they are, for most of their operations, contractors, who undertake assignments from governments in return for handsome fees with the understanding that they then conduct those operations as if they were entirely private initiatives.²⁰⁸ While world order is likely to be perceptibly improved when people like Carlos are not at liberty, the state which has ordered and financed the terrorist operation is served when the target state and the international community insist on focusing on the marionette and not the puppeteer. When principals try to evade responsibility, the law has long told that *qui facit per alium, facit per se*, those who do things through the medium of another are deemed to have done them themselves.

Here, however, I wish to focus on the authentic private operator, the individual or group that may share the ideology of a state or other groups but is not affiliated with any state and designs and conducts its operations on its own behalf. While it may be passively monitored by an intelligence agency of a state that is aware of its activities and possible plans, it is not actively assisted by that agency. (I exclude from this category multi-celled organisms that are intentionally segregated from each other, but follow the general lead of a territorial community; from a legal standpoint, I assume that they are agents of the territorial community and should be assimilated to cases in which a state is the author of the terrorist act.) We know that there are such groups, though we are not always certain as to who they are. Osama bin Laden, whose activities were discussed earlier and who is currently under indictment in the Southern District of New York,²⁰⁹ is ostensibly an autonomous private operator.

208. See YOSSI MELMAN, *THE MASTER TERRORIST: THE TRUE STORY OF ABU-NIDAL* 84 (1986).

209. See John Barry et al., *Terror: The Real bin Laden*, *NEWSWEEK*, Mar. 1, 1999, at 40.

Sheikh Omar Abdul Rahman of Egypt, currently imprisoned in New York for his intellectual authorship of the World Trade Center bombing,²¹⁰ is ostensibly an autonomous private operator. Timothy McVeigh and Terry Nichols were ostensibly private operators.²¹¹ Om Shin Rikyo is ostensibly a private and autonomous operator.²¹² I retain the adverb “ostensibly,” even in cases of convictions, because it is in the very nature of international and domestic terrorism that links between the agent and principal are shadowy such that the principal retains a capacity for plausible deniability.

The international decision process has been remarkably ambivalent about the appropriate responses to be taken with respect to private terrorists. Universal jurisdiction is activated for a category of *hostes humani generis*, an international rogues’ gallery in which terrorists are worthy of inclusion. Indeed, the *Restatement of Foreign Relations Law (Third)* Section 404 states that “[u]niversal jurisdiction is increasingly accepted for certain acts of terrorism, such as assaults on the life or physical integrity of diplomatic personnel, kidnapping, and indiscriminate violent assaults on people at large.”²¹³ Yet there has been great reluctance to extradite terrorists so that they can be tried in states that are pursuing them. Until now, the international conventions that have been concluded are all extradition treaties based on the principle of *aut judicare aut dedere*.

When a state in whose territory a terrorist is found does not extradite, does the injured state have the right to resort to self-help? United States courts apply the *Ker-Frisbie* doctrine,²¹⁴ but there appears to be increasing international resistance to jurisdiction based on abduction. Consider the case of *Alvarez-Machain*,²¹⁵ an incident that is almost

210. See *Report: Note Found in Suspects’ Apartment*, ST. PETERSBURG TIMES, August 5, 1997, at 3A; *Prosecutors Introduce Wiretaps of Sheik’s Plans*, DALLAS MORNING NEWS (HOME FINAL EDITION), Apr. 23, 1995, at 9A.

211. See *Nation in Brief*, ATLANTA J. & CONST., Dec. 14, 1998, at A4.

212. See *‘Murder Machine’ Admits Tokyo Gas Attack*, INDEPENDENT, June 27, 1997, at 14, available in 1997 WL 10475363.

213. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 cmt. a (1986).

214. See *United States v. Winter*, 509 F.2d 975, 985–86 (5th Cir. 1975); *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952).

215. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

paradigmatic of the problems faced by the United States. The case arose out of the torture and murder of Enrique Camarena-Salazar, a DEA agent operating in Mexico.²¹⁶ Twenty-two Mexican nationals were indicted in the United States for the murder, including Dr. Humberto Alvarez-Machain, a Mexican physician who, it was alleged, had assisted Camarena's torturers.²¹⁷ When an agreement with a Mexican police official to deliver Alvarez for \$50,000 fell through, Alvarez was seized in Mexico, put on a twin-engine plane and flown to El Paso, where he was arrested.²¹⁸ A reward was paid to Alvarez's abductors.²¹⁹ The Supreme Court ultimately confirmed U.S. jurisdiction,²²⁰ yet the diplomatic cost to the executive branch was heavy.

The national debate since the Reagan administration, over whether the appropriate response to terrorists should be political and military or judicial, may oversimplify the matter. Given the range and variety of terrorist activities in this fourth category, it would be a mistake to decide *a priori* that a political-military or legal-judicial approach should always be taken. Some cases will lend themselves to a legal-judicial approach; indeed, in some cases, a political-military approach may be too costly or be unlikely to yield any benefits. Conversely, some cases will not lend themselves to a legal-judicial approach and may only be dealt with politically or militarily. A policy of using both approaches has the additional benefit of increasing the deterrent force of United States commitments.

V. ENDURING FACTORS RETARDING THE DEVELOPMENT OF EFFECTIVE INTERNATIONAL RESPONSES

Despite the relatively promising developments in the 1996 General Assembly declaration, which we reviewed earlier, and the 1998 Convention for the Suppression of

216. *See id.* at 657.

217. *See id.*

218. *See United States v. Caro-Quintero*, 745 F. Supp. 599, 602 (C.D. Cal. 1990); Tim Seller, *A Drug War Abduction Daring DEA Episode, Prompted by Agent's Killing, Draws to End*, ARIZONA DAILY STAR, May 9, 1999, at 1B.

219. *See Caro-Quintero*, 745 F. Supp. at 603.

220. *See Alvarez-Machain*, 504 U.S. at 670.

Terrorist Bombings, the political positions which have retarded the development of an effective international legal regime in this regard have changed little. The Non-Aligned Movement's solidarity has been broken by a number of prominent defections, yet a substantial number of states still resist a definition of terrorism that might be applied to terrorist activities of groups that some wish to view as "freedom fighters" or fighters in wars of "national liberation." Nor is there a clear demonstration that terrorism does not pay. The IRA, the PLO, and the ANC, to name only a few recent examples, have done very well for themselves. The apprehension of Abdullah Ocalan, the leader of the PKK, indicated that for many governments and intellectual leaders within other countries, Ocalan was a "freedom fighter," whose methods could be overlooked or justified.²²¹

Even the United States, a frequent target of international terrorism and a strong partisan of developing effective international responses, has had to calculate whether enhancing the competence of international institutions will actually be an effective restraint or will simply hobble its unilateral actions, which may be the only real means of dealing with terrorism. Thus, the United States resisted inclusion of a competence to deal with terrorism in the statute of the International Criminal Court and apparently does not wish to create a regime in which international institutions, a potential majority of whose members may be ambivalent about terrorism, would assume the competence to play a significant role in responding to terrorism. The United States may have good reasons for ensuring that its own military, the indispensable factor in many international actions, will not be targeted, but the price of the protection may be failure to secure effective international prohibitions of terrorism.²²² Thus, the exception that was carved into Article 19(2) of the Terrorist Bombing Convention protects the United States military, but may also be stretched to cover

221. See Michael Ledeen, *Europe Coddles a Terrorist, Again*, WALL ST. J. EUR., Nov. 30, 1998, at 8.

222. See *Let Dictators Go — U.S. Right-Wingers*, IRISH TIMES, Dec. 14, 1998, at 17.

other activities that should properly be viewed as terrorism. Article 19(2) states:

The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by the Convention.²²³

Nor has terrorism lost its attraction for all members of the rank-and-file. While the romantic vision of the terrorist portrayed him as a member of the oppressed masses who resorted to this form of violence as a last, desperate resort, we now encounter, paradoxically, a bizarre attraction to terrorism by members of industrialized and democratic polities where the range for individual political initiative is ample. From anti-abortionists, to animal rights proponents, to militant environmentalists, to generalized opponents of contemporary civilization (like Theodore Kaczynski, the Unabomber),²²⁴ the willingness to resort to terrorism in democratic systems seems to be growing. At the same time, the apprehension of international terrorists may become more difficult as terrorism becomes more diffuse. Arquilla and Rondfeldt write that:

