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**TARGETING INTERNATIONAL TERRORISM WITH THE LAW OF ARMED CONFLICT:
AN ALTERNATIVE STRATEGY**

by Darryl J. Fengya

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A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Operations.

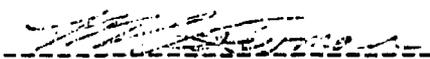
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Abstract of

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The Law of Armed Conflict (LOAC) and Peacetime Reprisal are reviewed and analyzed relative to their applicability toward using the U.S. Armed Forces against international terrorists. The LOAC is proposed as an alternative to the currently used law enforcement approach. The LOAC provides a viable, more practical alternative to law enforcement for dealing with international terrorism. Legal objections most often posed against the use of the LOAC against international terrorists are analyzed and refuted. Peacetime reprisal and the doctrine of self-defense under Article 51 of the United Nations Charter are compared with respect to their applicability as measures to be invoked against state-sponsored terrorism. This paper asserts that the LOAC, and peacetime reprisal, used selectively, offer a more suitable legal approach for dealing with state-sponsored international terrorists, and a more pragmatic international legal regime for operations by armed forces. It further recommends formal reassessment of these measures as means to confront and respond to state-sponsored terrorism.

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TABLE OF CONTENTS

CHAPTER	PAGE
ABSTRACT.....	11
I INTRODUCTION.....	1
II DEFINITION.....	3
Terrorist or Freedom Fighter?.....	3
Popular Definitions.....	4
Selected U.S. Government Definitions....	4
U.S. Policy.....	5
III SOLDIER OR CRIMINAL.....	7
Proper Exercise of Force.....	7
Terrorism as Criminal Behavior.....	8
Two International Law Approaches.....	9
IV LAW ENFORCEMENT APPROACH.....	10
Terrorists in Domestic Law.....	10
Terrorists in International Law.....	11
V THE PROBLEM.....	12
The Armed Forces in Law Enforcement....	12
VI APPLYING THE LAW OF ARMED CONFLICT.....	15
Objections to Law of Armed Conflict	
Approach.....	15
Objections Refuted.....	16
VII REPRISALS AND U.N. ARTICLE 51.....	20
Reprisal Option.....	20
Article 51.....	21
VIII IMPLICATIONS AND CONSIDERATIONS.....	23
Deterrence.....	23
Political Implications.....	23
Escalation of Violence.....	24
IX THE FUTURE.....	25
Toward Increased Use of Armed Force....	25
X CONCLUSIONS AND RECOMMENDATIONS.....	27
APPENDIX I--SELECTED EXCERPTS FROM TREATIES, CONVENTIONS, AND RESOLUTIONS.....	29
II--COMPARISON OF ALTERNATE INTERNATIONAL LAW APPROACHES TO INTERNATIONAL TERRORISM.....	31
NOTES.....	34

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TARGETING INTERNATIONAL TERRORISM WITH THE LAW OF ARMED CONFLICT:
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CHAPTER I

- INTRODUCTION -

Terrorism is to the human race what cancer is to the human body. We have no cures. Frequently we are able to treat symptoms, but occasionally, where there is no alternative, radical surgery is used. International terrorism is the worst kind of cancer. Left untreated, or worse, treated incorrectly, it threatens the entire international body.

The world community has yet to find a mutually acceptable approach to political problems caused by international terrorists, therefore proposed strategies for deterring or responding to terrorist acts can be measured only on a case-by-case basis. Finding a universally acceptable definition of terrorism is at the heart of this problem. There is no shared definition internationally. In consequence, there be no acceptable international approach.

The United States and other like-minded governments have tended to treat terrorists as ordinary criminals subject to prosecution under domestic criminal law.¹ In fact, the United States has chosen a law enforcement approach to deal with international terrorism. There is, however, a more effective legal regime -- that of the Law of Armed Conflict. But prominent U.S. leaders and policy makers object to this approach, fearing it

will confer honor or dignity on terrorists. Their beliefs are a result of misconceptions and, perhaps, lack of understanding of the Law of Armed Conflict. The Law of Armed Conflict offers flexible alternatives to policy makers and is a more efficient, applicable, and concise legal regime for operations by U.S. armed forces who sometimes are tasked to enforce international law abroad.

