

Chapter 33

An Appraisal of Lawful Military Response to State-Sponsored Terrorism*

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In their military posture statement for fiscal year 1986, the Joint Chiefs of Staff state:

The use of terrorism against the United States . . . continues to pose a formidable challenge The threat from international terrorism has never been greater In addition to the renewed activity of terrorists indigenous to countries in Western Europe, the threat is growing from Muslim transnational groups which originate in the Middle East and are influenced by Iran, Libya and Syria. These groups pose a significant threat to U.S. interests both in the Middle East and in Europe.¹

This JCS statement echoes Administration concerns regarding State terrorism addressed in National Security Decision Directive (NSDD) 138, signed by President Reagan on 3 April 1984. In the words of Defense Department official Noel Koch, NSDD 138 “represents a quantum leap in countering terrorism, from the reactive mode to recognition that pro-active steps are needed.”² Although the document itself remains classified, Robert C. McFarlane, former assistant to the President for National Security Affairs, suggested at the Defense Strategy Forum on 25 March 1985 that it includes the following key elements:

- The practice of terrorism under all circumstances is a threat to the national security of the United States.
- The practice of international terrorism must be resisted by all legal means.
- State-sponsored terrorism consists of acts hostile to the United States and to global security and must be resisted by all legal means.
- The United States has a responsibility to take protective measures whenever there is evidence that terrorism is about to be committed.
- The threat of terrorism constitutes a form of aggression and justifies acts in self-defense.³

It is clear that the Reagan Administration had embraced a new proactive posture, asserting the right to act preemptively to defend its citizens and interests where threatened by State-supported terrorism abroad.

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Is the new U.S. stance justified? The recent instances of State-supported violence would indicate “yes.” Terrorist attacks in 1983 and 1984 took the highest annual toll of lives and property on record. More U.S. lives were lost in 1983 to international terrorism than in the previous 15 years combined. And with rare exception, the often spectacular attacks during 1983 and 1984 were carried out by groups that were State-supported.⁴

While moral justification for this new U.S. policy may be obvious, the problem of defining that State support or linkage which warrants a U.S. military response, that legal framework supportive of such a proactive policy, and those reasonable force alternatives responsive to the threat, is more difficult. It is to these particular concerns that this paper is addressed.

State Sponsorship

Unlike the 1960s when most terrorist groups were autonomous, international terrorism since that time has come to resemble the workings of a multinational corporation. Walter Laqueur placed this in perspective when he noted: “An operation would be planned in West Germany by Palestinian Arabs, executed in Israel by terrorists recruited in Japan with weapons acquired in Italy but manufactured in Russia, supplied by an Algerian diplomat, and financed with Libyan money.”⁵

The United States was jolted into an awareness of the changing character of terrorism when its Embassy in Tehran was seized on 4 November 1979 by Iranian militants who enjoyed the support of Ayatollah Khomeini’s revolutionary government.⁶ While the U.S. Government resolved that crisis with the loss of only eight lives—lost in the aborted rescue mission—nations, including the United States, have not been as fortunate in the 1980s. Shiite terrorists bombed the U.S. Embassy in Beirut in April 1983, the U.S. Embassy in Kuwait in December 1983 and the U.S. Embassy Annex in Beirut in September 1984, all with paralyzing effectiveness. Similar attacks against South Korean diplomats in Rangoon in 1984 and against the Italian cruise ship *Achille Lauro* in October 1985 suggest that we have only seen the beginning. While the last two incidents could be clearly linked either to a government or nongovernmental international organization, the linkage in the attacks on U.S. interests in Lebanon and Kuwait was less clear.

It is the linkage between the terrorist and the sponsoring State which is crucial to providing our Government with the justification for response against that State and with the ability to capitalize on the response in terms of deterrence. Causal connectivity or linkage, however, can only be established if effective intelligence operatives are positioned to discover who the terrorists are, where they are, and who supports them. Covert intelligence operatives are necessary for identifying and targeting terrorist training camps and bases, and for providing an effective

warning of impending terrorist attacks. Unfortunately, a decade of dismantling our security apparatus in the 1970s has radically reduced our human intelligence collection capability. Secretary of State Shultz has correctly noted, “we may never have the kind of evidence that can stand up in an American court of law.”⁷

