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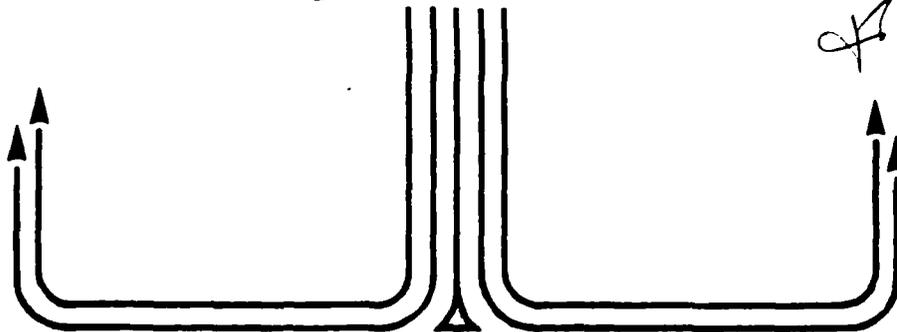
LEGAL LIMITATIONS ON THE USE OF
AIRPOWER AGAINST TERRORIST ACTIVITY

Major, Robert E. Kaszczuk 86-1350,
"insights into tomorrow"

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REPORT NUMBER 86-1350

TITLE LEGAL IMITATIONS ON THE USE OF AIRPOWER AGAINST TERRORIST
ACTIVITY

AUTHOR(S) MAJOR ROBERT E. KASZCZUK, USAF

FACULTY ADVISOR LT COL ROGER SINDLE, ACSC/EDX

SPONSOR LT COL DENNIS VODER
HQ USAF/JACI
WASHINGTON D.C., 23340

Submitted to the faculty in partial fulfillment of
requirements for graduation.

Accession For	
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DTIC TAB	<input type="checkbox"/>
Unannounced	<input type="checkbox"/>
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AIR UNIVERSITY
MAXWELL AFB, AL 36112



UNCLASSIFIED

SECURITY CLASSIFICATION OF THIS PAGE

REPORT DOCUMENTATION PAGE

1a. REPORT SECURITY CLASSIFICATION UNCLASSIFIED			1b. RESTRICTIVE MARKINGS			
2a. SECURITY CLASSIFICATION AUTHORITY			3. DISTRIBUTION/AVAILABILITY OF REPORT STATEMENT "A" Approved for public release; Distribution is unlimited.			
2b. DECLASSIFICATION/DOWNGRADING SCHEDULE						
4. PERFORMING ORGANIZATION REPORT NUMBER(S) 86-1350			5. MONITORING ORGANIZATION REPORT NUMBER(S)			
6a. NAME OF PERFORMING ORGANIZATION ACSC/EDCC		6b. OFFICE SYMBOL (If applicable)		7a. NAME OF MONITORING ORGANIZATION		
6c. ADDRESS (City, State and ZIP Code) Maxwell AFB AL 36112-5542			7b. ADDRESS (City, State and ZIP Code)			
8a. NAME OF FUNDING/SPONSORING ORGANIZATION		8b. OFFICE SYMBOL (If applicable)		9. PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER		
8c. ADDRESS (City, State and ZIP Code)			10. SOURCE OF FUNDING NOS.			
			PROGRAM ELEMENT NO.	PROJECT NO.	TASK NO.	WORK UNIT NO.
11. TITLE (Include Security Classification) LEGAL LIMITATIONS ON THE USE OF			12. PERSONAL AUTHOR(S) Kaszczuk, Robert E., Major, USAF			
12. PERSONAL AUTHOR(S)						
13a. TYPE OF REPORT		13b. TIME COVERED FROM _____ TO _____		14. DATE OF REPORT (Yr., Mo., Day)		15. PAGE COUNT 34
16. SUPPLEMENTARY NOTATION ITEM 11: AIRPOWER AGAINST TERRORIST ACTIVITY						
17. COSATI CODES			18. SUBJECT TERMS (Continue on reverse if necessary and identify by block number)			
FIELD	GROUP	SUB. GR.				
19. ABSTRACT (Continue on reverse if necessary and identify by block number) International law, particularly the law of war, supports the use of airpower in an armed response to terrorism. The study evaluates national self-help in relation to counter-terrorist and anti-terrorist operations. The study traces the development of the law of self-help and its applicability today against this new form of warfare. The study concludes that the United States can legally justify direct military action against terrorists, but it must consider other factors, such as, international public opinion.						
20. DISTRIBUTION/AVAILABILITY OF ABSTRACT UNCLASSIFIED/UNLIMITED <input type="checkbox"/> SAME AS RPT. <input checked="" type="checkbox"/> OTIC USERS <input type="checkbox"/>				21. ABSTRACT SECURITY CLASSIFICATION UNCLASSIFIED		
22a. NAME OF RESPONSIBLE INDIVIDUAL ACSC/EDCC Maxwell AFB AL 36112-5542				22b. TELEPHONE NUMBER (Include Area Code) (205) 293-2483		22c. OFFICE SYMBOL

