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Terror and Terrorism: There is a Difference

DAVID F. FORTE*

I.

When American F-111 fighter bombers delivered their ordnance to military and terrorist training targets in Libya, they were not merely attacking Libya militarily. They were defending the international legal order by helping to refine what had become a muddied principle of international law. Of course, the initial dismay of the allies, save one; the predictable denunciations from the enemies of the West; and the guarded and sometimes grudging approval of the American press obscured what had been done. Nevertheless, diplomacy is the primary means of enforcing the international legal order, and force but an adjunct. If the Administration can correct the ill effects of its secret negotiations with Iran, the salutary effect of the American military response against Libya may yet bear fruit, for that raid began to resolve the confusion between acts of terror and acts of terrorism, and the appropriate legal response to each.¹

Consider the following.

— In April, 1986, in Los Angeles, Richard Ramirez was charged with fourteen murders, five attempted murders, seven rapes, fifteen other sexual offenses—three with children—two kidnappings, nineteen burglaries, and six robberies. Ramirez was thought to be the notorious “Night Stalker,” a man “whose reign of crime spread terror across Southern California for six months,” the Associated Press reported.² With that type of incident, terror was the apt description.

— During World War II, allied forces bombed Dresden and many Japanese cities with incendiaries. The resulting firestorms killed thousands of civilians. Allegedly, the attacks were accomplished for the purpose of terrorizing the populace in order to hamper the enemy’s war effort, and to place pressure on the enemy political leadership

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1. See, e.g., the diplomatic success of the United States at the Tokyo Summit. 7 *Summit Leaders Condemn Terror, Citing Libyan Role*, N.Y. Times, May 6, 1986, at 1, col. 6.

2. *Chilling Courtroom Drama Unfolds In Night Stalker Case*, Associated Press (available Apr. 21, 1986 on NEXIS, File: WIRES).

to end the conflict.³

— In October, 1983, over two hundred and fifty U.S. Marines were killed in their barracks in Beirut by a solo suicide attacker in a truck filled with explosives. President Reagan later declared: "Every effort will be made to find the criminals responsible for this act of terrorism so this despicable act will not go unpunished."⁴

— In October, 1985, Palestinian gunmen seized an Italian cruise ship, the *Achille Lauro*. They killed an American who was confined to a wheelchair. Later, the perpetrators were apprehended when the Egyptian aircraft, that was transporting them to Tunis, was diverted by the United States to Sicily. Their leader, however, escaped prosecution.⁵

— In March, 1978, former Italian Premier Aldo Moro was kidnapped by members of terrorist Red Brigade. They later shot Moro after the Italian government refused his abductors' demands to free a number of jailed terrorists.⁶

— In late 1985, Senator Bill Bradley (D., New Jersey) condemned the carpet bombing of Afghan villages by Soviet bombers and gunships. He declared: "The genocide in Afghanistan is one more appalling episode in a historical pattern of Soviet terror, and the world must now forcefully oppose it."⁷

— A number of protesters to American aid for the Nicaraguan armed opposition, the Contras, have asserted that Contra soldiers engage in terroristic acts against the Nicaraguan civilian populace.⁸

— An entire period of the French Revolution is known as "The Terror," a term used by the Terror's own leaders and by subsequent historians.⁹ A similar label is attached to the Stalinist era in the Soviet Union.¹⁰

— The common law knows of "in terrorem" clauses, which are

3. D. IRVING, *THE DESTRUCTION OF DRESDEN* (1963).

4. President Reagan, remarks and questions-and-answer sessions made to regional editors and broadcasters, White House, Oct. 24, 1983. Excerpts published in 83 DEP'T OF STATE BULL. 41 (Dec. 1983).

5. Walcott, *You Can Run But You Can't Hide*, NEWSWEEK, Oct. 21, 1985, at 22.

6. *Terror Gangs; Is Anyone Safe?*, U.S. NEWS & WORLD REP., May 22, 1978, at 30.