The question then is how much information is enough? Secretary Weinberger has underscored the very real practical difficulties that exist for the military planners in attempting to apply small amounts of force, especially over great distances, with insufficient intelligence. He has accurately noted the difficulty of assuring success, and has echoed the need for public support for any sustained resort to force by the United States in defending against terrorist attack.⁸ While these honest concerns would, of course, be factored into any decisional process concerned with the possible use of force, former Security Advisor McFarlane, speaking with the full support of President Reagan, has pledged: “We cannot and will not abstain from possible action to prevent, preempt and respond to terrorist acts where conditions merit the use of force.”⁹

Although no Reagan administration official has yet been able to define adequately “how much information is enough,” the demand for probative, or court-sustainable evidence affirming the complicity of a specific sponsoring State is an impractical standard that has contributed to the impression—on the part of certain States—that the United States is inhibited from responding meaningfully to their outrages. Hugh Tovar correctly notes: “There is a very real danger that the pursuit of more and better intelligence may become an excuse for non-action, which in itself might do more harm than action based on plausible though incomplete intelligence.”¹⁰ Thus, the United States should seek a functional standard of guilt appropriate to the threat and prove wrong those terrorist sponsors operating on the assumption the United States will never use force.

Legal Framework for Response

An examination of authorized responses to State-sponsored terrorism requires an understanding that terrorism is a strategy that does not follow traditional military patterns. In fact, a fundamental characteristic of terrorism is its violation of established norms. Even war has norms that survive despite their frequent violation. The only norm for terrorism is effectiveness. International law requires that belligerent forces identify themselves, carry arms openly and observe the law of war.¹¹ Principal among the laws of war are the principles of discrimination (or noncombatant immunity) and proportion. Terrorists, however, do not distinguish between the innocent (noncombatants) and the armed forces of the country in which the attack is made. Two rationales explain this strategy. The very fact that the victims of terrorist attacks are innocent third parties enhances the shock effect of attacking them. Alternatively, the terrorist may decree that everyone living in a certain society is guilty of its sins and deserving of punishment. In the

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contemporary language of defense economics, they wage countervalue rather than counterforce warfare.

Why is this important? It is important because the only credible response to terrorism is deterrence. There must be an assured, effective reaction that imposes unacceptable damage on the terrorist and those who make possible their activities. However, this reaction must counter the terrorists' strategy within the parameters of international law, and more specifically the law of armed conflict. Those who suggest otherwise neither understand the inherent flexibility of international law nor the cost of violating that law.¹²

International law has long recognized the need for flexible application. The underlying tenet of that law, the prohibition against the use of force, has as its principal exception the right of response in self-defense. Self-defense, however, is an inherent right, shaped by custom and subject to customary interpretation. Its codification within Article 51 of the U.N. Charter recognizes this inherent quality: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations"

According to some legal scholars, though, responding coercion cannot be justified under Article 51 unless the force directed against the "political independence" of another State has as its purpose "the permanent subjugation of that State to domination."¹³ This interpretation envisions a broad-based and far-reaching attack; but arguably an attack against just a small segment of a nation's governmental, military or social apparatus is legally analogous to an attack against the whole. If U.S. citizens, diplomats or military personnel are attacked or held captive in an attempt to induce a change in American policy, the political independence of our nation has clearly been subjected to attack.

The final clause of Article 2(4) of the U.N. Charter, which forbids the threat or use of force "in any other manner inconsistent with the Purposes of the United Nations," supports this interpretation. The principles codified in the Charter have as their primary purpose to "bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."¹⁴ The terrorist seizure of, or attack on U.S. citizens or instrumentalities, are certainly uses of force "in a manner inconsistent" with the Charter. Article 2(4) and Article 51, its exception, must be read together in a way that will give them both reasonable meaning. As Professor Myres McDougal explains: "Article 2(4) refers to both the threat and use of force and commits the Members to refrain from 'threat or use of force against the territorial integrity of political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'; the customary right of defense, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purpose of the United Nations, and a decent respect for

balance and effectiveness would suggest that a conception of impermissible coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion."¹⁵

A second restriction which doctrinaire legal scholars attempt to impose would permit self-defense only when an armed attack "occurs." This interpretation is based not only on Articles 51 and 2(4) but also on Article 2(3), which states: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Ian Brownlie argues that while "isolated or sporadic" incidents may constitute aggression, they do not reach the threshold of an "armed attack."¹⁶ It has thus been argued that because the definition of armed attack is narrower than aggression, then "certainly self-defense against armed bands would not seem to be included within the permitted area."¹⁷

Such rigid interpretations do violence to the very values underlying Article 51 and to the customary international law it seeks to codify. Neither the plain language of Article 51 nor U.S. practice in addressing incidents of aggression under its inherent right of self-defense suggests such a restrictive interpretation.