PREFACE

1. Subject to clearance, this manuscript will be submitted to Air University Review for consideration.
2. This article explores the development of the law of self-help. The law of self-help is divided into theories of self-defense and reprisal. This article explores both theories by comparing Israeli and U.S. responses to terrorist activity. The article draws no conclusions as to which country's response is proper. The article is concerned with the legal justification of a U.S. armed response under the law of self-help.
3. International law does not preclude a nation from protecting itself from the continuing threat of terrorism. Article 51 of the United Nations Charter recognizes the right of national self-defense. The U.S. has been reluctant in the exercise of this right. This article identifies the legal justification available to the United States in support of military action against terrorist groups. The article concludes that legal justification may not be sufficient unless those making the decisions are also aware of the influence international public opinion will have on the United States.

ABOUT THE AUTHOR

Major Robert E. Kaszczuk is currently attending Air Command and Staff College. His next assignment will be as Staff Judge Advocate to the Air Force Drug Testing Laboratory, Aerospace Medical Division, Brooks AFB, Texas. Prior assignments include tours as Circuit Trial Counsel, Area Defense Counsel, and base level JAG assignments. Major Kaszczuk received his BA in Psychology from North Texas State University and his MA in Public Administration from Central Michigan University. He graduated from Baylor University School of Law with his Juris Doctor in 1978. Prior to attending law school, Major Kaszczuk was a radar navigator in B-52's with 32 combat missions in SEA.

LEGAL LIMITATIONS ON THE USE OF AIRPOWER AGAINST TERRORIST ACTIVITY

The number of terrorist actions against American citizens and property is on the upswing. Concurrent with the increase in numbers, the violence used by terrorists is becoming more severe. A dichotomy, however, exists in how the United States responds to acts of terrorism. Currently, in the U.S. there exists no Federal criminal statute defining terrorism as a crime and authorizing our courts to prosecute individuals for terrorism. The same is also true for most western nations in the international arena. The people, on the other hand, want their leaders to take an active role in eliminating terrorism.

At the same time, some Third World countries are not interested in punishing terrorists. This is due in large part to Third World ties with fights against oppressors and subsequent identification with the struggles espoused by terrorist groups. This is not to say the United States and other Western States are not interested in actively prosecuting terrorists for their actions. However, prosecuting terrorists under existing criminal sanctions such as murder, extortion, kidnapping, arson, and air piracy leaves the impression that terrorists are not being punished for their acts of terrorism.

Experts in the study of international law as applied to terrorism point out that the major problem in combating terrorism through the legal systems of the Western World is the lack of a

universally acceptable definition of terrorism. Additionally, these experts point out terrorist activity involves conduct already proscribed by international law. Therefore, efforts to create an international treaty setting forth a separate crime of terrorism, historically, are secondary to establishing more effective sanctions against acts of terrorism.(1) Thus the problem is similar to that facing our Supreme Court in the early pornography cases causing Justice Stewart to remark that although he could not define pornography: "I know it when I see it."

The other side of the problem quite simply is Americans are growing tired of being victimized by every cause throughout the world in the name of liberation or any other political catch phrase. More and more, there is a cry for the authorities to do something to protect Americans abroad and put an end to the activities of terrorist groups aimed at American citizens and property.

How should terrorism be defined and what response should we make towards terrorists? The purpose of this paper is to provide a legal basis for U.S. armed response to terrorism. International law principles, including the law of war, support the use of air power against terrorism. This paper attempts to delineate the acceptable conduct allowable under international law, while recognizing the overriding influence international public opinion may have on the willingness to exercise the armed response option.