7. Bradley, *Captive Afghanistan, 6 Years Later; Fighters Need U.S. Aid*, N.Y. Times, Dec. 27, 1985, at A31, col. 2.

8. *Demonstrators Urge No Aid to Contras as House Prepares to Reconsider*, Associated Press (available Apr. 15, 1986 on NEXIS, file: WIRES); *Washington Dateline*, Associated Press (available May 19, 1986 on NEXIS, file: WIRES).

9. R. PALMER, *TWELVE WHO RULED: THE YEAR OF THE TERROR IN THE FRENCH REVOLUTION* (1941).

10. B. LEVYTSKY, *THE STALINIST TERROR IN THE THIRTIES: DOCUMENTATION FROM THE SOVIET PRESS* (1974).

unenforceable provisions in contracts or wills designed to compel adherence to the terms of the document by fear of serious financial reprisal.¹¹ "In *terrorem populi*" was a common-law criminal offense defined as going about armed despite the absence of riot or violence.¹² On the other hand, the law has approved the *in terrorem* principle as a legitimate basis for punishments for crime or contempt.¹³

II.

It is clear that all acts of terror seek to inspire dread and to paralyze the will of the immediate or ultimate victim to resist the objectives of the perpetrator.¹⁴ It is also clear, however, that some acts of terror are legitimate, while those that are not legitimate can be illegal under differing legal structures. Legitimate legal penalties such as imprisonment or death can inspire terror, as can justifiable military actions in war directed at enemy armed forces and designed to demoralize them. Even suicide missions against an armed force can be legitimate. For example, except for the fact that the driver of the truck bomb did not wear an insignia identifying him as an armed insurgent, his attack against the Marine barracks in Beirut was probably not illegal under international law since the Marines were dispatched into a civil war and insurgency situation.

Illegal acts of terror are another matter. Those acts of terror that are contrary to law are so under differing legal regimes. Municipal law proscribes and punishes individual acts of terror. The laws of war regulate others. Certain customary and treaty norms deal with other kinds of state-imputed acts of terror. Yet what has confused lawmakers, what has carried policy makers to rhetorical excess, and what has frustrated the American people, has been the failure to distinguish the different kinds of acts of terror, the different levels of culpability they incur, and the different forms of appropriate legal response.

The attempt to homogenize acts of terror and to universalize penalties attached to them has resulted in a burst of legislative and prescriptive activity that has only served to confuse and often to dilute the response to terror. A recent study on terrorism listed eleven definitions of terrorism put forward by the executive and legislative branches, and by some states.¹⁵ There are, at this writing, forty-six bills pending in Congress dealing directly with terrorism.¹⁶

11. BLACK'S LAW DICTIONARY 735 (5th ed. 1979).

12. *State v. Shepherd*, 177 Mo. 205, 228, 76 S.W. 79, ____ (1903).

13. *Commonwealth v. Runnels*, 10 Mass. 518, 520 (1812).

14. R. FRIEDLANDER, *TERROR-VIOLENCE: ASPECTS OF SOCIAL CONTROL* (1983).

15. R. S. CLINE & Y. ALEXANDER, *TERRORISM AS STATE-SPONSORED COVERT WARFARE* 21 (1986).

16. Available on LEXIS/NEXIS terminal, Library: REFSRV; File: BLCAS; Search Request: Terror! (Sept. 29, 1986).

The problem is that—legislatively and historically—we have often tried to deal with acts of terror as if they were neutral, fungible, and universal evils. They are not. Certain acts of terror, whether committed by robbers, rapists, or even soldiers, are individualized evils, and can be criminalized as such. But much of terror today is more than that. Terror has become a practice. It has truly become *terrorism*, the systematic and primary use of randomly focused violence by organized groups against civilian targets to effectuate a political objective.¹⁷ Modern terrorism is more than a neutral evil. It has a particular political and moral content.¹⁸ It is the difference between terror and terrorism that we must examine.