CHAPTER II

- DEFINITION -

International terrorism, especially state-sponsored terrorism, poses formidable challenges for the United States in the international arena. The U.S. has labored to construct a national policy and derive supporting strategies to deter and respond effectively to anti-American terrorism abroad. Perhaps the most formidable obstacle confronting policy makers of all countries is the task of defining terrorism. This is no small feat.

At this time, a generally accepted definition of international terrorism does not exist in international law.¹ Assigning to terrorism a definition which will gain universal acceptance in the current international environment may be impossible. In consequence, controversy surrounding disparate views of the legitimacy of political expression through terrorist means undermines the legal justification used by states who use armed force against terrorists abroad. It is, therefore, imperative that states which choose to use armed force against state-sponsored terrorists do so within the international law regime which offers the most widely accepted foundation for legitimate use of armed force. Following is an examination of various U.S. approaches to the problem of definition and legality.

Most simply stated, the reason behind the definitional difficulty is neatly but inaccurately paraphrased by the widely repeated statement, 'one man's terrorist is another man's freedom fighter.' The divergence in perceptions illustrated by this statement has made terrorism an extremely controversial and sometimes emotional subject. For the most part, despite extensive efforts to define terrorism accurately, it remains true that 'Terrorism, like beauty, remains in the eye of the beholder. Following is a list of a few often-used definitions of terrorism:

Terrorism is:

- a psychological weapon;
- a form of communication;
- a form of criminality;
- a form of warfare;
- a form of political warfare;
- a strategy in a new type of warfare;
- a freedom fighter's weapon.³

The U.S. government itself has experienced difficulty defining terrorism. There is no uniform view between its departments and agencies, and each tends to define terrorism from its own particular viewpoint depending on its unique responsibilities. The following definitions illustrate the variety and disparity of governmental views:

Department of State: [Terrorism is] premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine state agents, usually intended to influence an audience.

International terrorism is terrorism involving the citizens or territory of more than one country.⁴

Department of Defense: Unlawful use or threatened use of force or violence against individuals or property, with the intention of coercing or intimidating governments or societies, often for political or ideological purposes.⁵

The Vice President's Task Force on Combatting Terrorism: The unlawful use or threat of violence against persons or property to further political or social objectives. It is generally intended to intimidate or coerce governments, individuals, or groups to modify their behavior or policies."

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

The official State Department definition above is wordy and technical, and reflects the United States' efforts to attach to terrorism a precise definition from which effective international policy, and supporting counter-terrorism strategy can be formulated. But the definition does not include a statement concerning the legality of terrorism. Consider the following State Department policy/strategy statement which accompanies its definition.

- The U.S. Government has developed a comprehensive strategy to respond to the problem of terrorism. The first element of our counter-terrorism policy is that we do not make concessions of any kind to terrorists. We do not pay ransom, release convicted terrorists from prison, or change our policies to accommodate terrorist demands. Such actions would only lead to more terrorism. And we vigorously encourage other countries to be firm with terrorists, for a solid international front is essential for overall success.

- The second element of our strategy is to make state sponsors of terrorism pay a price for their actions. This policy was most graphically demonstrated by the April, 1986 bombing raid on terrorist support facilities in Libya. But there are also political, diplomatic and economic actions, public diplomacy, and sanctions -- all peaceful measures that can be crafted to discourage states from persisting in their support of terrorism.

- Third, the U.S. Government has developed a program of action to bring terrorists to justice, to disrupt their operations, and destroy their networks. These involve working with our friends and allies to identify, track, apprehend, prosecute, and punish terrorists using the rule of law. They also include measures designed to protect our citizens abroad by strengthening security and research to develop equipment to prevent terrorist incidents.

- The final element of our counter-terrorism policy is the Department of State Anti-Terrorism Training Assistance Program (ATA), which gives training in anti-terrorism techniques to law enforcement officials around the world. Given our country's strong commitment to human rights, ATA promotes a thorough understanding of the importance of human rights in all aspects of law enforcement.*

Close scrutiny of these incongruous U.S. definitions reveals divergent and inconsistent approaches to the problem of international terrorism. For example, the first two elements of the State Department policy/strategy statement outline terrorism as a matter of responsibility for politicians, diplomats and the military. The last two elements frame terrorism squarely within the responsibilities of law enforcement authorities. In addition, the State Department's list alternates between description of policy and strategy suggesting confusion as to whether the Department is stating its official position (policy), or describing a plan of action based on its position (strategy).

