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COUNTERING STATE-SPONSORED TERRORISM: A LAW-POLICY ANALYSIS

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30 May 1986

UNCLASSIFIED

SECURITY CLASSIFICATION OF THIS PAGE

AD-A170617

REPORT DOCUMENTATION PAGE

1a. REPORT SECURITY CLASSIFICATION UNCLASSIFIED	1b. RESTRICTIVE MARKINGS
2a. SECURITY CLASSIFICATION AUTHORITY	3 DISTRIBUTION / AVAILABILITY OF REPORT Distribution Unlimited
2b. DECLASSIFICATION / DOWNGRADING SCHEDULE	
4 PERFORMING ORGANIZATION REPORT NUMBER(S) 86-01	5 MONITORING ORGANIZATION REPORT NUMBER(S)
6a. NAME OF PERFORMING ORGANIZATION Advanced Research Program 6b. OFFICE SYMBOL (*If applicable*)	7a. NAME OF MONITORING ORGANIZATION
6c. ADDRESS (*City, State, and ZIP Code*) Naval War College Newport, RI 02841-5010	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 NUMBERS PROGRAM ELEMENT NO. / PROJECT NO. / TASK NO / WORK UNIT ACCESSION NO.

11. TITLE (*Include Security Classification*)
Countering State-Sponsored Terrorism: A Law-Policy Analysis

12. PERSONAL AUTHOR(S)
Terry, James P., LTC, USMC

13a. TYPE OF REPORT	13b. TIME COVERED	14. DATE OF REPORT (*Year, Month, Day*)	15 PAGE COUNT
FINAL	FROM _____ TO _____	86, May,	72

16. SUPPLEMENTARY NOTATION

17. COSATI CODES			18. SUBJECT TERMS (*Continue on reverse if necessary and identify by block number*)
FIELD	GROUP	SUB-GROUP	Terrorism, State-sponsored Terrorism, State Terrorism, Aggresion, Self-defense

19. ABSTRACT (*Continue on reverse if necessary and identify by block number*)

State-sponsored terrorism has become another means of conducting foreign affairs. This threat of low-intensity conflict requires that we confront a host of new legal, political, military and moral questions. The United States has been working hard to develop a strategy within the construct of international law. The elements of conventional (treaty) and customary international law underpin the US counter-terrorism strategy which was recently exercised during the 15 April 1986 defensive raid against Libya. That defensive response emphasized US concern for the principles of necessity and proportionality, target discrimination, exhaustion of non-coercive remedies and the interests of our allies. The US must, however, place greater emphasis on the underlying causes of state-sponsored terrorism.

20. DISTRIBUTION / AVAILABILITY OF ABSTRACT ☒ UNCLASSIFIED/UNLIMITED ☐ SAME AS RPT. ☐ DTIC USERS	21. ABSTRACT SECURITY CLASSIFICATION UNCLASSIFIED
22a. NAME OF RESPONSIBLE INDIVIDUAL Head, Advanced Research Program	22b. TELEPHONE (*Include Area Code*) (401) 841-3304 22c. OFFICE SYMBOL 30B

DD FORM 1473, 84 MAR

83 APR edition may be used until exhausted
All other editions are obsolete

SECURITY CLASSIFICATION OF THIS PAGE

☆U.S. Government Printing Office: 1985—538-01

COUNTERING STATE-SPONSORED TERRORISM:
A LAW-POLICY ANALYSIS

Executive Summary

I. INTRODUCTION

In its 1986 Public Report, the Vice-President's Task Force on Combatting Terrorism found that terrorism has become another means of conducting foreign affairs. This Task Force statement echoes Administration concerns over new and unconventional challenges to our foreign policy in critical areas of the world. Our enemies hope that the legal complexities of these kinds of challenges will ensnare us in our own scruples and exploit our humane inhibitions against applying force to defend our interests.

This study examines the threat posed by state-sponsored terrorism from the definitional, policy, and legal perspectives with special emphasis on the application of U.S. law to policy during the defensive response to Libyan terror on 15 April 1986.

II. THE DEFINITIONAL DILEMMA

The crisis facing the United States and other victim nations is not the problem of defining the act or even the conceptual elements of international law condemning particular acts of terrorism. Rather it is the confusion surrounding the interpretation of law with respect to that state support provided and the uncertainty regarding the elements of necessity and proportionality in any proposed response.

III. THE THREAT OF STATE-SUPPORTED TERRORISM

In the 1980s alone, terrorist violence has increased dramatically. Vice-President Bush's Task Force noted that 1985 saw the number of terrorist incidents reach an all-time high. Worldwide, one-half of these attacks were directed at only ten countries, with the U.S. the victim in one-third of these incidents. And, with rare exception, they were carried out by groups that were state-supported. Terrorists have targeted U.S. installations or officials abroad on an average of one every seventeen days during the past ten years. In the last twenty years, as many U.S. diplomats have died at the hands of terrorists as were killed in the previous two centuries. 1985 ended with the murder of five Americans in

terrorist attacks at the Rome and Vienna airports and 1986 began with a new spate of Libyan terror.

IV. U.S. POLICY TO COUNTER STATE-SUPPORTED TERRORISM

President Reagan has tied efforts to protect U.S. interests against terrorism to international law commitments underlying U.S. foreign policy. The President signed National Security Decision Directive (NSDD) 138 on 3 April 1984 and established a two-tiered approach to countering terrorist violence. Subsequently, the Public Report of the Vice President's Task Force confirmed the unequivocal nature of the U.S. position and reiterated our "no concessions" policy.

V. THE ROLE OF LAW

The cornerstone of the legal order approved by members of the United Nations, including the United States, is the prohibition of the use of force contained in Article 2(4) of the U.N. Charter. The unanimous adoption of two General Assembly resolutions has clarified the scope of Article 2(4). The first resolution -- the Declaration on Friendly Relations -- gives a more precise meaning to the prohibition of the use of force by states. The second resolution -- the Definition of Aggression -- provides a detailed statement on the meaning of the term "aggression." When interpreted in light of these resolutions, the actions of states supporting terrorist activities clearly fall within the scope of Article 2(4).

When the U.N. Charter was drafted in 1945, the right of self-defense (Article 51) was the only exception to the prohibition of the use of force accepted for inclusion. The use of the world "inherent" in the text of Article 51 suggests that self-defense is broader than the immediate Charter parameters Because self-defense is an inherent right, its contours have been shaped by custom and are subject to customary interpretation. Although the drafters of Article 51 may not have anticipated its use in protecting states from the effects of terrorist violence, international law has long recognized the need for flexible application.

VI. APPLICATION OF LAW TO U.S. POLICY

The 15 April 1986 U.S. response to continuing Libyan violence provides one example of the execution of U.S. counter-terrorism policy. The raid

was directed at military targets only. The objective was to strike at the military "nerve center" of Kaddafi's terrorist operations and limit his ability to use his military power to shield terrorist activities, thus "raising the costs" of terrorism in the Libyan leader's eyes and "deterring" him from future terrorist acts. The response was decided upon only after it was determined that Libya was clearly responsible for the 5 April bombing of the West Berlin discoteque, that he would continue such attacks, and after an assessment that the economic and political sanctions imposed after the Rome and Vienna airport bombings had been unsuccessful. There was a clear linkage drawn between the threat perceived and the response directed against Libyan military targets. Every effort was made to minimize collateral damage to the civilian communities contiguous to the two target areas.

The role of the allies was also considered. Prior to authorizing the response, President Reagan sent Ambassador Vernon Walters to consult with each of our NATO partners and to ensure that each understood our position and justification. Operationally, the rules of engagement relied upon by the Air Force and by Admiral Kelso's Sixth Fleet elements mirrored our international law commitments.

The President's follow-on moves were clearly appropriate as well. The President, through his support for coordinated sanctions at the 21 April European Community ministerial session and his plea for concerted non-military action at the follow-on Economic Summit in Tokyo, emphasized that diplomatic and economic measures are only effective against a pariah state if all major free nations participate.

VII. CONCLUSIONS AND RECOMMENDATIONS

The four basic elements of the law of armed conflict were clearly evident in the U.S. response to Libya. The force used was capable of being and was, in fact, regulated by the United States. Necessity for its use was established by exhaustion of lesser means. The force used was not otherwise prohibited. The 15 April raid was proportional to the threat and no greater in effect than required.

Despite legal support, our actions in Libya may have provided far more important lessons about our program to counter terrorism. In four significant areas, review is warranted. The controversy over justification of the raid is one such concern. A second area of needed improvement

concerns our coordination with the allies. Third, the impact of the U.S. decision to publicize the evidence linking Libya to the 5 April bombing in West Berlin underscores the importance of generating community support for our actions. Finally, the air strikes on Tripoli and Benghazi emphasize that U.S. efforts to resolve the underlying concerns in areas spawning terrorist violence must be increased.