Bluntly put, the target of the modern terrorist is the Western legal system and its human rights underpinnings. Laws that treat all acts of terror as indistinguishable fail to focus on the peculiar evil that these acts of *terrorism* represent. If we deal with the modern terrorist solely by means of legal principles that lump him in with other agents who may commit acts of culpable or even of legitimate terror, we shall have constrained the justifiable use of force against groups that may be truly at war with the United States and its allies throughout the world. More importantly, the idea of universalizing the condemnation of acts of terror serves to undercut the significant *moral distinction* between those who commit one or more acts of terror and those who do so in a programmatic fashion. Long ago, Aristotle noted the moral distinction between one who commits an unjust act, and one who acts unjustly.¹⁹ That distinction applies to terrorists as well.

III.

Let us look at the problem from the perspective of international law and how it treats and responds to organized groups whose acts of violence include terror. Basically, there are three kinds of these groups: formal armed forces, organized partisan units, and the classic modern terrorist movement.

In the first category are armies. By definition, armies are arms of the state, and, consequently, their action is imputed back to the state. Accordingly it is the state which bears the ultimate responsibility for any illegal excess committed by its armed forces. Through the 1949 Geneva Conventions, international law essentially protects non-combatants²⁰ and prisoners of war²¹ from direct attack or intentional

17. R. FRIEDLANDER, *supra* note 14, at 21.

18. Address by Secretary of State Shultz, Park Avenue Synagogue, New York City, Oct. 25, 1984. *Terrorism and the Modern World*, 84 DEPT OF STATE BULL. 12 (Dec. 1984).

19. ARISTOTLE, *THE NICOMACHEAN ETHICS*, Section VI, 187 (1134a 6-23) (J. Thomson trans. 1980).

20. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 29, 6 U.S.T. 3516, 3538, T.I.A.S. No. 3365.

21. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12,

harm. On the whole, organized armies observe these rules. Yet, every army sometime or other, in some conflict, has units or soldiers breaking these rules. For example, in general, the Geneva Convention to protect prisoners of war was observed during World War II by the West and by Germany. However, it was egregiously violated by the Soviet Union and Japan. Further, the requirement not to attack civilians was again mostly observed by the West, with some exceptions mainly arising from aerial bombardment. On the other hand, this requirement was seriously violated by the Soviet Union and Japan, and was systematically and intentionally violated by Germany.

World War II demonstrates that all armies at war have on occasion used actions that were designed to cause terror among civilians. Nonetheless, we would not term Great Britain or the United States a terrorist state in the sense that it uses terror as a primary and systematic means for political maintenance of internal power and of external influence. On the other hand, the Third Reich, the Soviet Union and Mao's China have all used terror as a primary means of internal control and external expansion. Therefore, we are permitted to make a rational and moral judgment as to whether a state is generally observant of the proper rules of international conflict, despite some failings, or whether the state systematically or recklessly disregarded those rules, in which case we can impute to the state an enmity to the values underlying those rules. This is central to our understanding of and dealing with, such wrongs. We know from history that the Soviet Union has a fundamental animosity and antipathy to those human rights values that are codified in the Geneva Conventions protecting civilians and prisoners of war. We know that the United States and Great Britain, though their armies at times have violated these rules, stand on a different moral posture.

What are the remedies for terroristic violations of the laws of war? As in most issues dealing with international law, the most common remedy is diplomacy. Repeated protests, incessant reaffirmations, and confirmatory actions can assist in creating a diplomatic atmosphere where the proper practice of the rules of war can become habitual. For example, after a brief and unfortunate hesitation, the United States has clearly let Iraq know that the use of chemical agents in its war with Iran is unacceptable and illegal.²² Further, the United States has apparently done what it can to try to prevent Iraq from being able to obtain and to use such agents. Allied to diplomacy, publicity is another means for attempting to make sure states observe the rules of war.