The DOD definition is cast in an obvious and understandable military viewpoint aimed at a succinct and precise explanation of the problem and accurately characterizes terrorism as unlawful, suggesting law enforcement responsibility. The elusive approach taken by the Vice President's Task Force avoids precision altogether.

The Task Force's follow-on statement, however, implies international terrorism is a problem that should be dealt with by military means, but acknowledges one of the primary objections to doing so.

Although the preceding examples serve to illustrate the difficult task of achieving consensus within one government, they don't achieve the goal of producing a useful definition supportive of government actions against the terrorist problem. It is, perhaps, more useful at this point to put the definition problem aside for a moment, and concentrate instead on the finer task of whether terrorism is lawful or unlawful behavior.

CHAPTER III

- SOLDIER OR CRIMINAL? -

Despite efforts to define and categorize terrorism, the question remains: what is a terrorist? Is he a *soldier or criminal*? Is one man's terrorist another man's freedom fighter, as some suggest? The answer to the latter question is the linchpin for finding a suitable legal approach to terrorism.

Indeed, many nations regard terrorism as a legitimate means of warfare.¹ A liberal interpretation is sometimes used by advocates of terrorism citing the American Colonial Revolution as a 'war of national liberation,' similar to that waged by terrorists. The United States, of course, also recognizes that oppressed people are sometimes justified in resorting to force, but only if properly exercised.² The qualification, 'but only if properly exercised,' is the key caveat and is the critical distinction which robs terrorists of their presumed justification. Stated another way, proper exercise of force distinguishes 'freedom fighters' from terrorists.

We need only look at what terrorists, or at least self-admitted former terrorist advocates, have said on the subject to shed light on this most important point. 'Nobody is a terrorist who stands for a just cause,' Yasir Arafat told the United Nations.³ 'In today's world, no one is innocent, no one is neutral,' warned Popular Front for the Liberation of

Palestine (PFLP) leader George Habash.⁶ One terrorist leader put it succinctly: 'There are no innocent tourists in Israel.'⁷ According to Rand Corporation's expert on terrorism, Brian M. Jenkins, terrorists rarely consider anyone an innocent bystander. 'To terrorists there are few 'innocent' bystanders. An individual may be 'guilty' and hence an appropriate target simply because of his organization, employment or ethnic identity.'⁸

This philosophy clearly runs counter to universally recognized and accepted rules governing use of force by legitimate soldiers and 'freedom fighters.' Although terrorists, similar to freedom fighters and soldiers, have a political purpose, they impose upon themselves no limits to their methods or targets. As shown by their own statements, they are willing not only to attack innocents and neutrals indiscriminately, but innocents frequently are the intended targets of their attacks. Both forms of aggression are clear violations of international laws forbidding such actions by legitimate combatants.

Terrorism, then, clearly is criminal behavior. But, terrorism differs from ordinary crime in its political purpose and its primary objective.⁷ Terrorism is a political crime. It is always a crime despite claims of some that one man's freedom fighters are another's terrorists.'⁹

Therein lies the origin of the divergent approaches to defining international terrorism inside the U.S. government. On one hand, we acknowledge terrorist's political purpose,

and thus seek political, diplomatic or military solutions to the problems they cause. Terrorists approve of this approach and perception, seeing themselves as soldierly heroes of their people and their cause. On the other hand, their indiscriminate attacks and unacceptable criminal means of warfare result in vehement objection to any suggestion they might in any way be categorized as honorable soldiers. Thus we see them as criminals, and we refuse to acknowledge them in any way which might be perceived as conferring legitimacy to their cause. It follows naturally, though perhaps not logically, that we should select a legal approach in our national policy. This results because there are two potentially applicable international law approaches to international terrorism. States can treat terrorism as a law enforcement problem, or they can invoke the law of armed conflict (LOAC).⁹ It is the tendency to adopt the former, to the exclusion of the latter, that may be illogical.