In 1818, the United States established the right to enter the territory of another State to prevent terrorist acts where the host is unable or unwilling to quell the continuing threat. The Seminole Indians in Spanish Florida had demanded "arms, ammunition, and provisions or the possession of the garrison at Fort Marks." President Monroe directed General Jackson to proceed against the Indians with the explanation that the Spanish were bound by treaty to keep her Indians at peace but were incompetent to do so.¹⁸

Subsequently, in 1837, the standard under which anticipatory self-defense could be justified was more clearly established. During an insurrection in Canada, the American steamer *Caroline* was used to transport men and materials for the rebels from American territory into Canada across the Niagara River. The U.S. Government had shown itself unable or unwilling to prevent this traffic, and, in these circumstances, a body of Canadian militia crossed the Niagara, and, after a scuffle in which some Americans were killed, sent the *Caroline* adrift over the falls. In the controversy that followed, the United States did not deny that circumstances were conceivable which would justify this action, and Great Britain for her part admitted the necessity of showing circumstances of extreme urgency. They differed only on the question of whether the facts brought the case within the exceptional principle. Charles Cheney Hyde has summed up the incident by saying that "the British force did that which the United States itself would have done, had it possessed the means and disposition to perform its duty."¹⁹ The formulation of the principle of self-defense in this case by the U.S. Secretary of State, Daniel Webster, has met with general acceptance. There must be shown, he said, "a necessity of self-defense, instant, overwhelming, leaving us no choice of means and no moment for deliberation."²⁰

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The requirement of “necessity” for self-defense is not controversial as a general proposition. However, its application in concrete cases requires judgements on facts and intentions that often involve diverse perceptions. A case for self-defense is not persuasive either on the political or legal level unless a reasonable basis of necessity is perceived. Those to whom a justification is addressed (that is, other governments or the public) will consider whether it is well-founded; they will not regard the use of force as a purely discretionary act.

An important dimension of this question concerns the separate issue of *when* does action become necessary; that is, when is the use of force justified? Pertinent to this question is whether the force is to be used for rescue of nationals whose lives are threatened, as a response to a continuing threat, or as reprisal.

The law with respect to imminently endangered nationals is clearest. The late Sir Humphrey Waldock (who served as a judge and president of the International Court of Justice) underscored that law when he wrote that force may be used to intervene in another State to protect its nationals from injury if there is: an imminent threat of such injury; a failure or inability on the part of the territorial sovereign to protect them; and measures of protection are strictly confined to the object of protecting them from injury.²¹ Waldock later observed that, “Cases of this form of armed intervention have not been infrequent in the past and, where not attended by suspicion of being a pretext for political pressure have generally been regarded as justified by the sheer necessity of instant action to save the lives of innocent nationals, whom the local government is unable or unwilling to protect.”²²

Examples of such cases of military action to protect nationals in peril include the Belgian action in the Congo (Stanleyville) in 1961, the U.S. action in the Dominican Republic in 1965, and, more recently, the U.S. rescue of the *Mayaguez* in 1975, the Israeli rescue action in Entebbe, Uganda in 1976, and the West German rescue effort in Mogadishu, Somalia in 1977.

The law with respect to military response to a continuing threat is more difficult. Military action has been justified,²³ however, where an imminent threat of attack exists and where the purpose is to protect the security of the State and its essential rights of territorial integrity and/or political independence. Would this line of reasoning support an attack on terrorist camps in one country when terrorists trained at that camp have executed hostages in another? It might be argued that military action against the camps would deter or preclude further hostage deaths or hostage-taking. An argument on similar lines was advanced in the Boxer Rebellion incidents in China at the turn of the century.²⁴ However, elimination of the threat of future attacks by terrorists from those camps in the delinquent States could be more effectively justified under the rationale of anticipatory self-defense.