PREFACE

A number of the sources listed in the Bibliography were authored by international law specialists and printed in legal journals and periodicals. Although some are dated, they have been selected because they offer the best discussion of the legal issues under consideration. A second category of source material was authored by writers expert in various aspects of the effort to combat terrorism. The remaining articles are primarily reports of terrorist violence and the U.S. response thereto found in the public media. The latter two categories of source material are extremely current.

Many of the legal articles are authored by professors and scholars who may harbor some differences of opinion concerning the interpretation of international law, although there is generally agreement on fundamental principles. The reader should be aware that this literature and the interpretation provided may not represent the view of every U.S. decision maker. However, every attempt is made within the study to identify these differences as well as the areas where U.S. policy and the legal interpretation advocated herein converge.

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I. INTRODUCTION

In its 1986 Public Report, the Vice-President's Task Force on Combatting Terrorism found:

> Terrorism has become another means of conducting foreign affairs. Such terrorists are agents whose association the state can easily deny. Use of terrorism by the country entails few risks, and constitutes strong-arm, low-budget foreign policy.[1]

This Task Force statement echoes Administration concerns over new and unconventional challenges to our foreign policy in critical areas of the world. Secretary Shultz was correct when he stated that "these new and illusive challenges have proliferated, in part, because of our success in deterring nuclear and conventional war."[2] This threat of low-intensity conflict, then, requires us to confront a host of new legal, political, military and moral questions.

From the perspective of law, our enemies hope that the legal complexities of these kinds of challenges will "ensnare us in our own scruples and exploit our humane inhibitions against applying force to defend our interests."[3] The United States, however, has been working hard to develop a strategy within the construct of international law. Early in the Reagan Administration, Secretary of State Haig instituted an interdepartmental group and gave high priority to review of counter-terrorism policies and programs.[4] In 1984, President Reagan signed National Security Decision Directive (NSDD) 138 which assigned

responsibility for developing strategies for countering terrorism and at the same time made clear that, while we must make the fullest use of all the non-military weapons in our arsenal, we must be prepared as well to respond within parameters set by the law of armed conflict. Defense Department official Noel Koch explains, NSDD 138 "represents a quantum leap in countering terrorism, from the reactive mode to recognition that pro-active steps are needed."[5] 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 March 25, 1985, that the Directive supports resistance by force to state-sponsored terrorism "by all legal means."[6] The Vice-President's Task Force refined this construct in 1986 in its Public Report. It explains:

> States that practice terrorism or actively support it will not do so without consequence. If there is evidence that a state is mounting or intends to conduct an act of terrorism against this country, the United States will take measures to protect its citizens, property and interests.[7]

This evolution of U.S. policy on terrorism is an outgrowth of responses by prior Administrations. The terrorist attacks at Munich in 1972 led to the establishment of a cabinet-level committee, chaired by the Secretary of State. The Carter Administration expanded this program and transferred control to the National Security Council. Lead agency authority for coordination of the federal response to terrorist incidents

taking place outside the United States returned to the State Department in April 1982.

Managing the terrorist threat posed by state sponsors from the legal perspective requires a coordinated effort at several levels. First, identification of the threat requires that intelligence and linkage to the state-sponsor be clearly established. Second, selection of military force from within the range of options available should meet the legal requirements of necessity and proportionality. Finally, when the option of military force is considered, its use must be consistent with other of our interests and commitments and support U.S. efforts to lessen international violence in the longer term.

II. THE DEFINITIONAL DILEMMA

The confusion over a precise definition for state-supported terrorism is in large part reflective of the basic disagreement over the elements of terrorism itself. All agree, however, that an anatomy of state-sponsored terrorism requires the following basic elements: (1) a politically subversive violent act or threat thereof; (2) a state sponsor; (3) an intended political outcome which might include expansion of political control or political change; and (4) a target, whether civilian, military or material, whose death, injury or destruction can be expected to influence to some degree the desired political outcome. Terrorism's uniqueness lies in its use of armed force against targets that would be exceptional or aberrational in regular warfare, with results that have little relationship to traditional military necessity.

State involvement in terrorist activity is dictated by practical as well as ideological considerations. The strategic thinking involved incorporates the view that terrorism is a suitable substitute for traditional warfare when that warfare becomes too expensive or too risky. The construct of state support includes propaganda and political support, funding, intelligence, training and supply of weapons at one end of the spectrum and direct covert involvement at the other.

The crisis facing the United States and other victim nation is not the problem of defining the act or process or even the conceptual elements of

international law condemning particular acts of terrorism. Rather, it is the vagueness and confusion surrounding the interpretation of the law with respect to that state support provided. Attempts at definition by foreign governments which are at variance with the United States emphasize this dilemma. Each tends to select terminology reflective of its own particular experience and representative of its own policy goals. France and Venezuela, for example, do not distinguish individual or group terrorism from state-supported terrorism. The former defines all terrorism as "heinous acts of barbarism"[1] while the latter considers that it is any act that "endangers or takes innocent human lives, or jeopardizes fundamental freedoms."[2]

Cline and Alexander have most clearly identified the aspect of sponsorship within the subset of state-supported terrorism. They define this category of warfare as:

> The deliberate employment of violence or the threat of use of violence by sovereign states (or subnational groups encouraged or assisted by sovereign states) to attain strategic and political objectives by acts in violation of law intended to create overwhelming fear in a target population larger than the civilian or military victims attacked or threatened.[3]

The value of this approach is that it relates the use of force in low-intensity conflict to international law concerns and, more specifically, the law of war. By relating the threat or use of force to attempts to change national political imperatives, the law of armed conflict is invoked and the right of self-defense triggered. The law of

armed conflict is that branch of international law, often called the law of war, which regulates the conduct of states and combatants engaged in armed hostilities, at whatever level of intensity.

Recognition that state-supported terrorism has as its ultimate objective the compulsory submission of the enemy to the will of the aggressor reflects an understanding that this brand of low-intensity conflict can be as destructive and destabilizing as more traditional forms of warfare. Carl von Clausewitz was perhaps the first to declare that "an act of violence intended to compel our opponent to fulfil our will... is a mere continuation of policy by other means."[4] This statement underscores the notion that state-sponsored terrorism is precisely such a pursuit of policy, absent only the conventional nature of more traditional conflict.

III. THE THREAT OF STATE-SUPPORTED TERRORISM

In the 1980s alone, terrorist violence has increased dramatically. Vice President Bush's Task Force noted that 1985 saw the number of terrorist incidents reach an all-time high.[1] Worldwide, one-half of these attacks were directed at only ten countries, with the U.S. the victim in one-third of these incidents.[2] And with rare exception, they were carried out by groups that were state supported.[3] Terrorists have targeted U.S. installations or officials abroad on an average of one every seventeen days during the past ten years. In the last twenty years, as many U.S. diplomats have died at the hands of terrorists as were killed in the previous two centuries. 1985 ended with the murder of five Americans in terrorist attacks at the Rome and Vienna airports.

Factors contributing to the utility of terrorism for state-supported political change are many. In its simplest terms, terrorism as a weapon has proven to be cheap and to have a synergistic or multiplier effect in its impact. Coupled with these characteristics, evidence of the state-to-terrorist relationship can be protected at the discretion of the sponsor and thus shelter the perpetrator from immediate responding coercion and other legal claims offered in self-defense. Like other forms of low-intensity warfare, terrorism is ambiguous. The fact that it throws us off balance and that we must grope for an appropriate means of response--or

a determination if any response is appropriate--only increases its effectiveness.

Apart from its ambiguity, the character of terrorist warfare makes its effectiveness entirely dependent upon its deviation from the norms of conventional conflict. Those nations supporting terrorism see its potential as unlimited. According to Brian Jenkins of the Rand Corporation, "[f]or some nations unable to mount a conventional military challenge--for example, Libya versus the United States--terrorism [is] the only alternative, an equalizer."[4] Its low cost and limited training and weapons requirements make it a strategy ideally suited for less sophisticated states.