Definition of Terrorism

Terrorism has been characterized by Dr. Neil C. Livingstone as differing significantly from other forms of warfare in three aspects. First, terrorism is nonstate violence and usually regarded as illegitimate violence. Second, terrorism is a political act designed to demoralize their enemy (the government) creating conditions for general revolt. And third, terrorism is far less destructive than traditional warfare which is consistent with the terrorists' desire to communicate their cause to the world.(2) In light of these characteristics, terrorism can be defined as a form of coercion used to force compliance with the demands of a group or individual to achieve their perceived political objectives. The Department of Defense defines terrorism as "the unlawful use or threatened use of force or violence by a revolutionary organization against individuals or property, with the intention of coercing or intimidating governments or societies, often for political or ideological purposes."(3) The target of terrorism, the existing government they perceive as the enemy, is rarely attacked directly. Rather, violence is usually directed at an instrumental target in order to coerce the primary target to accept their demands or face future violence.

Types of Terrorist Activities and Responses

Terrorism takes many forms today, but the actions most likely to attract media attention involve the taking of hostages and destruction scenarios involving large scale car bombings. Hostage situations can include the hijacking and holding of airliners or cruise ships and the seizing and holding of embassies and the individuals found therein. The important point to note is those individuals seized in these situations are rarely the intended targets, but rather are seen as a means of coercing the primary target state into meeting the terrorist's stated objectives. Another type of terrorist activity is the destruction scenario. Examples include the Beirut bombings against U.S. Marines and U.S. Embassy activities and the more indiscriminate bombings such as preferred by the Irish Republican Army. The purpose of these bombings is to demoralize the "enemy" and hopefully produce an irrational act by the target government leading to a general revolt. While oversimplifying the aims and objectives of terrorist groups, these activities begin to set the stage for governmental response to acts of terrorism.

Governments respond in different ways to these provocations. Some governments, notably Israel, take a daring and direct approach aimed at physical reprisal directed against the terrorist. Most other governments, however, resort to diplomacy, international legal bodies, and as a last resort, armed force. Illustrating the more direct approach of Israel, the Entebbe

rescue certainly is the highlight of national self-help in response to an international crisis. As one author noted, "Since the Entebbe rescue, there also has been a decided tendency for governments to resort to the use of force outside their borders as evidenced by the successful West German action at Morjadesha and the ill-fated Egyptian action in Cypress and U.S. action in Iran."⁽⁴⁾ Rescue attempts are not the only application of Israeli airpower against terrorists. On the night of December 28, 1968, Israel attacked Beirut International Airport and destroyed thirteen planes belonging to Arab airlines worth about \$43.8 million.⁽⁵⁾ The attack was in response to an incident two days earlier at the Athens Airport where two Arabs attacked an Israeli plane as it was taking off. Recently, Israel again demonstrated the use of airpower against terrorism when it struck a PLO headquarters in Tunis by using aerial bombardment.

The U.S., on the other hand, has been more restrained in responding to terrorist demands. Traditionally, the U.S. seeks to wait out the terrorists. Negotiations with terrorists are not a favored tactic of official Washington. During the Iranian hostage crisis, the U.S. explored several avenues in attempting to resolve the crisis. These included direct diplomatic attempts with Iran, an appeal to the United Nations, filing a complaint with the International Court of Justice, economic reprisals against Iranian assets in this country, embargoes on trade, and humanitarian appeals.⁽⁶⁾ Only after all these avenues appeared

to be exhausted, did the U.S. resort to an unsuccessful rescue attempt.

Recently, however, the U.S. has employed a more direct approach with terrorists as soon as the situation allowed. For example, the U.S. intercepted an Egyptian airliner carrying those responsible for hijacking a cruise ship in the Mediterranean and the suspected (at that time) murder of an American citizen aboard that ship. The airliner was intercepted by Navy warplanes and forcibly diverted to a landing where the terrorists were turned over to Italian authorities for prosecution. This followed our condemnation of an Israeli interception of aircraft over Lebanon some years earlier.(7) Such actions may signal the shift by the U.S. to a more direct approach in dealing with terrorism and finally a recognition that:

Growing state-sponsorship of terrorism has serious consequences. It puts more resources in the hands of the terrorists: money, sophisticated munitions, intelligence, and technical expertise. It also reduces the constraints on them, permitting them to contemplate large-scale operations without worrying so much about alienating perceived constituents or provoking backlash.(8)

Certainly, as illustrated by the Israeli rescue at Entebbe, most Third World countries are vulnerable to self-help measures undertaken by militarily advance countries. Self-help only works in one direction, it cannot be used by a weak state against a strong state.(9) Governments can direct their attention to either the causes of terrorism or to the violence itself. Every state has the right to decide how it will combat terrorism, but

not the right "to decide whether to do so without undermining its own claim to sovereignty."⁽¹⁰⁾ Therefore, the question simply becomes does the United States have the right to use its military might against terrorists assuming the American people would support the use of air power and potential loss of life over a sufficient length of time to combat terrorism.