A further mechanism for enforcement is internal discipline. A state is required through its own municipal law to punish those of

1949, art. 12, para. 1, 6 U.S.T. 3316, 3328, T.I.A.S. No. 3364.

22. *U.S. Fears Iran May Use Chemical Arms*, N.Y. Times, Apr. 25, 1985, at A3, col. 4.

its soldiers who have violated the proper rules of war.²³ Beyond these mechanisms lie other means of relief. At a more serious level of enforcement, the victim state may engage in permissible acts of retaliation such as the responsive use of chemical agents.²⁴ Finally, in the most extreme situations, a systematic practice of attacking civilian populations may engender a charge of committing a crime against humanity, thus permitting trials such as those that took place at Nuremberg.²⁵

A second kind of group which may engage in acts of terror are organized partisans. These are traditionally resistance groups operating within an occupied territory. Partisans enjoy the same rights and are obligated by the same rules of international warfare as are organized armies. They must carry some external sign of their combat status, and they must treat prisoners and civilians in a humane way. During World War II, such partisans attacked military targets, but they also shot informers and collaborators and they could not, of course, take prisoners. The remedy for such excesses usually lies in the hands of the military force engaged in occupation duty. Organized partisan units are supposed to be accorded prisoner of war protections, but in fact they usually are not. If found out of uniform, by informers or by other means, they can legitimately be tried and shot. Internal discipline, though available, is more problematical. There is no example I can think of where a partisan unit, such as the French Maquis, for example, was disciplined by the returning political power for whom they had fought.

We can now see that in these first two examples of excesses by organized military units, the remedies are usually found in diplomacy, or internal discipline, or retaliation by the offended party.

Let us now turn to the classic terrorist as we have known him in the last two decades. Generally speaking, there is no external sign showing him to be part of a partisan military unit. His objectives include attacks on soldiers, political leaders, and those who cooperate with the government. But his primary objective is to attack civilians in order to terrorize and cripple the will of the target government. The most appropriate remedy for dealing with terrorists is to treat them for what they are—as criminals who violate municipal

23. First Lieutenant William Laws Calley, Jr., was convicted on March 29, 1971 of murdering unarmed Vietnamese civilians during the Vietnam War, in violation of Article 118 of the Uniform Code of Military Justice. See R. HAMMER, *THE COURT-MARTIAL OF LT. CALLEY* (1971).

24. Prohibition of the Use in War of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061. (Reservations added. Protocol ratified December 16, 1974 with reservation entered into force for the United States on April 10, 1974.)

25. See G. F. A. BEST, *NUREMBERG AND AFTER: THE CONTINUING HISTORY OF WAR CRIMES AND CRIMES AGAINST HUMANITY* (1984).

law.²⁶ Most Western states utilize their domestic legal methods to capture, prosecute and punish terrorists. What we have found in the last twenty years, however, is that the ordinary criminal processes of Western states are inadequate to deal with the international character of terrorism as it has come to be. Consequently, four remedies are employed to polish the criminal law so that it can effectively deal with the terrorist, and at the same time, treat him as a criminal.

The first remedy is to try to perfect the extradition mechanism between states. This has been evidenced in a number of Conventions, such as the European Convention on Terrorism,²⁷ and the Montreal,²⁸ Hague,²⁹ and Hostage Taking Conventions.³⁰ At the same time, it has led to a movement to try to limit the political offense exception to extradition so that these types of politically violent acts cannot escape criminal prosecution. The most prominent example is the renegotiated extradition treaty between the United States and Great Britain.³¹

The second attempted remedy has been to try to institutionalize pressure on those states that are reluctant to deal with these terrorists as criminals within their own legal systems. This objective led to the Tokyo,³² Montreal,³³ Hague,³⁴ and Hostage Taking Conventions.³⁵ The latter three, of course, declare that if a terrorist is found within one of the signatory states, that state must subject him to its criminal processes, or extradite him to another state otherwise having jurisdiction over him.³⁶

The third method of dealing with terrorists as criminals has been to expand domestic jurisdiction. The United States has enacted a number of pieces of legislation extending extraterritorial jurisdiction over

26. R. FRIEDLANDER, *supra* note 14, at 72.

27. European Convention on the Suppression of Terrorism, Council of Europe, Nov. 10, 1976, *reprinted in* R. FRIEDLANDER, 2 TERRORISM DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 565 (1979).

28. Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, art. 8, 24 U.S.T. 565, 571, T.I.A.S. No. 7570 [hereinafter Montreal Convention].

29. Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, art. 8, 22 U.S.T. 1641, 1646-47, T.I.A.S. No. 7192 [hereinafter Hague Convention].

30. U.N. Doc. A/C.6/34/L.23, art. 10, 1460-61.

31. *Supplementary Extradition Treaty Between the United States and the United Kingdom of Great Britain and Northern Ireland: Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate*, 99th Cong., 1st Sess. (1985).

32. Aviation: Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

33. Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

34. Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.

35. U.N. Doc. A/C.6/34/L.23.

36. Montreal Convention, *supra* note 28, art. 7 at 571. Hague Convention, *supra* note 29, art. 7 at 1646. Hostage Taking Convention, *supra* note 30, U.N. Doc. A/C.6/34/L.23, art. 8 at 1460.

hostage-taking acts, and terrorist acts on airplanes.³⁷ Recent Senate debate called for the Attorney General to reach beyond the country's border to deal with those who murder American citizens anywhere in the world.³⁸

The fourth level has been to try to define terrorism as a form of universal criminality whereby every state in the world may capture and try terrorists.³⁹ The extent to which the permission to capture terrorists includes intervening in the territory of jurisdiction of other states is a proposition hotly debated. Although Senator Specter supports this proposition, Judge Sofaer, the State Department's Legal Adviser, has declared that certain kinds of Eichmann-like apprehensions might be contrary to international law.⁴⁰

All of these actions have been beneficial. We have to make good our view that the terrorist is fundamentally a criminal. But in facing the political facts, it is evident that these reforms have been directed more at the symptoms or results of modern terrorism rather than at its causes. Even if successful, all that these legislative enactments will do is give a wider range of enforcement jurisdiction over the terrorist once he is captured, or they will give greater permission for a pursuing state to capture him. Removing the cause of terrorism is another issue. Finding the cause of terrorism is another issue. However, I do not mean to use the words, "the cause of terrorism" in the sense often heard in the United Nations, where assertions are voiced that Zionism, apartheid, and colonialism are the primary causes of terrorism. No, the cause of modern terrorism can be seen in itself, not in its exculpatory rhetoric.

IV.

Modern terrorism has a particular and consistent character. In terms of the means used by terrorists, in terms of the objective of terrorism, and in terms of the ideology of terrorism, there is one undeviating constant. It is the systematic use of *totalitarian force*. Terrorism, whether Lenin practiced it from the seat of government, or whether somebody with a bomb practices it on an airplane, is the same. It is designed to paralyze the ordinary daily lives of everyday people; it is designed to make them vulnerable and malleable within the hands of an outside power; it is designed, in other words, to

37. Hostage-Taking Act, 18 U.S.C.S. § 1203 (Law. Co-op. 1984 & Supp. 1986); Aircraft Sabotage Act, 18 U.S.C.S. § 32 (Law. Co-op. 1984).

38. See, e.g., remarks of Sen. Lautenberg, 132 CONG. REC. S1428-29 (daily ed. Feb. 19, 1986).

39. See Address by President Reagan before the American Bar Association, Washington, D.C., July 8, 1985. *The New Network of Terrorist States*, 85 DEPT OF STATE BULL. 7 (Aug. 1985).