Dr. James B. Motley claims, however, that it will continue to be the Soviet Union that presents the greatest threat of terrorist violence in certain areas of the world. He states:

> Although direct Soviet-American military clashes would be unlikely to fall into the category of low intensity conflict, the Soviets and their proxies can be expected to continue to expand their 'risk minimizing' strategy by maintaining their involvement in the internal affairs of Third World countries and supporting efforts to overthrow legitimate governments. Terrorist warfare will be an essential element of that strategy.[5]

Livingstone and Arnold accurately note as well that Soviet support for Turkish terrorists, the IRA, the Italian Red Brigades and the German Red Army Faction are seen "as a way of compelling NATO member states to devote

resources to the control and suppression of internal violence that might otherwise go to bolstering their external defense capabilities."[6]

Southern Africa and Latin America are other areas of particular concern regarding Soviet and Soviet-surrogate support for terrorist activity. In Africa, Soviet, East German and Cuban support for national liberation movements have been a significant element in governmental changes in Angola, Mozambique, and Ethiopia.[7] The U.S. interest in this region is obvious. The area contains immense deposits of many strategic minerals which are vital to industrial economies like ours, including: the platinum group (86 percent of world reserves), manganese (53 percent), vanadium (64 percent), chromium (95 percent), and cobalt (52 percent) as well as a dominant share of world gold and diamond output and internationally significant output of coal, uranium, copper and other minerals. Many of these resources are vital to Western defense and high technology industries.[8]

The reality is that south and central Africa are increasingly contested areas in global politics. Since Portugal's departure from its ex-colonies in 1975, the U.S.S.R. and its clients have shown every interest in keeping the pot of regional conflicts boiling. Eleven years after Angola's independence, for example, substantial numbers of Cuban combat forces and Soviet advisors remain there, as participants in a still unresolved and tragic civil war. The potential damage to U.S. and Western interests in the region, should the violence continue, is further enhanced

by southern Africa's geopolitical importance along the contiguous strategic sea routes.[9]

Latin America represents the most intense arena of Soviet interests today. Through direct arms shipments, the delivery of Hind helicoptors and the provision of "advisors" from Cuba, the Soviets have been actively pursuing the development of a totalitarian state in Nicaragua. Using Nicaragua as a base of operations, arms have also been provided to terrorists like the M-19 group in Columbia. Coupled with these activities, the Soviet Union and its surrogates have gone on the offensive in attacking our support of El Salvador's efforts to defend itself. Secretary Shultz placed this in perspective when he stated:

> These tactics obviously play on the moral scruples that discipline our power, on the American people's antipathy to violence and desire for peace.... We are right to be reluctant to unsheath our sword. But we cannot let the ambiguities of the terrorist threat reduce us to total impotence.[10]

Terrorist activity supported by states in the Middle East continues to pose the most immediate threat to U.S. citizens and property. Iran, Syria and Libya have been most active in targeting U.S. interests in that region. That support has been described as follows:

> Khomeini's regime organizes, plans and assigns the mission of terrorists, mainly Shi'ite Moslems, operating in the Mideast and beyond. Kaddafi contributes monetary aid and arms, at least to a limited extent. Assad gives local aproval to proposed operations since he controls the bases from which the missions are launched. All three strive to expel what

> they call the aggressive forces of these target nations.[11]

Iran's role in the perpetration of terrorist violence is well known. The 1979 hostage crisis,[12] together with Iranian government complicity in the assasination of anti-Khomeini dissidents in Europe, and Tehran's support of terrorists and other revolutionary elements opposed to various Moslem governments within the region, clearly place contemporary Iran in the ranks of the world's outlaw regimes.[13]

In a Special Report published in 1983, the U.S. Department of State examined the Libyan role of supporting any terrorist group claiming to be anti-American or anti-Israeli.[14] Middle East scholars have also established that Kaddafi has trained more than seven thousand Arab and African terrorists in the use of Soviet arms and that he continues to smuggle currency and weapons to subversive groups worldwide. The findings of Cline and Alexander are representative:

> In 1972, Libya sent arms to and provided safe havens for the Palestinian terrorists involved in the Munich massacre of Israeli ahtletes at the Olympic Villange. In 1981 and 1982, it furnished funds and arms to the Sandinistas and the Salvadoran guerrillas in Nicaragua. In 1983, Libya partially funded the Point Salines airstrip in Granada, under construction by Cuban workers.[15]

More disturbing has been Kaddafi's long record of abusing diplomatic privilege by supplying terrorists groups with arms and funding through his embassies abroad.[16] Recent events only emphasize these findings.

Syria's role in supporting terrorist activity has been equally lethal to U.S. interests. Intelligence analysts quoted in the New York Times claim that the truck bomb used to destroy the Marine BLT headquarters in Beirut in 1983 was wired by Syrians in the Bekaa Valley.[17] Syria continues to provide weapons and training as well as diplomatic assistance to Arab terrorist organizations in Lebanon while allowing these groups to maintain offices in Damascus.

The support provided by these states is increasing. As a result of early successes by Iran, Syria and Libya, in particular, it has been institutionalized by these states and others as a national policy device. Recent events in Lebanon have dramatically demonstrated this emerging confluence of national, cultural and psychological forces.

IV. U.S. POLICY TO COUNTER STATE-SPONSORED TERRORISM

The policy dilemma posed by the threat of state-sponsored terrorism is obvious. Not only are there definitional concerns, but there are fundamental issues concerning the kind of responses the U.S. can lawfully take which preserve our political and social values. The October 12, 1983 bombing of the Marine BLT headquarters in Beirut triggered the reshaping of U.S. thinking on this issue. The U.S., as Brian Jenkins explains, is now properly moving toward "a doctrine of 'best achievable security,' realizing that in today's world of political violence and 'grey area' warfare, it is necessary to accept some risks, and that every terrorist success does not represent a failure of the U.S. government."[1] Consistent with this thinking, President Reagan has tied efforts to protect U.S. interests to international law commitments underlying U.S. foreign policy. The President signed National Security Decision Directive (NSDD) 138 on 3 April 1984 and established a two-tiered approach to countering terrorist violence. That document, according to former Assistant for National Security Robert McFarlane, incorporates the following key elements:

* The practice of terrorism under all circumstances is a threat to the national security of the United States.

* 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 against U.S. interests.

* The threat of terrorism constitutes a form of aggression and justifies acts in lawful self-defense.[2]

NSDD 138 appears to largely reflect the long-standing U.S. policy with respect to terrorism, while adding a new proactive defensive element. Mr. McFarlane's remarks imply that states that practice terrorism or actively support it will not be allowed to do so without consequences. Secretary of State Shultz emphasized this new element in January 1986 when addressing the Low-Intensity Warfare Conference at the National Defense University. He stated that whenever we have evidence that a state is mounting or intends to conduct an act of terrorism against us, we have a responsibility to take measures to protect our citizens, property and interests.[3] The United States appears determined to act in a strong manner against terrorist violence without surrendering basic freedoms or endangering democratic principles.

In confirming the unequivocal nature of the U.S. position on terrorism, the Public Report of the Vice President's Task Force reiterates our "no concessions" policy. The U.S. will "not pay ransom, release prisoners, change its national policies or agree to other acts that might encourage additional terrorism. At the same time, the United States will use every available resource to gain the safe return of American citizens

held hostage by terrorists or their state sponsors."[4] This policy is based upon the conviction that to give in to terrorists' demands places even more Americans at risk. This "no concessions" policy is believed to be the best way of ensuring the safety of the greatest number of Americans.

Implementation of these policy goals requires a coordinated national response on several levels: legal, political and military. Effective crisis response requires an integrated approach in which political and/or military response is considered within a supportive framework of international law.

V. THE ROLE OF LAW

A. Terrorism and the Application of International Law

The basic provision restricting the threat or use of force in international relations is Article 2(4) of the U.N. Charter. That provision states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purpose of the United Nations."[1]

The underlying purpose of Article 2(4)-- to regulate agggressive behaviour between states-- is identical to that of its precursor article in the Covenant of the League of Nations. Article 12 of the Covenant stated that League members were obligated not "to resort to war."[2] This terminology, however, left unmentioned hostilities which, although violent, could not be considered war. The drafters of the U.N. Charter wished to ensure that the legal niceties of a conflict's status did not preclude cognizance by the international body. Thus, in drafting Article 2(4), the term "war" was replaced by the phrase "threat or use of force." The wording was interpreted as prohibiting a broad range of hostile activities including not only "war" and other equally destructive conflicts, but also applications of force of a lesser intensity or magnitude.[3]

The United Nations General Assembly has clarified the scope of Article 2(4) in two important resolutions, adopted unanimously.[4] Resolution 2625

gives a more precise meaning to Article 2(4). The Declaration on Friendly Relations describes behavior which constitutes the unlawful "threat or use of force" and enumerates standards of conduct by which states must abide.[5] Contravention of any of these standards of conduct is declared to be in violation of Article 2(4).[6]

In passing Resolution 3314, the General Assembly provided a detailed statement on the meaning of "aggression" which is defined as "the use of armed force by a state against the sovereignty, territorial integrity or political integrity or political independence of another state, or in any manner inconsistent with the Charter of the United Nations."[7] The resolution contains a list of acts which, regardless of a declaration of war, qualify as acts of aggression.[8] The resolution provides that a state which commits an act of aggression violates international law as embodied in the U.N. Charter.[9]

The actions of states supporting terrorist activities clearly fall within the scope of Article 2(4), when interpreted in light of these resolutions. The illegality of aid to terrorist groups such as those led by Abu Nidal has been well established by the U.N. General Assembly. Both resolutions specifically prohibit the "organizing," "assisting," or "financing" of "armed bands" or "terrorists" for the purpose of aggression against another state.[10]

B. The Law of Self-Defense Applied to the Terrorist Threat

Historically, rules on the lawful use of force have developed within a framework of state-to-state relationships. Little doubt exists, however, as to their applicability in the terrorist arena where actors are mere agents of state sponsors. The Long Commission, in commenting upon the devastating attack on the U.S. Marine Headquarters in Beirut, concluded, for example:

> ...state sponsored terrorism is an important part of the spectrum of warfare and adequate response to this increasing threat requires an active national policy which seeks to deter attack or reduce its effectiveness. The Commission further concludes that this policy needs to be supported by political and diplomatic actions and by a wide range of timely military response capabilities.[11]

When the U.N. Charter was drafted in 1945, the right of self-defense was the only exception to the prohibition of the use of force accepted for inclusion. Customary international law had previously accepted reprisal, retaliation and retribution as legitimate responses as well. Reprisal allows a state to commit an act which would otherwise be illegal to counter the illegal act of another state. Retaliation is the infliction upon the delinquent state of the same injury which it has caused the victim. Retribution is a criminal law concept, implying vengeance, which is sometimes used loosely in the international law context as a synonym for retaliation. While debate continues as to the present status of these responses, the U.S. position has always been that actions protective of

U.S. interests rather than punitive in nature offer the greatest hope of securing a lasting, peaceful resolution of international conflict.[12]

The right of self-defense was codified in Article 51 of the Charter. That Article provides:

> 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....