International Legal Bodies Concern

The United Nations is certainly aware of the terrorism problem and the growing inclination of victim states to engage in self-help to remove the threat to their citizens. Several conventions against hostage taking have been enacted in the last several years. The U.N. Convention against the taking of hostages dealt with the issue of Entebbe type rescue attempts. Third World countries pushed for the inclusion of language forbidding these raids, while Western countries opposed this action. The end result was a compromise position recognizing the territorial integrity of a state.⁽¹¹⁾ Equally watered down has been the actions by the Security Council in relation to either the taking of hostages or the rescue attempts themselves. When the Security Council attempted to act, they were ignored by the parties involved. The usual action consisted of acts of censure or more often failure to censure through the veto power of members of the Security Council supporting both sides of an issue. The only currently promising approach for U.N. action is in the "more vigorous application of . . . international law

forbidding states to permit their territory to be used as a base for armed bands . . . to operate in the territory of another state."⁽¹²⁾

The International Court of Justice has had little influence in this area, preferring for the most part to defer to the political question as a means of not hearing terrorism cases. Even when they have taken a case, their rulings have had little or no effect on the parties. In the Iranian hostage case, the Court determined that the Iranian state was not responsible for the initial taking of the hostages, but became responsible through their subsequent approval and support. Iran simply ignored the ruling and held itself not bound by the decision of a biased international body. An interesting sidelight relevant to this article is the Court's consideration of the hostage rescue attempt. The Court's only comment on the rescue was in viewing it as an act of contempt by the U.S., while the entire hostage matter was before the Court and in violation of its order neither party take steps to aggravate the situation while they deliberated the matter.

At present, a strong case can be made for state action against terrorist activity based on terrorism being a direct attack against civilized society and the inability, at present, for international organizations to have an effect on terrorists.

The Right to Self-Defense

The right to national self-defense was raised to the level of legal doctrine in the Caroline Case. A brief discussion of the case is in order to understand the development of the right to self-defense still recognized under the United Nations Charter, Article 51.

During the Canadian rebellion of 1837, active sympathy for the rebels was evident among Americans. The rebel leaders urged support from concerned American citizens and were successful in gaining several hundred volunteers along with arms and ammunition. After the force grew to around a thousand strong, they invaded and captured Navy Island belonging to the British. The Americans, who were cooperating with the rebels, were in constant contact with the American shore and were constantly reinforced with men and supplies. The Caroline made several trips between the American shore and Navy Island and was known to be supplying war material to the rebel forces.

The Canadian forces saw the destruction of the Caroline as important to prevent the rebels from being resupplied, as well as, depriving them access to the Canadian shore. On the 29th of December, the British forces caught the Caroline at berth at Fort Schlosser. The British boarded her and after a brief scuffle took control (two American citizens were killed and one captured and later released). Immediately after capturing the vessel, it

was set afire, towed into the current of the river and allowed to go over Niagara Falls.

The British subsequently raised three defenses to the action. First, the British raised the piratical character of the vessel. Second, the laws of the U.S. were not being brought to bear on the supporters of the rebels. And third, their action was an act of self-defense and self-preservation.(13) The first two were of no consequence to the ultimate solution of the disagreement.

Upon entering the case, Daniel Webster outlined the formula upon which the British government must defend its claim of self-defense. He "called upon the British to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."*(14)* Webster believed he was setting an impossible task. The British were, however, able to answer based on the facts as seen by the British. While the facts were under dispute, the basic law was agreed to by both parties which made the right to national self-defense more valuable as a legal precedent.