40. Gwertzman, *Shultz Backs 'Moderate Force' Against Terrorists*, N.Y. Times, Mar. 14, 1986, at A8, col. 4; Specter, *How to Make Terrorists Think Twice*, N.Y. Times, May 22, 1986, at A31, col. 1.

make them totally at the mercy of him who wields the force. In short, terrorism is totalitarianism on the cheap. Consequently, we make an error if we attempt to deal with terrorism solely on the basis of expanding the mechanism of criminal enforcement. This is because terrorism is not merely a politically violent form of criminality. Terrorism today is one aspect in an actual shooting war against the West.

Terrorist groups and their direct state sponsors are independent actors with independent moral and legal responsibility for their acts. Yet, a fundamental anti-Western ideological stance permeates virtually all of them. It is significant that most thorough analyses have shown that when it comes to terrorist actions, virtually all roads eventually wind their way back to Moscow, not necessarily in terms of direct control, but in terms of support, training, or of ideological compatibility.⁴¹ Whether it be through the Bulgarians, the North Koreans, the Nicaraguans, the Cubans, the Syrians, or the Libyans, the Soviet Union maintains a constant supply of arms, training and encouragement to terrorist groups who act against Western institutions. There is a conscious alliance of ideology and opportunity, in many cases an alliance only of convenience, using this mechanism to wage war. But there is an alliance.

Let us take a frank look at the bipolar struggle and the terrorist component so that we neither underestimate nor exaggerate the Soviet role. In its rivalry of and enmity to the West, the Soviet Union is attempting either to discredit, undermine, or simply overwhelm those aspects of Western resolve, Western economy, and Western military policy, but at low risk to the Soviet Union. One does not have to be apocalyptic to acknowledge the fact that Soviet competition with the West has reached an armed combat stage at certain localized points. The U.S.S.R. much prefers proxies or allies when battle must be joined, and it much prefers a conventional military solution over any other. Its massive aid to Nicaragua, Vietnam, Ethiopia, and Angola, and its own strategy in Afghanistan, are designed to overwhelm resistance groups by the application of large conventional forces and weaponry. Last year offensives in Cambodia, Nicaragua and Angola were all designed to defeat the insurgencies there before American aid could reach the rebels.

There are two other military options available besides the conventional: nuclear and terrorist. Because of its emphasis on conventional arms, the Soviet Union does not favor a nuclear confrontation, and would certainly oppose nuclear adventurism by any terrorist-supporting state. Nonetheless, even at the upper extreme of weaponry, the U.S.S.R. seeks nuclear superiority for obvious political objectives. At the lower level (where we are concerned in this article), the Soviet

41. Casey, *The International Linkages—What Do We Know?*, in U. RA'ANAN, *HYDRA OF CARNAGE* 5 (1986).

Union assists and encourages guerrilla and terroristic groups attacking the West. Here too it uses proxies, but with a lesser degree of tactical and political control than even that which it can wield in a conventional war situation.

The proxies, whether they be states or terror groups themselves, operate tactically with much freedom to maneuver. There is an independent act of will. They bear consequent responsibility for acts of terrorism. Thus, in terms of morality, legality, and political prudence, it is perfectly justifiable to deal with these intermediate groups and their state sponsors directly, even if political requirements limit effective response against the Soviet Union.

But how should we do so? Because of this very real military and political context of terrorism, our response is inadequate if we consider it solely in the terms of traditional or even expanded criminality. No, rather we must look at these acts as they are: the use of military force by the state that harbors, equips, and dispatches the terrorist. Consequently, our response to the state that uses terrorists must be at the same level that we would respond to a state that otherwise breaks the rules of war. We may try to use diplomacy, we may try publicity, but in the end we must be willing to use those means, whether they be economic or military, that every state retains in a combat situation where the offending state has broken the rules of war. Specifically, those means are retorsion, retaliation, selfdefense, and protection of one's nationals, all of which allow a different variation on the proper use of force or of economic reprisal. We do ourselves no service by constantly passing laws against the individual terrorist when we fail to take legally appropriate executive action in opposing the state that employs an illegal use of armed force against us. It is for that reason that the raid on Libya was an act vital to the integrity of international law.