The use of the word "inherent" in the text of Article 51 suggests that self-defense is broader than the immediate Charter parameters. During the drafting of the Kellogg-Briand Treaty,[13] for example, the United States expressed its views as follows:

> There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to response in self-defense.[14]

Because self-defense is an inherent right, its contours have been shaped by custom and are subject to customary interpretation. Although the drafters of Article 51 may not have anticipated its use in protecting states from the effects of terrorist violence, international law has long recognized the need for flexible application. Secretary of State Shultz emphasized this point when he stated: "The U.N. Charter is not a suicide pact. The law is a weapon on our side and it is up to us to use it to its

maximum extent.... There should be no confusion about the status of nations that sponsor terrorism against Americans and American property."[15] The final clause of Article 2(4) of the Charter supports this interpretation and forbids the threat or use of force "in any other manner inconsistent with the purposes of the United Nations."

Professor Myres McDougal of Yale University has placed the relationship between Article 2(4) and Article 51 in clearer perspective.

> 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 or political independence of any State, or in any 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.[16]

Significant in Professor McDougal's interpretation is the recognition of the right to counter the imminent threat of unlawful coercion as well as an actual attack. This comprehensive conception of permissible or defensive coercion, honoring appropriate response to threats of an imminent nature, is merely reflective of the customary international law. It is precisely this anticipatory element of lawful self-defense which is critial to an effective policy to counter state-sponsored terrorism.

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

Three historical incidents, cited with approval by international lawyers, illustrate these requirements. In 1818, the U.S. established the right to enter the territory of another state to prevent terrorist attack 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 Seminoles with the explanation that the Spanish were bound by treaty to keep their Indians at peace but were incompetent to do so.[17]

During the Canadian insurrection of 1837, the standard under which anticipatory self-defense could be justified was more clearly established. Anti-British sympathizers gathered near Buffalo, New York, and a large number of Americans and Canadians were similarly encamped on the Canadian side of the boundary with the apparent intention of aiding these rebels. The Caroline, an American vessel which they used for supplies and communications, was boarded in an American port at midnight by an armed

group, acting under orders of a British officer, who set the vessel on fire and let it drift over Niagara Falls. At least two U.S. citizens were killed in the incident. The United States protested. The British government replied that the threat posed by the Caroline was established, that the American laws were not being enforced along the border, and that the destruction was an act of necessary self-defense. 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 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."[18] The formulation of the principle of self-defense, in this case by U.S. Secretary of State Daniel Webster, is often cited. There must be shown, he said, "...a necessity of self-defense, instant, overwhelming, leaving us no choice of means and no moment for deliberation."[19] It is clear, however, that the Webster formulation was not applied by the British in the decision to destroy the Caroline, at least with respect to the element requiring "no moment of deliberation." The formulation may have been overly restrictive even when stated in 1841. In the present era in which terrorists and their sponsors possess weapons with rapid delivery capabilities, any requirement that a nation may not respond until faced

with a situation providing no moment for deliberation is unrealistic.[20] The U.S. Department of State has criticized Secretary Webster's formulation as follows: "This definition is obviously drawn from consideration of the right of self-defense in domestic law; the cases are rare, indeed, in which it would exactly fit an international situation."[21]

A more recent example of preventative defensive measures drawn from World War II has greater application to the element of necessity as it relates to those states sponsoring terrorist violence. Following the French capitulation to Germany in June 1940 and the establishment of the Vichy regime, many French naval vessels took refuge at Oran on the North African coast. Although British demands for disposition of the vessels were accepted by French commanders at Alexandria and Martinique, thus establishing the reasonableness of the demands, they were rejected at Oran. Fearing the French vessels would fall into Berlin's hands as a result of the Vichy armistice with Germany, Britain destroyed the fleet at Oran. An international law authority, in noting that acquisition of the French fleet could have provided the Germans the means to invade Great Britain by sea, states, "Nothing in international law required the British to defer action in self-defense until after the French warships were incorporated into the German Navy."[22]

The examples just cited do not suggest the lack of international law restraints upon the determination of necessity for preemptive action. Rather, they suggest that self-defense claims must be appraised in the

total context in which they occur. One aspect of this contextual appraisal of necessity, especially as it relates to response after-the-fact to terrorist violence, concerns the issue of whether force can be considered necessary if peaceful measures are available to lessen the threat. To require a state, however, to tolerate terrorist violence without resistance on the grounds that peaceful means have not been exhausted is absurd. Once a terrorist attack has occurred, the failure to consider military response would play into the hands of aggressors who deny the relevance of law in their actions. The legal criteria for the proportionate use of force is established once a state-supported terrorist attack has taken place. Neither the United States, nor any other state, is obliged to ignore an attack as irrelevant. The imminent threat to the lives of one's own nationals requires a similar conclusion.

A related but more difficult issue concerns the elapsed time between the state-sponsored terrorist attack and the identification of the state responsible. Admittedly, there must be some temporal relationship between terrorist act and lawful defensive response. Nevertheless, it would be unreasonable to preclude the victim of terrorism, be it the United States or some other state, from redress based upon a doctrinaire determination that the threat is no longer imminent, when the terrorist state's own actions preclude immediate identification.

The requirement of proportionality is linked to necessity. Professor McDougal and Dr. Feliciano define the rule as follows:

> Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense. For present purposes, these objectives may be most comprehensively generalized as the conserving of important values by compelling the opposing participant to terminate the condition which necessitates responsive coercion.[23]

This definition simply requires a rational relationship between the intensity of the attack and the intensity of the response. While the relationship need not approach precision, a nation subjected to an isolated state-sponsored terrorist attack on one of its citizens is not entitled to destroy a city of the offender-nation. Other canons of military practice such as conservation of resources support this principle of restraint in defense. The United Nations has condemned as reprisals those defensive actions that were greatly in excess of the provocation.[24] Where a continuation of terrorist acts beyond the triggering event is reasonably expected, however, a response beyond the scope of the initial attack would seem to be legally appropriate to counter the continuing threat.

C. Rules of Engagement.

The rules of necessity and proportionality in the terrorist scenario are given operational significance through peacetime rules of engagement (ROE). Rules of engagement are directives that a government may establish to define the circumstances and limitations under which its own forces will initiate and/or continue engagement with terrorist forces. In the U.S. context, this ensures that National Command Authority (NCA) guidance is provided, through the Joint Chiefs of Staff (JCS), to deployed forces in periods short of war for handling crisis response to terrorist violence and other threats.

Rules of engagement reflect domestic law requirements and U.S. commitments to international law. They are impacted by political and operational considerations. Captain J. Ashley Roach, USN, correctly notes that ROE "should not delineate specific tactics, should not cover restrictions on specific system operations, should not cover safety related restrictions, should not set forth service doctrine, tactics or procedures, ...should never be 'rudder orders,' and certainly should never substitute for a strategy governing the use of deployed forces, in a peacetime crisis or in wartime."[25] For the commander concerned with responding to a terrorist threat, ROE represent limitations or upper bounds on how he may dispose his forces, while in no way diminishing his authority to effectively protect his own forces from attack.

Terrorist violence against U.S. interests represents hostile activity short of war which may trigger the applicable peacetime rules of engagement. The only peacetime ROE currently applicable worldwide and the present basis for all unified commanders' peacetime ROE's are the JCS Peacetime ROE for U.S. Seaborne Forces, last promulgated in July 1981. These ROE are designed exclusively for the maritime environment. A more comprehensive ROE for sea, air and land has been in development since suggested by Admiral Long at USCINCPAC in 1981, and should be promulgated by the Secretary of Defense later this year.