Self-Defense and the United Nations Charter

The U.N. was formed on the 26th of June 1945, as an organization devoted to the maintenance of world peace and the economic and social advancement of all peoples. The U.N. Charter entrusts the maintenance of peace to the Security Council. Article 2(3) calls on all members to "settle their international

disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."⁽¹⁵⁾

Likewise, Article 2(4) compels members to refrain "from the threat or use of force against the territorial integrity or political independence of any state"⁽¹⁶⁾

These articles do not purport to prohibit every instance of the use of force, however. The usual exception to the prohibition against the use of force is national self-defense. Article 51 of the U.N. Charter explicitly states:

Nothing in the present Charter shall impair the inherent right to individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right to self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.⁽¹⁷⁾

As one author has pointed out, however, the right to self-defense is not strictly a right, but is more precisely a "privilege" which legitimizes an otherwise illegal action taken as a response to attack by another state. He goes on to report that it is an interim measure until the Security Council acts.⁽¹⁸⁾ In addition, Article 33 calls on the parties to a dispute to resort to all peaceful means of settling their conflict and gives the Security Council discretion to call upon the parties to settle their dispute by such means.⁽¹⁹⁾ The current interpretation is that Article 2(4) does not prohibit all

forms of armed response, but only those that seek to violate the territorial integrity, political independence, or fundamental freedoms of a state.(20)

What then are the requirements for a valid self-defense response to continued terroristic harassment? A useful tool in setting the parameters for a self-defense response would be to contrast the Israeli and U.S. views as demonstrated by the actions taken by these countries against terrorist groups.

Self-defense is one aspect of self-help. Reprisals are another aspect of self-help and related to self-defense through a set of common preconditions:

- (1) The target state must be guilty of a prior international delinquency against the claimant state.
- (2) An attempt by the claimant state to obtain redress or protection by other means must be known to have been made, and failed, or to be inappropriate or impossible in the circumstances.
- (3) The claimant's use of force must be limited to the necessities of the case and proportionate to the wrong done by the target state.(21)

The differences between self-defense and reprisals lie in their purpose.

Self-defense is permissible for the purposes of protecting the security of the state and the essential rights--in particular the rights of territorial integrity and political independence--upon which that security depends. In contrast, reprisals are punitive in character: They seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future.(22)

These differences remain important to the U.S., mainly due to the response triggered among the American people immediately

following a terrorist incident. This immediate cry for vengeance usually subsides quickly and any subsequent action taken by the U.S. against those believed responsible runs the very real risk of being condemned not only by the international public opinion, but equally by Americans who have no desire to involve the armed forces in any type of military action outside our borders. One thing must be kept clearly in mind whether we are seeking to justify our use of force under a theory of self-defense or reprisal. Under the recognized law evolving from the Caroline case, through the development of the U.N., whichever state seeks to legitimize its use of force has a heavy burden of showing the necessity of its action. For example, in a hostage rescue situation where the hostages are not under imminent danger of harm, "the illegality of their detention and the failure of international organs to obtain their release should not be enough to legitimize the use of force to effectuate their release."⁽²³⁾ To allow the use of armed force in these situations would create a necessity where for the present none existed. This approach has been used at times and rightfully rejected on an international scale.⁽²⁴⁾

Faced with the dichotomy of not allowing terrorists to continually harass its people and the restraints placed upon its use of force, a sovereign nation must take some sort of action. The use of force must be governed, however, by some definable principles. One author, Richard A. Falk, suggested a framework

against which a claim of retaliation against prior terrorist acts may be measured:

- (1) The burden of persuasion is upon the government that initiates an official use of force across international boundaries;
- (2) That the governmental user of force will demonstrate its defensive character convincingly by connecting the use of force to the protection of territorial integrity, national security, or political independence;
- (3) That a genuine and substantial link exists between the prior commission of provocative acts and the resultant claim to be acting in retaliation;
- (4) That a diligent effort be made to obtain satisfaction by persuasion and pacific means over a reasonable period of time, including recourse to international organizations;
- (5) That the use of force is proportional to the provocation and calculated to avoid its repetition in the future, and that every precaution be taken to avoid excessive damage and unnecessary loss of life, especially with respect to innocent civilians;
- (6) That the retaliatory force is directed primarily against military and para-military targets and against military personnel;
- (7) That the user of force make a prompt and serious explanation of its conduct before the relevant organ(s) of community review and seek vindication there from of its course of action;
- (8) That the use of force amounts to a clear message of communication to the target government so that the contours of what constituted the unacceptable provocation are clearly conveyed;
- (9) That the user of force cannot achieve its retaliatory purposes by acting within its own territorial domain and thus cannot avoid interference with the sovereign prerogatives of a foreign state;
- (10) The user of force seek a pacific settlement to the underlying dispute on terms that appear to be just and sensitive to the interests of its adversary;
- (11) That the pattern of conduct of which the retaliatory use of force is an instance exhibits deference to consideration (1)-(10), and that a disposition to accord respect to the well of the international community be evident;
- (12) That the appraisal of the retaliatory use of force take accounts of the duration and quality of support, if any, that the target government has given to terroristic enterprises.(25)

The way an individual sovereign interprets these guidelines will determine the course it will follow in dealing with the use of armed force against terrorism and the states supporting or harboring terrorists within their boundaries.