CHAPTER IV

- LAW ENFORCEMENT APPROACH -

Despite the multi-definitional characterization of international terrorism apparent within the U.S. Government, it is clear the U.S. considers international terrorism a law enforcement problem, as suggested in the aforementioned State and Defense Department policies. Inside U.S. borders, of course, there is no question; terrorist acts fall under the jurisdiction of law enforcement authorities. The lead U.S. agency for combatting domestic terrorism is the Federal Bureau of Investigation (FBI). This is a proper arrangement and in most cases law enforcement authorities and the judicial system are adequately prepared to respond to terrorist threats. In some special situations the armed forces may be required to assist domestic law enforcement officials where terrorists have a firepower advantage or where extra manpower is required. Generally speaking, however, domestic law enforcement recognized the eventuality of a domestic terrorist threat and trained and equipped their respective organizations to respond efficiently and adequately. Domestically, terrorists are seen as criminals regardless of their cause, and are dealt with as such.

Beyond U.S. borders, however, the problem and the solution are not so clear cut. The State Department is the lead U.S. agency for international terrorism, but has no

armed enforcement apparatus. If, by U.S. policy, terrorists are criminals, how are we to enforce the law effectively inside foreign countries?

The problem is not insurmountable if the foreign country in question is friendly to the U.S. where legal avenues may be used. In many cases there are extradition agreements or other legal means by which terrorists may be brought to answer for their acts. Unfortunately, for obvious reasons, international terrorists rarely seek refuge inside countries friendly to the U.S. It is more often the case that they are deep within the protective borders of countries hostile to the U.S., or at least countries politically motivated not to cooperate with the U.S.

Even in friendly countries, though, it is problematic in the highest degree to enforce U.S. law. Law enforcement within another country's borders is matter of sovereignty which all nations should and do protect meticulously. And, although terrorism may be a crime, it is not universally recognized as such; therefore, even friendly countries, though sympathetic, may be reluctant to help. The U.S. was painfully reminded of sensitivities to sovereignty when it forced an Egyptian airliner carrying suspected terrorists to land in Sicily. U.S. soldiers attempting to apprehend the alleged terrorist were greeted at gunpoint by Italian soldiers who took the suspects into custody as a matter to be dealt with under sovereign Italian law.

CHAPTER V

- THE PROBLEM -

Beyond U.S. borders, specifically within the recognized boundaries of other countries, clearly international terrorism must be addressed within the regime of international law. But, the world has no international police force or judicial system.¹ The inability or unacceptability of domestic law enforcement authorities to cross borders rule out use of domestic law enforcement officers in such circumstances, especially when coercive force is necessary and all other means are exhausted. In addition, even if it were acceptable, domestic law enforcement agencies are not equipped or trained for operations inside the borders of hostile countries. Such operations by definition are within the purview and responsibility of U.S. Armed Forces.

The armed forces, however, are not instruments of the Department of Justice or State Department, and law enforcement is not their mission. As an exception to this policy, the international character of the U.S. counter-narcotics (CN) effort necessitated use of armed forces equipment and personnel. The armed forces accepted the challenge, but perhaps not willingly. Very careful attention was required so as to avoid violation of the letter and spirit of the U.S. statutory mandate against posse

comitatus, that is, using the armed forces to enforce domestic law.

More importantly, though, the armed forces are not trained to enforce law. Their use-of-force policy, more properly referred to as rules of engagement (ROE), is incompatible with that used by law enforcement officers. There are no sufficiently developed rules of engagement in the armed forces to allow acceptable and reasonable armed engagements with criminals. In most cases, using the military as a law enforcement tool, when force is required, is similar to the proverbial "using a sledgehammer to kill a mosquito." Use of such overwhelming force is never acceptable in the public eye.

In addition, there is no law enforcement doctrine in the military, and performance of law enforcement functions by military personnel and their equipment is extremely costly and inefficient. Each of these points was adequately demonstrated by the CN effort. Although some of these problems were solved, there were substantial costs, and resources were diverted from genuine national security concerns. We proved law enforcement with the armed forces is inefficient, and the armed forces are not well suited for the mission.

Even so, the military remains, for the most part, the executive agent of the U.S. government abroad when coercive force is required, especially in counter-terrorist missions. Thus, when we use military force abroad, we are

enforcing international law with a force ill-prepared to do so.

But more importantly, from a political standpoint, we are unprepared to convince the international community of the legitimacy of using our armed forces to enforce law within another's borders because the law is not universally recognized. If use of military force against terrorists inside another's borders is to be accepted by other nations as legal, it must be viewed as having a valid foundation in international law.