V.

Until the raid on Libya, factors associated with the problem of terrorism conspired, and still conspire, to frustrate opportunities to deal with these states in a normal manner permitted by international law. The first of these factors has been alluded to above. The very success in passing conventions, laws and resolutions against terrorism led many to ignore the different legal options already available. The common thread of all these conventions, domestic laws, and United Nations resolutions, is that the terrorist is a fungible evil. The theory is that an act of terror allegedly done by a soldier who was fighting in the Contra army, a village bombing by Soviet gunships in Afghanistan, and a terrorist attack on passengers at the Rome airport are no different.

Now, in a moral sense, it is true that acts of terror are fungible. The soldier in a partisan army that shoots a civilian to cow a village into submission is no less culpable for his acts than the terrorist

that sets a bomb in downtown Belfast. But by passing laws that treat all terrorists' actions as the same everywhere we lose the legitimate distinction between dealing with certain acts violative of the laws of war and certain acts that are individually criminal. There are remedies—as badly enforced as they are—in international law and the rules of war that should be used against the individual soldier who terrorizes a civilian. The criminal remedies we have fashioned for non-uniformed civilians acting as terrorists should be directed at them. Indeed, those individuals that engage in *terrorism*, that is, in an organized and ongoing practice of violent intimidation of civilians should be treated as universal criminals. However, the remedies directed at a state that engages in terrorism as a policy are on a different legal plane. If the terroristic act is a basic part of a *state* policy towards other states, we do not have a problem of mere individual criminality nor simply of universal criminality. We have instead a problem of a violation of the international law regarding the legitimate use of force between states.⁴²

A second factor that has frustrated opportunities to deal with terror-sponsoring states is that the movement to universalize the laws against terrorism tends to confirm the philosophical problem of what has come to be known as moral equivalence. One of the faults of part of the political cognoscenti in this country has been to presume that an action done by the Soviet Union and similar action done by the United States are *ipso facto* of the same moral equivalent. Even criticisms of the Soviet Union's actions in Afghanistan are sometimes stated as being comparable to the United States' role in Vietnam, as if U.S. actions provide the standard of evil from which we can judge Soviet actions.⁴³ In point of fact, as I have stated above, the state-sponsored terrorist's act of blowing up the airports in Vienna or Rome, and the individual soldier's excessive action are of different legal orders. The terrorism in Vienna and Rome is an essential part of the entire program of a political entity. Ultimately, there is a moral difference between a culpable and condemnable action in a war and culpable terroristic action that is essentially part of a political program. The fact that we have tried to universalize the attitude toward terroristic acts anywhere makes us lose the moral distinction between what is essentially evil and what is, in an Aristotelian sense, incidentally evil. That being the case, today we have criticisms of the Contras because some of the Contras have apparently at sometime or another committed acts that were terroristic in nature, as if these Contras are no different from the Khaddafi or Khomeini terrorists that we are trying to deal with elsewhere in the world. This confuses necessary distinctions that must be made in order to choose a policy

42. See Address by President Reagan, *supra* note 39.

43. Lewis, *Abroad at Home: In the Afghan Tunnel*, N.Y. Times, June 23, 1980, at A23, col. 5.

that is both effective and moral in a world of imperfect political actors.

The third factor that has undermined an effective response to state terrorism has been the relatively successful attempt in international forums to legitimize those terroristic excesses done by civilians when done for a particular cause. The view of the West should be that all acts of terror are culpable, although they may be culpable in different contexts—under domestic criminality, or under universal criminality, or under the laws of war—and they may have different intensities of evil to be judged when making unavoidable political choices. However, what the Marxists and their allies in the United Nations have done is to reverse logic by treating the particular form of violence that we know of as modern terrorism as legitimate, and treating the counteractions of those states defending themselves as illegitimate.