The Israeli and U.S. Views

Israeli Prime Minister Shimon Peres stated his country's position quite clearly when he stated "Israel will continue to act full force against terrorists, killers, murderers, assassins Whoever wants peace [in the region] must stop terrorism. There can't be a compromise about it."⁽²⁶⁾ The occasion prompting that position statement was the international reaction, including U.S. concern, about the Israeli bombing raid of the PLO headquarters located in Tunis, Tunisia. That raid, of course, was not the first time Israel has justified military excursions using air power as a self-defense action. No one can deny that the PLO, as well as many Arab states, are determined to end the viability of Israel as a sovereign state. The PLO in particular has repeatedly directed terrorist actions against the citizens and the very sovereignty of Israel.

Israel attempted to justify its bombing of Iraq's nuclear reactor as anticipatory self-defense. The Israeli leadership, one assumes, were convinced that the Iraqi government was in the process of developing a nuclear capability to be directed, in part, against Israel. Their problem, however, was that the reactor was not near completion nor was there clear evidence that

Iraq had the capability to manufacture a nuclear weapon in the near future. The Israeli action was held to be a violation of Article 2(4) and not legitimate under Article 51 because the threat was not imminent.(27) It is not seen as a holding that anticipatory self-defense is no longer a viable response under current international law.

A second example of Israel using air power, this time in retaliation, against state sponsored terrorism was the Beirut raid discussed earlier. While the Lebanese government denied responsibility for the PLO attack in Athens which prompted Israel's raid--it is important to note that Lebanese officials publically praised the work of the Popular Front. The Lebanese also allowed the Popular Front freedom of movement and recruitment within the refugee camps located in Lebanon.(28) Again, Israel was condemned for its actions. However, applying Falk's framework, listed above, a case can be made justifying Israel's act in self-defense against continued threats by state supported terrorists.

Terrorism is popularly looked upon as war on the cheap. Terrorists can go a long way in their "war" with very little support. Moreover, the sponsoring countries run very little risk of receiving unacceptable retribution for their support. Israel clearly saw the destruction of \$43 million of aircraft as a means of precluding these Arab states from continuing their support of terrorist aggression against her citizens.

There are those who suggest that the United States adopt an Israeli policy in dealing with terrorists, however, there are differences that must be considered. Brian Michael Jenkins suggests several of these differences: (1) Israel considers itself at war, the U.S. does not; (2) reprisal is part of Israeli military doctrine, it is not part of U.S. military doctrine; (3) public support exists for Israel's anti-terrorist actions; such support in the U.S. is only evident after a terrorist attack and subsides quickly; (4) states sponsoring terrorism are on Israel's borders, they do not border the U.S.; and (5) Israel more easily tolerates world condemnation, the U.S. does not.(29)

In an address to the Park Avenue Synagogue, Secretary of State George P. Shultz noted that no nation has had more experience with terrorism than Israel nor has contributed as much to developing the best ways to confront it. He also noted the broad public support for their anti-terrorist policies within Israel.(30) Secretary Shultz goes on to warn that if our reaction to terrorism is to turn on ourselves we give them incentive to continue. We must seek:

a consensus in this country that our responses should go beyond passive defense to consider means of active prevention, preemption, and retaliation. Our goal must be to prevent and deter future terrorist acts, and experience has taught us over the years that one of the best deterrents to terrorism is the certainty that swift and sure measures will be taken against those who engage in it There should be no moral confusion on the issue. Our aim is not to seek revenge, but to put an end to violent attacks against innocent people Clearly, the democracies have a moral right, indeed a duty, to defend themselves.(31)

Terrorism is a new form of warfare directed against us, that requires a military response. But it isn't without risk of loss of life, public condemnation, and risk of mistake.(32)

A new attitude may be developing in the U.S., boosted no doubt by our successful interception of the Egyptian airliner carrying suspected hijackers. As President Reagan warned, "You can run, but you can't hide."(33) Only time will tell if there will be sustained public support for armed response to terrorist activity or if this was the giddy response of a public imbued with emotion over one successful operation.