Professor Lauterpacht states, as an example, that when a State is informed that a body of armed men is being organized on foreign territory for the purpose of

attack on its citizens, and when an appeal to the authorities of the foreign State “is fruitless or not possible, or if there is danger in delay, a case of necessity arises”; then “the threatened State is justified in invading the neighboring country and disarming the intended invaders.”²⁵ Lauterpacht further points out that every State judges “for itself, in the first instance, whether a case of necessity in self-defense has arisen,” but that “it is obvious that the question of the legality of action taken in self-preservation is suitable for determination and must ultimately be determined by a juridical authority of political body”²⁶ The United States has long taken the position that each nation is free to defend itself and is the “judge of what constitutes the right of self-defense and the necessity . . . of same.”²⁷ Similarly, more than half a century ago Secretary of State Frank Kellogg noted that when a State has resorted to the use of force, “if it has a good case, the world will applaud and not condemn its actions.”²⁸

The use of force as a reprisal or punishment presents the greatest dilemma. If the terrorists holding U.S. hostages in Lebanon were summarily to execute them, and it were shown that a specific country had sponsored their acts, could the United States execute punitive raids against the State? Although the grisly nature of terrorism often invokes strong public sentiment for retaliative action, the present international law may not permit the use of force in reprisal against a violating State. The “Declaration of Principles of International Law On Friendly Relations Between States,” adopted unanimously by the U.N. General Assembly in 1970, declares categorically: “States have a duty to refrain from acts of reprisal involving the use of force.”²⁹ The United States supported the declaration, and, like other nations, has gone on record in stating that it considers reprisal to be unlawful in contrast to acts of lawful self-defense.³⁰

While there will continue to be debate on whether reprisals are legally permissible, it is clear that coercive actions whose purpose is protective are more easily justified than actions whose express aim is punishment. The more important point is that military response to State-supported murder of hostages, one’s own nationals, would be justified under the doctrine of self-defense as a necessary and proportional coercive action to eliminate a continuing threat.

Proactive Responses Authorized Under International Law

The decision to use force against the terrorist must be as closely tied to a clear objective as is the case in planning at the higher end of the coercion spectrum. Because the relationship between objective and threat is often unclear in the low intensity conflict arena, a strategy to fight State-supported terrorist violence must always focus on the underlying political purpose of the States presently supporting terrorist organizations. That purpose is unquestionably our removal from the region concerned. How do we counter this purpose, this objective? Secretary of State Shultz was correct when he stated that our policy “. . . must be

unambiguous. It must be clearly and unequivocally the policy of the United States to fight back—to resist challenges, to defend our interests, and to support those who put their own lives on the line in a common cause.”³¹ Implementation of this proactive policy requires that we make the fullest use of all the weapons in our arsenal. These should include not only those defensive measures which reduce U.S. vulnerability, but also new legal tools and agreements on international sanctions, as well as the collaboration of other concerned governments. While we should use our military power only if conditions justify it and other means are not available, there will be instances, as there have been in the past, where the use of force is our only alternative. In this circumstance, our action would be fully justified as a necessary defensive measure to eliminate a continuing threat or to save U.S. lives.

Closely related to the legal question is the question of linkage. When clear linkage to a supporting State exists, we must publicize that relationship and attack with discrimination only those targets which most affect the well-being of the State sponsor. The “center of gravity” in the sponsoring State must always be that target whose destruction will most significantly undermine the target State’s will to commit future acts of terror against us. Since terrorism is a form of international conflict bound by its rules, lawful response is properly limited to those targets which do not enjoy civilian immunity. Military targets may be preferable for two other reasons. First, the selection of military targets—while the terrorists are attacking our civilians in violation of international law—should not raise concerns on the part of other States. Additionally, selection of military targets would refocus attention on the fact that terrorism is, in fact, a form of armed conflict.

The thrust of this new strategy, outlined in NSDD 138, must be to reclaim the initiative lost while the United States pursued a reactive policy which neither deterred terrorist activity nor encouraged successful response. A note of caution concerning our willingness to use force is required, however. The closest coordination between our military force and civilian leadership is critical, both to prevent publicity concerning our planning and to protect those forces involved. Maintaining secrecy can mean the difference between success and failure. Equally important, other countries working with us often have good reasons not to want publicity, and unacknowledged programs offer them some protection.

The key to an effective response to the threat posed by terrorist States is the commitment to address the attacks they sponsor within the scope of armed conflict. Full implementation of NSDD 138 should lead to increased planning for lawful preemptive contingency operations to eliminate the military threat; rather than, as now, treating each incident after the fact as a singular crisis provoked by international criminals. By treating terrorists as combatants, the right

of self-defense against their sponsor is triggered, and responding coercion may be the only proportional response to the threat. Because the unlawful acts of combatants are violations of the law of armed conflict, those terrorists who do succeed in their war crimes may be tried upon capture and the linkage to the supporting State publicized. Where terrorist acts cannot be prevented, the law supports military action to eliminate a continuing threat. Military action could lawfully include strikes at the heart of offending States' military apparatus where necessary to preempt further attacks. Finally, we may not be able to wait for absolute certainty and clarity. If we do, the world's future will be determined by others—most likely by those who are the most brutal, the most unscrupulous and the most hostile to everything we believe in.