CHAPTER VI

- APPLYING THE LAW OF ARMED CONFLICT -

An alternative to the law enforcement approach to terrorism -- one under which use of the armed forces abroad is more practical -- is the Law of Armed Conflict (LOAC). The LOAC is the legal regime under which the armed forces' actions are governed during peace and hostilities.

This approach has been rejected by scholars, jurists and military professionals for reasons hinted at by the Vice President's Task Force. Recall the Task Force pointed out that some experts believe "referring to terrorism as war, (the LOAC approach), rather than as criminal activity, lends dignity to terrorists and places their acts in the context of accepted criminal behavior (parentheses mine)." This is a widely held and respected opinion, but one which is based on a fundamental misunderstanding of the LOAC.

Opponents of the LOAC approach mistakenly believe that application of the LOAC to terrorists will legitimize their actions and will secure for them status and privileges enjoyed by recognized legitimate combatants. The most important misconceptions follow:

1. If the LOAC is applied to international terrorists then they will receive legal status that implies acceptance of their methods.
2. Only criminal law, not the LOAC, addresses criminal activity.
3. If the LOAC were applied to international terrorists,

then they would be given combatant status.

4. If the LOAC were applied to terrorists, they would cease to be criminals.
5. If the LOAC were applied to international terrorists, then terrorists become lawful combatants entitled to POW status if captured.
6. If the LOAC is applied, then acts of international terrorists will be sanctioned or approved by the international community and terrorists will have achieved both status and recognition for their cause.¹

If these statements were true, it is easy to see why there would be widespread objection, and it is understandable why military professionals in particular would object. Yet a review of the LOAC reveals the above assertions to be incorrect. The following observations are offered to refute these misconceptions:

1. The LOAC condemns terrorist methods as unlawful.
2. The LOAC provides provision for war crimes and grave breaches of the 1949 Geneva Conventions, and provides for universality of criminal jurisdiction.
3. The LOAC recognizes that not all persons who engage in combatant activity are combatants entitled to POW status. Some, like terrorists, are unprivileged or unlawful combatants.
4. The acts of terrorists are criminal under both domestic law and the LOAC.
5. Under the LOAC terrorists are neither lawful combatants nor entitled to POW status.
6. Applying the LOAC to an activity or conduct does not mean that the law approves of that conduct.*

* NOTE: See APPENDIX I for selected excerpts from applicable treaties, conventions, and resolutions governing behavior of combatants under the Laws of Armed Conflict.

The LOAC governs behavior in warfare and protects the legitimate combatants of recognized belligerents. If legitimate combatants violate the LOAC, they no longer are entitled to its protection. Thus, rather than bestowing status or recognition on international terrorists and their state sponsors, (if any), the LOAC identifies participation in such acts as universal crimes that bring no honor.³ It must be stressed that recognizing terrorism may be more than a criminal act does not mean to imply that the perpetrator has some degree of legitimacy for his or her actions.⁴ The bottom line is simple: Because a body of law is applied to an activity or conduct does not mean that the law approves of that conduct.⁵

The LOAC approach to terrorism is a more effective regime in which to pursue terrorists. It does not purport to enforce U.S. law in a foreign country, but rather operates under universal laws against war criminals. It confers no honorable status of any kind on terrorists. Recognizing terrorists as combatants would force them to modify their behavior to conform to international LOAC or suffer very clear consequences of being war criminals if they did not comply. Plus, the LOAC would provide the U.S. greater justification to respond to terrorist acts when these acts are a genuine threat to national security. And, importantly, using the LOAC approach would permit the armed forces to operate in the legal regime with which they are most

familiar, and one under which their doctrine, training,
tactics, weapons, and ROE have been tailored.**

** NOTE: See APPENDIX II for a partial comparison of the two
alternate international law approaches to international
terrorism.

CHAPTER VII

- REPRISALS AND U.N. ARTICLE 51 -

In addition to adopting the LOAC as its international law approach to state-sponsored terrorism, the U.S. should adopt selective use of reprisals. Naval Warfare Publication (NWP) 9. defines reprisals as follows:

A reprisal, under international law, is an enforcement measure under the LOAC which would otherwise be unlawful but which is justified as a response to the unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the LOAC. Reprisals may be taken against enemy armed forces; enemy civilians, other than those in occupied territory; and enemy property.¹

The specific reference to an "enemy" in this definition indicates reprisal used in a wartime context, and as such is not a measure available in peacetime. There is, however, a similar measure available in peacetime which is called the *peacetime reprisal*.