The options available to the U.S. are somewhat limited. Surgical strikes may offer the best offense against continuing terrorism. That is to say that whether they are used against a terrorist target, as in Tunis, or in support of a rescue attempt, surgical strikes may be free of the normal legal constraints imposed by international law. This is a result of three considerations:

- (1) First, they are discrete and, accordingly, do not present the problem of cumulative violations of just war under international law standards.
- (2) Second, they may be presumed to be justified by a high and urgent necessity that may require sacrifice of other values such as some of the moral-legal constraints.
- (3) Third, as a practical matter, surgical operations may be subject to intrinsic limitations arising out of the capabilities of the force and the circumstances of its deployment.(34)

The available options seem to be limited to rescue attempts, interception of known terrorists, and bombing raids against known terrorist base camps. The author would place the Grenada

operation in a rescue category due to the eagerness in which the Administration sought to justify its action based on the rescue of students present in the country. This has been recognized as permissible humanitarian intervention, akin to the Israeli Entebbe rescue.

Initially, the U.S. came out strong in favor of Israel's bombing raid on Tunis, only to back off slightly while not condemning Israel, after Tunisia protested our public statement. The U.S. itself has conducted air strikes which it characterized as reprisal action.(35) It doesn't appear, however, that this will be a predominate policy of the U.S. when one looks at our international posture and history.

Likewise, interception of civilian aircraft doesn't appear to be a set policy for the U.S. The nature of interception alone precludes its repeated usage. This coupled with our condemnation of Israel's interception of a civilian aircraft over Lebanon several years ago would lead one to the belief the U.S. would hesitate in this area. Additionally, the consequences facing the U.S. if the civilian aircraft failed to respond to the intercepting pilots' commands could conceivably be greater than tolerable to a country as sensitive to public condemnation as the United States.

Rescue attempts appear to be the most likely scenario for the use of military air power in the near future. Five countries have attempted armed rescue attempts. Three were successful, but it should be noted that of the three attempted in non-permissive

environments only the Entebbe raid was successful.(36) Rescue attempts are not free from the test of necessity. There must be a belief by the invading country that the hostages are in immediate danger of death or serious injury before a rescue attempt using force can be legally justified.(37)

The Laws of War

As stated earlier, terrorism is war on the cheap. To consider it anything less than war is to deny its basic purpose, which is to bring down governments. Quite often the target government is not the only body affected. The U.S. is often an incidental target of terrorist groups because of its involvement and support of established governments around the world. It is conceivable for the U.S. to be at war with terrorism. It can be argued that the customary laws of war prohibit terrorism as an international strategy.(38)

In reality, war is rarely declared in current international relations. At the same time, there have been several armed conflicts and it is generally agreed that certain legal rights attach in these situations. Terrorists, on the other hand, usually attempt to justify their acts under the banner of a liberation movement. By seeking to justify their actions in the name of politics, they also open themselves up to armed response. These groups usually enjoy such a level of popular support within the countries from which they operate that those governments may not even have the power to prevent their continued operation.

Even the United States has provided "aid and comfort" to anti-Castro exiles who propose to liberate their country.(39)

The objective of anti-terrorist action is simply to deter future terrorism. Deterrence is but an example of the application of the law of war. The U.S. cannot meet each terrorist incident with a counterattack. "The military establishment is still bound by the legal and moral constraints of the laws of war. This does not preclude aggressive counter-terrorist operations."(40) However, to justify aerial response against terrorists under the law of war doctrine, the principles of both proportionality and discrimination must be considered. Simply stated, proportionality requires the military means be relative to the just military ends sought under a legitimate military necessity. Discrimination rules out indiscriminate attack without regard to collateral civilian casualties.

Collateral damage is not outlawed by the law of war. What is outlawed is the intentional targeting of civilians or other targets unrelated to the terrorists' ability to continue their attacks. This would be the same prohibition against belligerents in armed conflict between sovereign states. The fact that civilians are located near or in a terrorist camp when attacked and casualties result is not in itself a violation of the laws of war assuming the attack itself is justified.