This proactive strategy, long overdue, embraces use of the military instrument, along with other defensive and nonmilitary measures, as a lawful and effective response to State-supported terrorism. It attempts, for the first time, to use international law and its inherent right of self-defense as a force for the rights of Americans rather than as a shield for the scorn of our enemies.

Lieutenant Colonel Terry wrote this paper while attending the Naval War College.

Notes

1. U.S. MILITARY POSTURE FY-1986 at 94-95 (1985).
2. *Preemptive Anti-Terrorist Raids Allowed*, *The Washington Post*, 16 April 1984, p. 19.
3. McFarlane, *Terrorism and the Future of Free Society*, (Speech delivered at the National Strategic Information Center, Defense Strategy Forum, Washington, D.C.: 25 March 1985).
4. See Livingstone & Arnold, *The Rise of State-Sponsored Terrorism* in LIVINGSTONE & ARNOLD, EDs., *FIGHTING BACK* 14-21 (1985).
5. LAQUEUR, *GUERRILLA: A HISTORICAL AND CRITICAL STUDY* 324 (1976).
6. *Supra* n. 4 at 14; see also Terry, *The Iranian Hostage Crisis: International Law and U.S. Policy*, *JAG Journal* 31-79 (Summer 1982).
7. Shultz, *Terrorism and the Modern World* at 23 (Speech to Park Avenue Synagogue, New York City: 25 October 1984).
8. See Taubman, *The Shultz-Weinberger Feud*, *The New York Times Magazine* 3 (14 April 1985).
9. *Supra* n. 3.
10. Tovar, *Low-Intensity Conflict: Active Responses in an Open Society*, at 24 (Paper prepared for the Conference on Terrorism and Other "Low-Intensity" Operations: International Linkages, Fletcher School of Law and Diplomacy, Medford, Mass.: April 1985).
11. The rules of land warfare are found primarily in Hague Convention IV of 1907.
12. See Terry, *State Terrorism: A Juridical Analysis*, *Journal of Palestine Studies* 94-117 (Autumn 1980) for one view of the cost incurred when a nation State violates international law in the name of increased security.
13. See, e.g., Wright *The Cuban Quarantine*, 57 *Am. J. Int'l L.* 588 (1963).
14. U.N. Charter, Art. 1, para. 1.
15. McDougal *The Soviet Cuban Quarantine and Self-Defense*, 57 *Am. J. Int'l L.* 596 (1963).
16. Brownlie, *International Law and the Activities of Armed Bands*, 7 *Int'l & Comp. L. Q.* 712, 731 (1958).
17. GARCIA-MORA, *INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES* 118-120 (1962).
18. MOORE, *A DIGEST OF INTERNATIONAL LAW* in v. II 409 (1906).
19. HYDE, 2 *INTERNATIONAL LAW* 107 (2nd ed. 1945).
20. *The Caroline Case*, MOORE n. 18 at 412.
21. WALDOCK, 81 *HAGUE ACADEMY RECUEIL DES COURS* 467 (1952).
22. WALDOCK, 106 *HAGUE ACADEMY RECUEIL DES COURS* 240 (1962).

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23. See Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, U.S. Naval Institute Proceedings, 1-5 (January 1982). The attack by Navy F-14s on two Libyan jets which had fired on them over the Gulf of Sidra, had missed, and were returning to base in Libya was justified on the basis that they constituted a continuing threat because they could have turned at any time and reinstated the attack.
24. See MCDUGAL, *STUDIES IN WORLD PUBLIC ORDER* 711 (1960).
25. OPPENHEIM, *INTERNATIONAL LAW* 298 (8th ed. 1955).
26. *Id.* at 299.
27. Brownlie, *The Use of Force in Self-Defense*, 37 *Brit. Y.B. Int'l L.* 183, 207 (1961).
28. Address by Secretary of State Kellogg before the American Society of International Law, 28 April 1928, *Am. S. Int'l L. Proc.* at 141, 143 (1928).
29. U.N. General Assembly (UNGA) Resolution 2625 (1970).
30. See, e.g. the statement of the Secretary of State in 68 *Am. J. Int'l L.* 736 (1974).
31. George Shultz, Address before the Low-Intensity Warfare Conference (National Defense University, Washington, D.C.: 15 January 1986).