The new ROE, designated the JCS Peacetime ROE for U.S. Forces, will reflect U.S. national security policy to protect our forces and interests from military, paramilitary or terrorist attack. The new ROE are guided, in part, by the U.S. global objectives of deterring armed attack across the spectrum of conflict, defeating an attack should deterrence fail, and preventing or neutralizing hostile efforts to intimidate or coerce the United States by the threat of terrorist activity. Deterrence, according to the thinking behind this document, requires clear and evident capability and resolve to respond to a terrorist threat in a manner designed to force any potential aggressor to assess his own risks as unacceptable. The rules should provide the on-scene commander with the flexibility to respond to the hostile intent of terrorists with minimum necessary force and to limit the scope and intensity of the threat.

The strategy underlying the rules seeks to terminate violence quickly and decisively and on terms favorable to the United States. The inherent right of self-defense provides the policy framework for all ROE. Within that framework, the concept of "necessity" implies the requirement that a hostile act occur or that a terrorist unit exhibit hostile intent. Hostile intent in the terrorist context is the threat of the imminent use of force against the United States by a terrorist organization. Where there are preparations for the imminent use of armed force, the right exists under international law to use proportional force by all authorized means available in order to deter or neutralize the potential attacker or, if necessary, destroy the threat. A determination that hostile intent exists and requires the use of force must be based on convincing evidence. The amount of evidence required for military response, however, will vary depending on the existing state of international tension, military preparations of the terrorist entity, and available intelligence and warning information.

The draft JCS peacetime rules recognize existing laws and require that attempts to control and eliminate the threat without the use of force be first considered and applied, if feasible. In developing rules of engagement, as in developing U.S. national policy, the use of force is the measure of last resort. In applying minimum force to eliminate a terrorist threat, the rules authorize only the application of minimum force -- that is, "necessary" force proportional to the threat.

The implementation of national guidance through promulgation of the JCS Peacetime ROE should greatly assist in providing both clarity and flexibility of action for our theater commanders. The expected approval this year by Secretary Weinberger will insure consistency in the way all military commanders, wherever assigned, address terrorist threat situations while at the same time providing the mechanism for the automatic amending of ROE or the issuance of supplemental measures upon the occurence of specified conditions or events.

VI. APPLICATION OF LAW TO U.S. POLICY

A. Law-Policy Analysis

> It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerrillas. International law requires no such result. A nation attacked by terrorists is permitted to use force to prevent or preempt future attacks, to seize terrorists, or to rescue its citizens when no other means is available. The law requires that such actions be necessary and proportionate. But this nation has consistently affirmed the right of states to use force in exercise of their right of individual or collective self-defense.
>
> George Shultz
> January 15, 1986

Seldom has the law been more accurately or forcefully pronounced. Conceptually, there is little dispute concerning our right to exercise the doctrine of self-defense. The difficulty lies in our determination of those conditions which justify the use of military power--that is, whether there is actual necessity, demonstrable justification and whether the military instrument can be used in a manner proportionate to the threat. A second and related issue concerns the availability of other means. A third query centers on whether the selected response can be applied in a manner appropriate to a clear objective. Finally, but a thread common to each inquiry, is the issue of linkage.

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 (HUMINT) 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."[1]

Although no Reagan Administration official has yet been able to define politically "how much information is enough," the demand for evidence meeting domestic law standards of probable cause is unrealistic. 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."[2] The United States must seek a standard of complicity, however, which provides a sufficient factual basis upon which to act. Secretary Shultz would add: "While we are right to be reluctant to unsheath our sword, we cannot let the ambiguities of the terrorist threat

reduce us to impotence. A policy filled with so many qualifications and conditions that they all could never be met would amount to a policy of paralysis."[3] This debate emphasizes that the discreet use of power to counter terrorist violence will never be without risk, but that those risks involved are reasonable in light of the threat.

B. Elements of Lawful Response

1. Exhaustion of Non-Military Options.

The real time relationship between threat and threat-recognition is often compressed in the terrorist conflict arena. Strategy development is thus limited with respect to pre-attack, non-military initiatives which must always be the option of choice. Because terrorism is covert in execution, unacknowledged by its state sponsor, and practiced with violent effectiveness as its only criteria, traditional means of conflict resolution authorized by law and customary practice are precluded. Thus, diplomacy and conciliation may be of little utility in responding to a state whose actions are denied and whose practices are ultimately designed to eliminate normal, lawful intercourse between nations.

This is not to suggest that non-coercive efforts to avoid terrorist attack are not important. Counter-terrorism expert, Dr. William Farrell, correctly notes:

> Diplomatic action, alone or in concert with allies which could conceivably impact successfully upon a

> terrorist group and/or its sponsor, should be considered and employed initially. Political and economic sanctions are also alternatives which demand consideration before military force is employed.[4]

In a democratic society, however, the range of options open to an administration aimed at protecting its citizens and resources abroad from terrorism is limited. One of the best things a democratic government can do is educate the public and its military about the realistic options open to it in any crisis. Professor Abraham Miller suggests: "The image of an invincible and omnipotent America that can rescue hostages under any circumstance is patently unrealistic. It is a mindset that comes from a failure to realize how lucky the Israelis were at Entebbe and from the charges and counter-charges of the 1980 election campaign, during which the Iranian hostage crisis was played to the hilt."[5]

This further suggests that measures which may be justified under law may not be feasible in terms of execution. Another value which must be considered before using military force is moral justification.

> Claiming justifiable defense in the protection of democratic values while employing tactics which are similar to those practiced by the terrorists undermines public confidence. While there may be some immediate emotional release no matter what the response, thoughtful reflection over the long term will only tolerate action based on moral grounds.[6]

These valid concerns underscore the need to weigh other long-term values besides countering the immediate terrorist threat when determining an appropriate policy.

2. Law and the Use of Force Against Terrorism.

> There is substantial legal authority for the view that a state which supports terrorist or subversive attacks against another state, or which supports or encourages terrorist planning and other activities within its own territory, is responsible for such attacks. Such conduct can amount to an ongoing armed aggression against the other state under international law.[7]

An examination of legally authorized responses to state-supported 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 rules that survive despite their frequent violation. The only norm for state-supported terrorist violence is encompassed in the mix of surprise, humiliation, horror, guilt and shock--in other words, effectiveness. International law requires that belligerent forces (including irregulars) identify themselves, carry arms openly and observe the law of war.[8] Principal among the laws of war are the principles of necessity of action, proportionality and target discrimination (non-combatant immunity). Military necessity is the principle which justifies a measure of regulated force not forbidden by international law to eliminate an imminent terrorist threat. Proportionality is the principle which forbids the infliction of injury or destruction not actually necessary to eliminate that threat. Discrimination is an aspect of targeting which requires that the objects of attack bear a military

relationship to the participant state. Under the law of armed conflict, only military installations and personnel, or their agents in the case of terrorism, may properly be targeted for destruction. This last principle confirms the basic immunity of the civilian population during armed conflict at whatever level. Terrorists and their sponsors, however, do not distinguish between civilians and the armed forces of the country against which the attack is made. One rationale to explain this strategy may be the enhanced shock effect inherent in the death of innocent third parties from terrorist attacks.

The United States, however, has traditionally embraced these rules including the principle of civilian immunity. Secretary Shultz has correctly noted:

> Unlike terrorists and communist guerrillas, we do not believe the end justifies the means. We believe in the rule of law. This nation has long been a champion of international law...and the U.N. Charter as a code of conduct for the world community.[9]

The United Nations Charter principles addressed by Secretary Shultz merely codify pre-existing U.S. commitments and other protections provided by customary international law. The practice of states over time comes to reflect custom; and international law, being a product of the political process, changes and develops as internationally accepted standards of conduct change.[10] An excellent discussion is provided by Marjorie Whiteman:

> Over varying periods of time certain international practices have been found to be reasonable and wise in the conduct of foreign relations, in considerable measure the result of a balancing of interests. Such practices have attained the stature of accepted principles or norms and are recognized as international law or practice. Accordingly, there are in the field of international law, certain well recognized principles or norms.
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> ....
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> The recognized customs prevailing between states and other subjects of international law are reflected not only in international practice per se but also in international treaties and agreements, in the general principles of law recognized by states, in judicial and arbitral decisions and in the work of qualified scholars. Based largely on custom, this reflected and recognized international law is, to a considerable extent, unwritten in form and uncodified.[11]

When international law fails to preclude terrorist violence and a nation is subjected to state-sponsored terrorist attack, a number of legal and policy considerations arise. Foremost is an understanding that certain states' ideological view of the weight to be accorded international law may be different from our own. In the Middle East, for example, the military imbalance between the U.S. and states with perceived interests at variance from our own see justification for extra-legal measures in that very inequity. The Soviet Union and its surrogates, conversely, choose to characterize the law, as do all states to a limited degree, in their own national interest. Analysis of Soviet decision-making reveals that identical principles of international law applied by Western and socialist states cannot be placed in parallel columns and compared as to their

terminology alone. The purpose for which law is to be applied by Moscow is determinative of its characterization. Extralegal factors such as the importance of the Soviet interest involved, geographic proximity to Soviet borders, and the lack of forefulness with which the rest of the world can be expected to express disapproval are all important to that determination. It must be remembered that any Soviet commitment to non-interference in the internal affairs of sovereign states is not considered inconsistent by Moscow with promoting class struggle within capitalist countries nor supporting national liberation movements in Asia, Africa and Latin America.[12] For this reason, it is important for the U.S. to emphasize those international law commitments, clarified in the U.N. Charter, which are not subject to loose interpretation by the Soviets or other states. While it is useful in any analysis to understand and consider the misdirected objectives and the underlying rationale of the terrorist states involved, these do not effect lawfulness of response by states subjected to attack.