Peacetime reprisals, like wartime reprisals, constitute "countermeasures that would be illegal if not for the prior illegal act of the state against which they are directed."² Peacetime reprisals, in the context of the following discussion, will be referred to as *armed reprisals*.

Armed reprisals are measures of counter force, short of war, undertaken by one state against another in response to an earlier violation of international law. Like all other instances of unilateral use of force by States, armed reprisals are prohibited unless they qualify as self-defense under Article

51 (of the U.N. Charter). Only defensive armed reprisals are allowed. They must come in response to an armed attack, as opposed to other violations of international law, in circumstances satisfying all the requirements of legitimate self defense (brackets mine).³

The sole purpose of reprisal is to cause a state to cease its unlawful activity immediately. 'The goal of ... armed reprisals is to induce a delinquent state to abide by the law in the future, and hence they have a deterrent function.'⁴ Since a terrorist's acts are illegal, use of armed force against a terrorist, or a state-sponsor, which in peacetime is otherwise illegal, would be justified under the doctrine of armed reprisal.

This does not mean that the U.S. should mirror terrorist-type attacks against innocents in its response. Rather, it should use the doctrine of reprisal to justify characteristics of its response which would otherwise be unlawful. For example, an air raid against terrorist targets within the airspace of another country, normally considered an unlawful infringement of sovereignty in peacetime, could be justified as a reprisal if the country had supported terrorist acts beyond its borders.

It could be argued that Article 51 of the U.N. Charter provides sufficient authority to strike against international terrorists under the doctrine of self-defense, and therefore resort to reprisal is not required. After all, the U.S. relied on Article 51 to justify its April, 1986 strike against targets in Libya as because it had evidence of impending terrorist acts against U.S. interests.

Indeed, although the U.N. Charter prohibits the use of force which violates the territorial integrity or political sovereignty of another nation, Article 51 provides that nothing in the Charter prevents a nation from exercising its inherent right of self defense. In Libya, the U.S. invoked the doctrine of *anticipatory self defense*, i.e., "the use of armed force where there is a clear necessity that is instant and overwhelming, and leaving no reasonable choice of peaceful means."⁹ But to say that the Libya strike was necessary because there was an instant and overwhelming need to do so stretches the justification to its limits.⁹

If we continue to use anticipatory self-defense where real justification is not glaringly obvious, we weaken the doctrine. In the Libyan case, using the justification of reprisal in response to the previous bombing of the La Belle disco in France would have provided alternative justification, and would not have stretched the anticipatory self-defense doctrine, or the credibility of our government.

⁹ The doctrine of anticipatory self-defense, as expressed in NWP 9, is based on precedent derived from diplomatic interpretation of U.S. domestic law, applied erroneously to the regime of international law. As such it is misleading in that it implies international law requires that a threat be "instant and overwhelming" in every case where anticipatory self-defense is used. In a modern environment, excessive adherence to this interpretation could result in reduction of reaction time such that effective defensive action is precluded. Current interpretation of the doctrine is, therefore, less restrictive, and the air raid on Libya probably was justifiable as anticipatory self-defense.

CHAPTER VIII

- IMPLICATIONS AND CONSIDERATIONS -

Application of the LOAC to problems of international terrorism requires serious consideration; there are potential positive and negative aspects to be considered. A few of the more salient considerations are addressed here.

The LOAC, if adopted and declared in U.S. policy, could have a deterrent affect on terrorists and their state sponsors. At a minimum, a U.S. declaratory strategy using the LOAC would impress upon the international community the seriousness with which the problem is viewed. In addition, adoption of the LOAC would allow a degree of predictability of U.S. response and would therefore serve to reduce opportunity for miscalculation of U.S. perceptions and intentions. In essence, the enemy would have our playbook, (LOAC), and could be assured that coercive force might be used, and under what conditions it might be used.