Is the U.S. currently "at war" with terrorists? There is no doubt the terrorists themselves espouse a political justification for their actions under the banner of a war of liberation. It

seems that if the targets of these wars of liberation are American citizens, property and interests abroad, the U.S. is faced with an armed conflict. Therefore, keeping to the principles of proportionality and discrimination, the U.S. could justify reprisals against terrorist groups. The legitimacy of each act will be judged on a case by case basis.

Reprisals in war are the commission of acts which, although illegal in themselves, may, under the specific circumstances of the given case, become justified because the guilty adversary has himself behaved illegally, and the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future.(41)

The laws of war attempt to balance national security interests against the desire to limit the effects of war to those individuals having a direct effect on the hostilities.(42) It does not preclude an attack based on the proximity of civilians, but recognizes that collateral damage may result. Due to the nature of terrorism, a high degree of certainty in targeting is tantamount to a successful defense of air attack against terrorist targets, particularly if civilian casualties result.

United States Action

The options available to the U.S. are not as restricted as one would initially believe. They can be divided into counter-terrorist and anti-terrorist activities. Counter-terrorist activities are retaliatory measures in response to a terrorist act, while anti-terrorist actions denote more offensive actions

designed to prevent terrorist acts. One point should be kept in mind when urging any responsive action; that is when looking at the history of terrorism, military action has been relatively ineffective in stopping terrorist activity. Each type of military action has both pros and cons. Advocates for action must consider both the benefits and the liabilities of their advocated response. In the short term, there may be a groundswell of public support, however, it may quickly dissolve if such action appears to have little effect on the continuation of terrorism. International condemnation is particularly damaging to a nation like the U.S. who is sensitive to public criticism.

The right to self-defense is not limited to a reaction to terrorism. Anticipatory self-defense has not been precluded by the U.N. Charter. Anticipatory self-defense is justified by a clear and present danger calling for preemptive measures. The aggressor still retains the burden under international law of justifying its actions by showing not only an imminent danger but also that no other means would have been effective.

Retaliatory self-defense in response to a continuing threat is subject to international law under the theory of reprisals. The current view in the U.S. certainly supports the use of retaliatory self-defense, however, the moralistic and legalistic restraints imposed by the American people cannot be ignored by the policy makers. Reasonableness will always remain the criteria by which such actions will be judged on the

international scene. The American experience, particularly after Vietnam, has been to tolerate use of armed force for only short periods of time, if used successfully with limited loss of American life. These conditions, more than international opinion, will shape our response to terrorism no matter what our legal justification under international law.

Conclusion

If the U.S. is sincere about the use of military force against terrorist activity, we must be clear about our objectives. We must use established military forces openly, but with the knowledge that as a great power we run the very real risk of condemnation of a great power attacking a relatively weak, underdeveloped country.

The principle point is that a retaliatory use of force that is perceived as excessive tends to engender a variety of bad consequences, including some that may be detrimental to the user. The further point is that rules of international law, as traditionally conceived, are too rigidly formulated to give appropriate insight into the factors that shape a decisional process of government and thus does not, in a realistic way, help officials or observers identify when a use of force is excessive.(43)

While armed response to terrorism can be justified by the application of the laws of war and the inherent right to self-defense, planners must take the current public support with a grain of salt. The perceived public outcry for U.S. retaliation against terrorists must be balanced with the growing

outrage against Israel both within the U.S. and on the international scene.

Rescue attempts must be evaluated against the backdrop of public support and likely successful outcome. "A Rand review of 77 hostage incidents found that 79 percent of the hostages who died were killed during rescue attempts."(44)

There is no indication that terrorism will diminish in the near future. It is more likely that terrorism against American citizens and property abroad and at home will increase. Increasing pressure will be exerted on government officials to react and end the threat. More and more, armed response, especially the use of air power, will be looked to as a solution to the problem. Within certain guidelines of the international laws of war, the use of air power can be justified against known terrorist targets. Even the unfortunate collateral injury to civilians will not preclude the right to strike known targets.

Self-defense, both retaliatory and anticipatory will be advocated as justification for future air strikes against terrorist positions. In certain circumstances, these actions will avoid condemnation by international public opinion. The central question will still remain as to whether it is worth the effort. Military action to date has been unsuccessful in deterring terrorists. Governments have two choices: attack the terrorists and hope others don't take their place or attack the underlying problems that give rise to terrorism. In the short-term attacking the terrorist may be the answer, but in the

long-term only by alleviating the problems giving rise to terrorism will it be ended. All the available U.S. air power will not change that undeniable fact.

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