C. April 15, 1986 Response to Libyan Terrorism: Development of a Contextual Model

1. The Libyan Threat.

The 15 April U.S. defensive strikes on Tripoli and Benghazi military targets were not without justification. The attacks on the nerve centers of Libyan terrorism were preceded by conclusive evidence of prior acts involving Libyan responsibility, with clear evidence that more were planned. The final provocation occurred on 5 April, however, in West Berlin. Immediately prior, on 25 March, a cable from Tripoli directed the Libyan People's Bureau in East Berlin to target U.S. personnel and interests. On 4 April, a return message was intercepted which informed Kaddafi's headquarters that a terrorist attack would take place the next day. On 5 April, the same day that an explosive device detonated in a West Berlin discoteque, killing Army Sgt. Kenneth T. Ford and injuring 230 including 79 Americans, the same People's Bureau reported to Colonel Kaddafi that the attack was a success "and could not be traced to the Libyan people."[13] Then, on 6 April, Tripoli exhorted other People's Bureaus to follow East Berlin's example.[14] In a news conference on 15 April, White House Press Secretary Larry Speakes advised reporters that personnel from the East Berlin People's Bureau were seen and identified in West Berlin, apparently on surveillance missions before the terrorist attack.[15]

In the week before the U.S. response, defense officials reported that Libya was planning terrorist attacks against U.S. diplomatic missions in ten African countries as well as in areas of the Middle East and Latin America. In one African country, for example, it was reported that three Libyan agents were planning to bomb the U.S. Embassy and kidnap the ambassador.[16] Secretary of State Shultz stated on 15 April that the U.S. had information that Libya was targeting thirty American embassies for possible attack.[17]

These were certainly not isolated events. The Libyans are known to have had a direct role in the kidnappings in Lebanon over the past three years. Immediately after the U.S. raid, three hostages -- two British and one American -- were murdered by their captors. Sir Geoffrey Howe, British Foreign Secretary, stated on behalf of his government, "...we have good reason to believe the hostages were in Libyan hands."[18] Even Italy appeared to have had enough of Kaddafi's violence. After Libyan patrol craft fired two Scud missiles (and missed) at its island of Lampedusa following the U.S. raid, Prime Minister Bettino Craxi stated that Italy would respond militarily if Libya attacked Italian territory again.[19]

Other recent terrorist acts can be traced indirectly to Colonel Kaddafi. The Rome and Vienna airport attacks on the ticket counters of TWA and El Al Airlines were masterminded by Abu Nidal, the Palestinian terrorist directly supported by Kaddafi and the Syrians. In fact, Abu Nidal maintains a residence in Tripoli. President Reagan summed up the

U.S. view of Kaddafi when he spoke to the nation immediately following the 15 April defensive response by U.S. warplanes.

> Colonel Kaddafi is not only an enemy of the United States. His record of subversion and aggression against the neighboring states in Africa is well documented and well known. He has ordered the murder of fellow Libyans in countless countries. He has sanctioned acts of terror in Africa, Europe and the Middle East as well as the Western Hemisphere.[20]

2. The U.S. Response.

The U.S. military response to continuing Libyan violence was directed at military targets only. The objective was to strike at the military "nerve center" of Kaddafi's terrorist operations and limit his ability to use his military power to shield terrorist activities, thus "raising the costs" of terrorism in the Libyan leader's eyes and "deterring" him from future terrorist acts.[21] Press Secretary Larry Speakes further advised that the American raids on Libya "...were justified on grounds of 'self-defense' to preempt further Libyan attacks."[22]

The response itself used F-111 bombers from an American air base in Great Britain and A-6 fighter-bombers from two aircraft carriers in the Mediterranean Sea to strike five Libyan bases. The response was decided upon only after it was determined that the Libyan leader was clearly responsible for the 5 April bombing, that he would continue such attacks,

and after an assessment that the economic and political sanctions imposed after the Rome and Vienna airport bombings had been unsuccessful and that our West European allies were unwilling to take stronger joint steps against Kaddafi. There was a clear linkage drawn between the threat perceived and the response directed against Libyan military targets as the "objectives" statement of Mr. Speakes indicates. Despite the fact that Kaddafi purposefully targets civilians, every effort was made to minimize collateral damage to the civilian communities contiguous to the two target areas. While civilian sectors were inadvertently hit, evidence supports the conclusion that this resulted from a failure of technology and an errant release of a bomb from an F-111 bomber which had been hit by Libyan anti-aircraft fire.

The role of the allies was clearly considered as well. Prior to authorizing the response, President Reagan sent Ambassador Vernon Walters to consult with each of our NATO partners and to ensure that each understood our position and justification. While only Great Britain's Margaret Thatcher offered public support and overflight rights for our F-111 bombers, President Francois Mitterand of France "favored stronger military action" than that actually proposed and executed against Libya but reportedly told Ambassador Walters, "We can't come out publicly for you."[23] It was reported that the French President, the most vocal critic of U.S. counter-terrorist policy in his public statements, had privately suggested

an "all-out effort to change Libyan policy" and "real major action against Libya."[24]

That the defensive raid was effective in mobilizing allied efforts was obvious in the meeting of twelve foreign ministers of the European Community on 21 April in Luxembourg. The package of economic and diplomatic sanctions approved, after being rejected only a week earlier, were aimed at limiting Libya's ability to sponsor terrorist attacks.[25] These were endorsed and refined during the Tokyo Economic Summit in May 1986 when President Reagan met with the leaders of Britain, Canada, France, Italy, Japan and West Germany, as well as other representatives of the European Community. It is interesting to note that the U.S. had to essentially "go it alone" in its actions against Libya following Kaddafi's implication in the Vienna and Rome airport bombings in December 1985, while the U.S. use of force on 15 April suddenly spurred more active support among the allies.

This allied support, even if offered publicly only after the fact, suggests that the allies viewed the U.S. actions to be proportional to the perceived threat. Proportionality in this case can be viewed from a dual perspective. First, this element of self-defense suggests that U.S. claims, in the sense of counter terrorist goals, should be reasonably related to the existing terrorist threat to U.S. national interests. Second, proportionality requires that the U.S. and other offended states use only such means in addressing Libyan violence as are necessary to

induce Colonel Kaddafi to abandon his offending course of conduct. In the first sense of proportionality, the U.S. action sought to neutralize the broad Libyan effort to overthrow the existing power balance in the Mediterranean region through terrorist violence. The U.S. response, for example, did not seek to create a totally new and threatening power situation in North Africa. In the second sense of proportionality, the defensive strikes directed at targets in Tripoli and Benghazi were restricted to military installations which represent the power behind which Kaddafi's terrorist infrastructure is concealed.

Operationally, the rules of engagement relied upon by the Air Force and by Admiral Kelso's Sixth Fleet elements mirrored our international law commitments. The targets the Navy and Air Force pilots were finally directed to hit were all military installations, emphasizing the fact that we apply the law of armed conflict at all levels of warfare. The use of force was authorized only after other avenues had been foreclosed. Quiet diplomacy, public condemnation, economic sanctions and a show of force in the Gulf of Sidra were all tried without effect. As President Reagan stated: "Kaddafi intensified his terrorist war, sending his agents around the world to murder and maim innocents."[26] Only when non-military measures had been exhausted (and with Kaddafi's support for terrorist violence unabated) were the military measures approved. Munitions (smart bombs) were selected that would minimize collateral damage and civilian casualties. The attacks were conducted while a majority of Libyans were

sleeping rather than performing civilian duties in the military installations. In fact, President Reagan insisted that the targets be chosen with a view toward holding down casualties among Libyan civilians.[27] Proportionality requires no such precision. The immunity of the civilian population does not preclude incidental civilian casualities that may occur during the course of attacks against military objectives, and which are not excessive in relation to the military advantage anticipated.