Using the LOAC against international terrorism has political implications. Invoking the LOAC admits that a "state of armed conflict" exists. In some cases, such as those where actions are taken against states sponsoring terrorists, the political ramifications of admitting the existence of a "state of armed conflict" might be unacceptable. Such an acknowledgement could lead to escalation to a higher level of violence. Although

escalation is always a danger, regardless of the justification chosen, invoking the LOAC provides greater legal justification for the attacked country to respond.

Use of reprisals also must be carefully considered. In the U.S., only National Command Authority (NCA) may authorize reprisals.¹ The fear is that executing a reprisal may trigger escalatory moves (counter-escalation) by the enemy. Hence, the United States has historically been reluctant to resort to reprisals for just this reason.²

CHAPTER IX

- THE FUTURE -

It is unlikely international terrorism will cease to be a threat in the near future. The use of state-sponsored terrorism, the most insidious form of international criminal behavior, poses great challenges to law abiding nations. States supporting international terrorism mockingly hide behind international law.

Following the raid on Libya, the question of legitimacy of attacking other terrorist targets was hotly debated. In the debate, many officials questioned the premise that harboring terrorists who attacked other nations is a form of aggression. Still others maintained that force cannot be used against a government that sponsors terrorist acts. The United States never accepted such a paralyzing view of the right to act in self defense.¹

In fact, increasingly, the prevailing opinion in the U.S. is swinging toward use of preemptive actions to stop a terrorist act before it occurs, and to use of military force to do so. Consider the following opinion from the President's Commission on Aviation Security and Terrorism:

'The President's commission ... recommends a more vigorous U.S. policy that not only pursues and punishes terrorists, but also makes state sponsors of terrorism pay a price for their actions. These more vigorous policies should include planning and training for preemptive or retaliatory strikes against known terrorist enclaves in nations that

harbor them. Where such direct strikes are inappropriate, the Commission recommends a lesser option, including covert operations, to prevent, disrupt, or respond to terrorist acts.²

If this opinion is translated into policy, the U.S. armed forces in general, not just specialized counter-terrorism units, can expect increased future involvement in counter-terrorism activities. If so, selective applications of the LOAC approach and the use of reprisals will offer superior justification for U.S. actions beyond that currently justifiable under the law enforcement approach.

CHAPTER X

- CONCLUSION AND RECOMMENDATIONS -

The preceding discussion proposes adoption of an alternative U.S. legal strategy against international terrorism. Specifically, the U.S. should consider invoking the LOAC against terrorists abroad, when those terrorists threaten U.S. interests and citizens. This doesn't mean that the LOAC would be applicable in every circumstance, nor should it be invoked automatically. Clearly our national approach should always consider peaceful means first. When we must use forceful means, however, force should be applied under the legal regime of the LOAC rather than under the current U.S. law enforcement approach.

Ironically, the LOAC approach provides a more effective criminal system for dealing with international terrorists than does the law enforcement approach.¹ In addition, using the LOAC provides the advantage of allowing the armed forces to operate in the legal regime with which they are most familiar. This has significant benefits and implications for the armed forces' doctrine, tactics, training, and ROE.

The purpose of this essay is to dispel misconceptions about the LOAC as applied to international terrorists, and to propose adoption of alternatives to the currently used law enforcement approach. Using the LOAC in conjunction with reprisals, selectively applied to certain situations, would

provide the U.S. increased legal justification for the use of armed force abroad in response to terrorist acts. Further review by military officials, politicians, diplomats and legal experts is warranted.

APPENDIX I

SELECTED EXCERPTS

TREATIES, CONVENTIONS, RESOLUTIONS

APPENDIX I

SELECTED EXCERPTS
FROM TREATIES, CONVENTIONS, AND RESOLUTIONS GOVERNING BEHAVIOR
OF BELLIGERENTS IN ARMED CONFLICT*

SOURCE

CONTENT

Hague Regulations
Art. 22

The right of belligerents to adopt means of injuring the enemy is not unlimited.

Resolution 2444 (XXIII)
of the U.N. General
Assemble, adopted
Dec, 1968

It is prohibited to launch attacks against the civilian population as such.

Geneva Convention IV,
Art. 33

Regarding civilians and civilian objects -- "all measures of intimidation or of terrorism are prohibited.

Geneva Convention IV,
Art. 34.

The taking of hostages is prohibited.

Geneva Convention III
Art. 4

(Too lengthy for complete listing here, but paraphrased below).