The revolutionary forces of the future may consist increasingly of widespread multi-organizational networks that have no particular national identity, claim to arise from civil society, and include some aggressive groups and individuals who are keenly

223. G.A. Res. 52/164, U.N. GAOR 6th Comm, 52d Sess., 72d plen. mtg., U.N. Doc. A/Res/52/164 (1998).

224. See *The Industrial Society & Its Future*, THE WASH. POST SUPPLEMENT, Sept. 19, 1995 available at <<http://www.wwfreespress.com/unaba.html>> (visited Oct. 21, 1999) (denouncing the continued development of technology).

adept at using advanced technology, for communications as well as munitions.²²⁵

If that prognosis is coupled with the diffusion of the means for manufacturing weapons of mass destruction, the prospect of international terrorism looms even larger.

VI. RESPONSES TO INTERNATIONAL TERRORISM AS A NOMOGENIC PROBLEM OF WORLD ORDER

International terrorism is likely to continue to be an attractive strategic option for elites as a cheap way of heightening diplomatic pressure on adversaries without having to bear responsibility. Recruiting the foot soldiers for terrorism, even for suicidal forms, has not proved to be a problem. At the same time, continued emphasis on state sovereignty, no less than sympathy for some of the terrorists' programs are likely, alas, to limit the capacity of the international legal system to respond effectively to terrorism. Because, as we have seen, the prescriptive regime that the international decision process has created tends to shield the state principals who order or finance terrorism, this part of international law, the intentions animating it notwithstanding, may actually encourage rather than deter terrorist adventures. In this respect, this regime in international law may be called "nomogenic," for much as iatrogenic disease is disease caused by presumably well-intentioned physicians, nomogenic pathologies are caused by intentional legal arrangements themselves.

Nor is the prognosis more reassuring with respect to putative non-state affiliated terrorists. Changes in psychopersonal organization in many advanced societies are likely to lead to greater willingness on the part of disaffected individuals to resort to the techniques of terrorism.²²⁶

225. John Arquilla & David Rondfeldt, *Cyberwar is Coming!*, in *IN ATHENA'S CAMP: PREPARING FOR CONFLICT IN THE INFORMATION AGE* 23, 49 (John Arquilla & David Rondfeldt eds., 1997).

226. See W. Michael Reisman, *The Tormented Conscience: Applying and Appraising Unauthorized Coercion*, 32 *EMORY L.J.* 499, 507 (1983) (citing G. SIMMEL, *CONFLICT* 17-18 (K. Wolff trans., 1955)).

Religious extremists, as well, have already indicated a willingness to use high levels of destruction to achieve their ends.²²⁷ Om Shin Rikyo, in Japan, still operates.²²⁸ If, as many scholars insist, the objective of terrorists is publicity, the global media may encourage terrorists by the wide dissemination of their acts. And the more those acts are publicized and only sporadically punished, the more the “copy-cat” phenomenon is likely to occur.

This final projection should be more alarming because of the availability of more destructive weapons to putative terrorists and the dissemination of the basic information about how to assemble them. And, ironically, the more alarming the prognosis, the graver the danger that efforts to respond to international terrorism may be used to restrict the ambit of personal liberty that is the very heart of liberal societies and often the real target of the international terrorist.²²⁹

227. Timothy Schofield, *The Environment As an Ideological Weapon: A Proposal to Criminalize Environmental Terrorism*, 26 B.C. ENVTL. AFF. L. REV. 619, 623 (1999) (citing Stephan H. Leader, *The Rise of Terrorism*, SEC. MGMT. Apr. 1, 1997; Steven Strasser & Tom Post, *A Cloud of Terror—And Suspicion*, NEWSWEEK, Apr. 3, 1995, at 38) (discussing the religious motivation behind the World Trade Center bombing).

228. See Michael A. Lev, *Doomsday Cult's Revival Raises Shivers in Japan*, AUSTIN-AM. STATESMAN, July 17, 1999, at A1.

229. See HEYMANN, *supra* note 4.