Identification criteria for the five targets actually selected were detailed with the same careful consideration as other elements of planning. In fact, seven aircraft did not release their ordnance due to an inability to secure a clear target picture.[28] The overall concern for innocent lives shown by U.S. forces in this incisive use of force stands in sharp contrast to one Libyan plot recently uncovered by U.S. interception of Libyan cables. Press Secretary Larry Speakes revealed on 15 April that Libyan agents had been directed to hurl grenades and open fire with machine guns on lines of people waiting at the U.S. visa office in Paris.[29]

3. Subsequent Actions.

Response to terrorism, like response to other forms of armed conflict, has war termination on favorable conditions as its critical element. Certainly, Administration officials must guard against a new Reagan Doctrine of repeated military retaliation against terrorism, thus raising this form of violence to a plateau it does not deserve. Having forcefully

demonstrated that the U.S. will respond to weaken Libyan military capability to support further acts of terrorist violence, the President's follow-on moves were clearly appropriate. The President, through his support for coordinated diplomatic and economic sanctions at the 21 April European Community ministerial session and his plea for concerted action at the follow-on Economic Summit in Tokyo, emphasized that non-military coercive measures are only effective against a pariah state if all major free nations participate. If the 15 April blow against Libya is to do more than re-establish the credibility of U.S. forces, an integration of strategies involving those nations trading with Libya is imperative. More importantly, those U.S. commercial interests still operating in Libya must be regulated.

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VII. CONCLUSIONS AND RECOMMENDATIONS

A persuasive argument can be made that the defensive response to Libyan state-sponsored terrorism met customary and conventional legal requirements to counter aggression and thus was valid under international law. The four basic elements of the law of armed conflict were clearly evident in the U.S. response. The force used was capable of being and was, in fact, regulated by the United States. Necessity for its use was established by exhaustion of lesser means. The force used was not otherwise prohibited. The 15 April raid was proportional to the threat and no greater in effect than required.

Just as the last element, proportionality, offers numerous reasonable options, so also does international law in its entirety provide a range of permissible responses to national conduct which seeks by flagrant and deliberate means to distort the international status-quo. There are at least three substantive legal bases upon which permissibility of the 15 April raid may be supported in international law. It may be supported in customary international law by the inherent right of self-defense. It may be supported by a realistic interpretation of Article 51 of the United Nations Charter (an interpretation which takes into account the tempo and weapons capabilities of today). It may be supported as an action in support of the collective interest of nations to maintain Eur-African peace and security.

Critics of the self-defense argument contend that use of force was too dangerous an instrument in this case and that U.S. actions will simply accelerate the continuing cycle of terrorist violence. But the alternatives seem even more dangerous. Conceding, as these critics do, that states whose citizens and property are threatened owe a responsibility to protect their interests and are lawfully authorized to do so, then the measures undertaken by the United States appear to have been both lawful and effective. The force option invoked was not disproportionate and was skillfully executed only after a series of previous peaceful alternatives had been attempted and had proved wanting. Under the circumstances, factual and legal, the 15 April response constituted substantial compliance with both the spirit and the content of the international legal regime to which we subscribe.

Despite legal support, our actions in Libya may have provided far more important lessons about our program to counter terrorism. In four significant areas, review is warranted. The controversy over justification of the raid is one such concern. Immediately following the defensive response, President Reagan told the nation:

> When our citizens are abused or attacked anywhere in the world, on the direct orders of a hostile regime, we will respond so long as I'm in the Oval Office. Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight -- a mission fully consistent with Article 51 of the U.N. Charter.[1]

This legally and factually accurate portrayal of U.S. actions supportive of international law rights and duties stands in sharp contrast to less careful Administration statements concerning possible U.S. reprisal and retaliation made in the weeks prior to and following the 15 April response. The U.S. must foster an internationally cooperative regime of law rather than a regime of retribution in which change is driven through punishment. The "eye for an eye" approach of certain nations, for example, has promoted rather than lessened international violence. Statements reflecting a lack of care in articulation on the part of our officials may not represent the underlying rationale behind our actions, but they have a significant impact on the perceptions of lesser developed nations, where legal principles are often literally interpreted. Because we believe in the rule of law, we must ensure that our words reflect that concern. When we deal with terrorism, we are often dealing with Arab states where rhetoric is an important aspect of their diplomacy. We cannot shape or challenge that rhetoric effectively if ours is equally unrepresentative of our own belief system.

A second area of needed improvement concerns our coordination with the allies. Here, the Libyan action provides a positive example. In the past, U.S. actions often caught the allies off-guard and made subsequent response unsupportable, no matter how valid. The mining of Nicaraguan waters is one recent example. In this instance, however, Ambassador Walters' visit to our major European partners established the U.S. rationale in advance of

the defensive action and provided the contours of U.S. policy objectives as well as the operational parameters of the response. This effort paid off handsomely as the European Community council of ministers supported our initiative against Libya with one of its own on 21 April and then endorsed a call for cooperation in isolating terrorist sponsors at the Tokyo Economic Summit in early May.

Third, the effect of the Administration decision to publicize the intercepted cables linking Kaddafi and Libya to the 5 April bombing in West Berlin emphasizes the importance of generating community support for our actions. Not since Secretary of State Rusk published photographs of Soviet offensive missiles in Cuba in 1962 has one act had such an immediate impact in terms of international consensus. Certainly, such decisions regarding release of information can impair intelligence sources and capabilities. Nevertheless, a careful balancing must occur in each instance of terrorist violence and evidence provided whenever possible. The conclusions of the community of nations in this instance were highly persuasive as to both the necessity and the reasonableness of the unilateral determination of national self-defense made by the United States.

Finally, the air strikes on Tripoli and Benghazi emphasize that U.S. efforts to resolve the underlying concerns in areas spawning terrorist violence must be increased. Since the real purpose of international law is to preclude violence through the peaceful resolution of interstate disputes, our primary focus must be the eradication of inequities which

preclude the effective use of lawful non-coercive measures. While pariah regimes such as Kaddafi's will always exist, they can be successfully isolated only if the moderate and responsible states in the region perceive a greater justice in condemning Kaddafi's violence than in condemning, for example, the violation of those Palestinian rights which he champions. The Soviet Union has taken full advantage of perceived U.S. complicity in the failure to accord the Palestinians the rights demanded by United Nations resolutions. The problem is one of fostering an understanding that longterm security for the U.S. and other economically powerful nations requires that we not be selectively indifferent to our professed legal, moral and political values and to our obligations as members of the United Nations.

NOTES

Chapter I

1. Public Report of the Vice President's Task Force on Combatting Terrorism (Washington: G.P.O., Feb. 1986), p. 2. (hereinafter Public Report)

2. George Shultz, Low-Intensity Warfare: The Challenge of Ambiguity, Current Policy No. 783 (Washington, D.C.: U.S. Department of State, Jan. 1986), p. 1.

3. Id.

4. See the survey and critique of U.S. actions in N.C. Livingstone. "Taming Terrorism: In Search of a New U.S. Policy," International Security Review, no. 7 (Spring 1982), p. 17.

5. Quoted in "Preemptive Anti-Terrorist Raids Allowed," Washington Post, April 16, 1984, p. A-19.

6. Robert C. McFarlane, "Terrorism and the Future of Free Society," speech delivered at the Defense Strategy Forum, National Strategic Information Center, Washington, D.C.: March 15, 1985.

7. Public Report, p. 7.

Chapter II

1. Report of the Ad Hoc Committee on International Terrorism, U.N.G.A., 28th Session, Supplement no. 28 (A/9028) (New York: United Nations, 1973), p. 350.

2. Ibid., p. 352.

3. Ray Cline and Yonah Alexander, State-Sponsored Terrorism, Report prepared for the Subcommittee on Security and Terrorism for the use of the Committee on the Judiciary, U.S. Senate (Washington: G.P.O., 1985), p. 40.

4. Carl von Clausewitz, On War, vol. 1, trans Colonel S.S. Graham (London and Boston: Routledge, Kegan Paul, 1969), pp. 2, 23.

Chapter III

1. Public Report of the Vice President's Task Force on Combatting Terrorism (Washington, D.C.: G.P.O., Feb. 1986), p. 4.

2. Id.

3. See Neil C. Livingstone and T.E. Arnold, "The Rise of State-Sponsored Terrorism" in N.C. Livingstone and T.E. Arnold, eds., Fighting Back (Lexington, Mass: Heath, 1985), pp. 11-24.

4. Brian M. Jenkins, "The Lesson of Beirut," paper presented to members of the DoD Commission on the Beirut International Airport (BIA) Terrorist Act of 23 October 1983, 17 Nov. 1983, p. 3.

5. Dr. James B. Motley, "Terrorist Warfare: Formidable Challenges," Fletcher Forum, vol. 9, no. 2, Summer 1985, p. 297.

6. Livingstone and Arnold, p. 13.

7. See "Soviet, East German and Cuban Involvement in Fomenting Terrorism in Southern Africa," Report of the Chairman of the Subcommittee on Security and Terrorism to the Committee on the Judiciary, United States Senate, Ninety-Seventh Congress (2nd Session), November 1982, p. 2. (hereinafter Report)

8. Chester Crocker, Asst. Secretary of State for African Affairs, described these interests in an important policy address to the American Legion in Honolulu on 29 August 1981. He described Southern Africa as a "key region" requiring a carefully considered and sophisticated policy in order to advance U.S. interests.