Terrorists do not meet conditions to be considered lawful combatants. Therefore terrorists do not qualify for POW status. (State-sponsored terrorists might qualify for POW status under this article. But traditional terrorists actions would remain illegal and subjects to universal jurisdiction).

*Dietrich Schindler and Jiri Toman, The Laws of Armed Conflict: A collection of Conventions, Resolutions and Other Documents, (Geneva: Harry Dunant Institute, 1973).

APPENDIX II

**COMPARISON OF
ALTERNATE INTERNATIONAL LAW APPROACHES
TO INTERNATIONAL TERRORISM**

APPENDIX II

**PARTIAL COMPARISON OF
ALTERNATE INTERNATIONAL LAW APPROACHES
TO INTERNATIONAL TERRORISM**

<u>TRAIT</u>	<u>LAW ENFORCEMENT</u>	<u>LAW OF ARMED CONFLICT</u>
Basic Thrust	Civil	Military
Primary Level of Responsibility	Police	Armed Forces
View of Terrorist Activity	Outlaw	Unlawful Combatant
Combatant Status of Terrorists	None	Unlawful or Unprivileged
Treatment of Terrorists	Criminal	Criminal
Objective of Authorities	Arrest, Prosecute, and imprison	Defeat, Prosecute, and imprison
Offenses, Where Normally Defined	Domestic Law	International Law
Applicability of Treaty Law Defining Offenses	Limited	Universal
Applicability of Extradition Law	Limited	Universal
Authority to Try	Domestic Courts	Normally Domestic, but International Courts Could.
Context of Armed Force Response	Peacetime Crisis	Armed Conflict
Subsequent Decisions on Use of Force (Rules Governing Conduct of Military Ops.	Some Law of Armed Conflict rules apply. Geneva Conv. Do Not Apply	All Law of Armed Conflict Rules Apply including Geneva Conv.

Source: Richard J. Erickson, "International Law and International Terrorism: Which Approach Should We Take?"

**Legitimate Use of Military Force Against State Sponsored
International Terrorism, (Maxwell AFB, Alabama: Air
University Press, 1989) pp. 84-85.**

NOTES

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1. Richard J. Erickson, 'What International Law Approach Should Be Taken Toward Terrorism,' Legitimate Use of Military Force Against State Sponsored International Terrorism (Maxwell AFB, Alabama: Air University Press, 1989), p. 59.

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1. Erickson, p. 28.

2. H.H.A. Cooper, quoted in MAJ William A Farrel, USAF, 'Terrorism Is . . .,' Naval War College Review, 32, No. 3, (May-Jun 1980), P. 64.

3. Stephen Sloan, Beating International Terrorism: An Action Strategy for Preemption and Punishment, (Alabama: Air University Press, 1986), pp. 1-5.

4. U.S. Department of State, Report to the Congress, Patterns of Global Terrorism (Washington: 1990), pp iii-iv.

5. U.S. Department of Defense, Protection of DOD Personnel and Resources Against Terrorist Acts, DOD Directive 2000.12. (Washington: 1986), para. C.1.

6. Vice President's Office, Public Report of the Vice President's Task Force on Combatting Terrorism (Washington: 1986), p. 1.

7. Ibid.

8. U.S. Department of State, Report to the Congress, Patterns of Global Terrorism (Washington: 1990), pp. iii-iv.

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1. Abraham D. Sofaer, 'Terrorism and the Law,' Foreign Affairs, Summer 1986, p. 903.

2. Ibid., p 906.

3. Brian M. Jenkins, International Terrorism: The Other World War, R3302-AF, (Santa Monica, CA: Rand, 1985), p. 2.

4. Ibid., p. 16.

5. Ibid.

6. Ibid.

7. Ibid., p. 4.
8. Ibid., p. v.
9. Erickson, p. 57.

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1. Sofaer, "Terrorism and the Law," p. 902.

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2. Ibid.
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4. Sloan, p. 3.
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3. Ibid., pp. 202-203.
4. R.W. Tucker, quoted in Dinstein, p. 208.
5. NWP 9, p. 4-4.

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1. NWP 9, p. 6-3.
2. Ibid.

Chapter IX

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2. "President's Commission on Aviation Security and Terrorism," Report. (Washington: May 1990), p. 1.

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1. Erickson, p. 76.

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