Those "national liberation movements" that are favored are seen to be legitimized by a most peculiar notion of self-determination. The original concept of self-determination signified an ongoing process of governmental accountability to its people. The new concept of self-determination allows terroristic groups of a certain favored ilk to use their own means to accomplish a particular political end—that end having very little to do with the ultimate political will of the people, and still less to do with the accountability of the governments that come to power as the result of the success of these national liberation movements. Consequently, an attempt at retaliation against a state, or even an attempt at retaliation against a group itself that is favored by the United Nations under this rubric, runs into two problems. First, the retaliation is said to be invalid because it is being used against a group whose struggle is defined as legitimate and whose means are defined as acceptable. Secondly, any excesses that may occur in a state's attempting to counteract terrorism, whether these excesses be by Israel or South Africa or a Western state, are then condemned as being terroristic themselves. All the resolutions condemning the universal nature of terrorism then apply to those states seeking to defend themselves.

In 1985, for example, Israel attacked the PLO headquarters in Tunis in response to a PLO-sponsored terroristic attack in Cyprus against three Israelis. In my view, retaliation against such a group being succored and given sanctuary by a state is legitimate so long as the retaliation is as surgical as possible and does not involve the military forces of the host state which were not involved in the terroristic act to begin with. Israel made an error in its attack in Tunis. On political grounds, Israel erred in that it attacked the PLO in a state that has been consistently moderate and consistently aligned with the West. In addition, Israel may not have used proportionate force; but if it did not use proportionate force, the error was only marginal. What did the United Nations do? The Security Council

vehemently condemned Israel's action as being aggression.⁴⁴ The term aggression has major legal implications, permitting the Security Council to assume Chapter VII jurisdiction, as it did during the Korean conflict, and thereby to authorize military force against the aggressor and to take other mandatory legal actions. Thus, even in cases where a response to terrorism may have been disproportionate, the response of the United Nations has often been to exaggerate the delictual responsibility of the retaliating state.

VI.

CONCLUSION

To formulate an effective legal and moral response to terrorism, fundamental differences must be acknowledged. We must realize that all acts of terror are not legally interchangeable. We should not create legal instruments that confound essential dissimilarities. We should acknowledge that *terrorism* is an organized, low level attack by groups trying to destroy the Western legal and moral order. We should recognize that many such terrorist groups have been given purported legitimacy by a distorted notion of self-determination and by recognition within many international bodies. Also, we should face the fact that the effectiveness of terrorism is immeasurably enhanced by indirect and direct assistance from the Soviet Union, Cuba, North Korea, Syria and others.

To erect an order that can withstand such an attack, all appropriate and legitimate legal resources should be employed. First, individual acts of terror, by whomsoever committed, should be punished, first of all, by municipal criminal legislation. This municipal law should be strengthened by conventions and treaties requiring prosecution or extradition. Second, in addition to individual culpability fastened on soldiers who commit acts of terror, all legitimate responses in international law should be employed by and against the responsible state, including protest, diplomacy, and disciplinary mechanisms. Where the responsible state actually sponsors such actions, retorsion and reprisal should be considered, particularly when a sponsoring state, such as Libya, has egregiously violated the laws of war. Third, the United States should never accept, expressly or impliedly, any of the legal and political mechanisms of the United Nations, or other bodies, that legitimize terroristic groups. Finally, in treating those groups in and of themselves and apart from the legal responsibility of their state sponsors, the United States should concretize the emerging norm of *hostis humanis generis*, that is, the universal criminality of those groups whose acts of terror are primary, habitual, and essential to their political program. These groups have become overt enemies of the political, moral and legal integrity of our world order. They should be recognized as such.

44. U.N. Doc. S/Res/573 (1985).