9. Id.

10. George Shultz, Low-Intensity Warfare: The Challenge of Ambiguity, Current Policy No. 783 (Washington, D.C.: U.S. Department of State, 1986), p. 1.

11. Ray Cline and Yonah Alexander, Terrorism as State-Sponsored Covert Warfare (Fairfax, Va.: Aero Books, 1986), p. 15.

12. See J.P. Terry, "The Iranian Hostage Crisis: International Law and U.S. Policy," JAG Journal, vol. 32 (Summer 1982), pp. 31-79 for a careful examination of the legal aspects of the crisis.

13. See, e.g., Alvin H. Bernstein, "Iran's Low Intensity War Against the United States," study prepared for the Heritage Foundation, September 1985.

14. See U.S. Department of State, The Libyan Problem, Special Report No. 111 (Washington, D.C.: U.S. Department of State, 1983), p. 4.

15. Cline and Alexander, Terrorism as State-Sponsored Covert Warfare, p. 17.

16. Supra, note 14.

17. New York Times, Dec. 30, 1984, p. 2.

Chapter IV

1. Brian Jenkins. "The U.S. Response to Terrorism: A Policy Dilemma," Armed Forces Journal International, April 1985, p. 44.

2. Robert C. McFarlane, "Terrorism and the Future of Free Society," speech delivered at the Defense Strategy Forum, National Strategic Information Center, Washington, D.C., March 15, 1985.

3. George Shultz, Low-Intensity Warfare: The Challenge of Ambiguity, Current Policy No. 733 (Washington, D.C.: U.S. Department of State, 1986), p. 1.

4. Public Report of the Vice President's Task Force on Combatting Terrorism (Washington, D.C.: G.P.O., Feb. 1986), p. 7.

Chapter V

1. U.N. Charter, June 26, 1945, 59 Stat. 1031, Treaty Series No. 993.

2. See League of Nations Covenant, June 28, 1919, Bevans, vol. 2, no. 46, 1919 at Part 5.

3. Myres McDougal and Florentino Feliciano, Law and Minimum World Public Order (New London: Yale Univ. Press, 1961), pp. 142-143.

4. See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 1615, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter cited as Declaration on Friendly Relations]; Definition of Aggression, G.A. Resolution 3314, 29 GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974) [hereinafter cited as Definition of Aggression].

5. The Declaration on Friendly Relations includes the following provisions:

> A war of aggression constitutes a crime against peace for which there is responsibility under international law. Every state has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes....
>
> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries for incursion into the territory of another State.
>
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State....
>
> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.
>
> No State shall organize, assist, ferment, finance, incite or tolerate subversive, terrorist or armed activities towards the violent overthrow of the regime of another State.

6. "By accepting the respective texts [of the Declaration on Friendly Relations], states have acknowledged that the principles represent their interpretations of the obligations of the Charter." Resinstock, "The

Declaration of Principles of International Law Concerning Friendly Relations: A Survey," American Journal of International Law, vol. 65, pp. 713, 715 (1971).

7. Definition of Aggression, supra note 4 at p. 142.

8. These include under article 3:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapon by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State, for perpetrating an act of aggression against a third State;

(g) The Sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

9. A fundamental purpose of the U.N. Charter is to "maintain international peace and security." U.N. Charter, Article 1, para. 1. Article 5(2) of the Definition of Aggression supra note 4, provides: "A

war of aggression is a crime against international peace. Aggression gives rise to international responsibility."

10. See supra notes 4, 5 and 9.

11. Report of DoD Commission on Beirut International Airport (BIA) Terrorist Act of 23 October 1983, 20 December 1983, p. 141.

12. See statement of U.S. Secretary of State, American Journal of International Law, vol. 68, 1974, p. 736.

13. 46 Stat. 2343, Malloy (Trenwith) Treaties, vol. 1, no. 5130, Aug. 27, 1928.

14. See generally M. Whiteman, International Law, vol. 5 (Washington, D.C.: G.P.O., 1965), pp. 971-1175.

15. George Shultz, Low-Intensity Warfare: The Challenge of Ambiguity, Current Policy No. 783 (Washington, D.C.: U.S. Department of State, 1986), p. 3.

16. Myres McDougal, "The Soviet Cuban Quarantine and Self-Defense," American Journal of International Law, vol. 57, 1963, p. 600.

17. John Bassett Moore, A Digest of International Law, vol. 2 (Washington, D.C.: G.P.O., 1906), p. 409.

18. Charles C. Hyde, International Law, vol. 2, 2d rev. ed. (Boston: Little, Brown, 1945), p. 107.

19. J.B. Moore, vol. 2, p. 412.

20. See W.T. Mallison, Jr., "Limited Naval Blockade or Quarantine Interdiction: National and Collective Self-Defense Claims Valid Under International Law," George Washington Law Review, vol. 31, 1962, pp. 335-398 for a more complete discussion of this issue.

21. The quotation is taken from a State Department legal memorandum entitled "Participation in the North Atlantic Treaty of States Not Members of the United Nations," printed in Hearings Before the Senate Committee on Foreign Relations on the North Atlantic Treaty, 81st Congr., 1st Sess., exec. L., Pt. 1 at 101, 102 (1949).

22. W.T. Mallison, Jr., p. 349

23. Myres McDougal and Florentino Feliciano, Law and Minimum World Public Order (New London: Yale Univ. Press, 1961), p. 242.

24. See Security Council discussion in 36 U.N. SCOR (2285-2288 mtgs.), U.N. Docs. S/PV 2285-88 (1981).

25. J. Ashley Roach, "Rules of Engagement," Naval War College Review, vol. XXXVI, Jan.-Feb. 1983, p. 46.

Chapter VI

1. George Shultz, "Terrorism and the Modern World," speech delivered to Park Avenue Synagogue, N.Y. City, Oct. 25, 2984.

2. Hugh Tovar, "Low-Intensity Conflict: Active Responses in an Open Society," paper prepared for the Conference on Terrorism and Other "Low-Intensity" Operations: International Linkages, Fletcher School of Law and Diplomacy, Medford, Mass., April 1985.

3. George Shultz, Low-Intensity Warfare: The Challenge of Ambiguity, Current Policy No. 783 (Washington, D.C.: U.S. Department of State, 1986), p. 2.

4. William R. Farrell, "Responding to Terrorism: What, Why and When," Naval War College Review, vol. XXXIX, Jan.-Feb. 1986, p. 51.

5. Abraham H. Miller, "Terrorism and Hostage Taking: Lessons from the Iranian Crisis," Rutgers Law Journal, vol. 13, 1982, p. 523.

6. Farrell, p. 51.

7. George Shultz, p. 2.

8. The rules of land warfare are found primarily in Hague Convention IV of 1907.

9. George Shultz, p. 3.

10. Law in the context of the world political process is examined in depth, for example, by Myres McDougal and Dr. Feliciano, Law and Minimum World Public Order (New London: Yale Univ. Press, 1961).

11. Marjorie Whiteman, Digest of International Law, vol. 1 (Washington, D.C.: G.P.O., 1963), pp. 1-2.

12. See J.P. Terry, Soviet Intervention: The Relationship Between Law and Power, Chapter 6 of dissertation completed at National Law Center, George Washington University, Washington, D.C., 1982, for a full discussion of this perspective.

13. Norman Kempster, "Cables Cited as Proof of Libyan Terror Role," Los Angeles Times, April 15, 1986, p. 1.

14. "Targeting a Mad Dog," Newsweek, April 21, 1986, p. 25.

15. "Attack on Libya: The First Word," New York Times April 15, 1986, p. 7.

16. Cited in Kempster, p. 1.

17. Id

18. Joseph Lelyveld, "Britain Cites Evidence of Libyan Role," New York Times, April 19, 1986, p. 4.

19. F.S. Dionne, Jr., "Italy Chief Vows Severe Response to Libyan Terror," New York Times, April 20, 1986, p. 1.

20. "Transcript of Address by Reagan on Libya," New York Times April 15, 1986, p. 7.

21. Larry Speakes' April 14, 1986 statement paraphrased in "Attack on Libya: The First Word," p. 7.

22. Larry Speakes quoted in Bernard Gwertzman, "U.S. Says Libyans Around World Are Plotting to Attack Americans," New York Times, April 15, 1986, p. 2.

23. Quoted in Bernard Weinraub, "U.S. Says Allies Asked for More in Libya Attack," New York Times, April 22, 1986, p. A-1.

24. Id

25. Richard Bernstein, "European Community Agrees on Libya Curbs," New York Times, April 22, 1986, p. A-8.

26. President Ronald Reagan, speech before ABA Convention on April 16, 1986, quoted in Time, April 28, 1986, p. 23.

27. "Hitting the Source," Time, April 28, 1986, p. 24.

28. Dan Rather, CBS Evening News, 22 April 1986 citing unnamed Pentagon source.

29. "Hitting the Source," p. 24.

Chapter VII

1. "Transcript of Address by Reagan on Libya," New York Times, April 15, 1986, p. 7.

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