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The United States and Nuclear Terrorism in a Changing World: A Jurisprudential View

Louis René Beres*

On Friday, February 26, 1993, a massive explosion caused by a car bomb rocked the 110-story World Trade Center in New York City.¹ Although seven people were killed and more than a thousand injured, the harms generated by this act of terrorism were substantially less catastrophic than what might have happened had the blast been nuclear. Recognizing that we may not be so "lucky" in the future, this Article considers both tactical and jurisprudential aspects of the problem—a problem that may well be the most serious threat to American security in the years ahead.

I. Introduction

Human beings have lived on earth for about 800 lifetimes, most of which have been spent in caves. It should come as no surprise, therefore, that barbarism often molds the terrorist imagination and that limits to terrorist destructiveness are imposed largely by technology. If, in the next several years, terrorist groups should gain access to nuclear explosives, nuclear reactors, or both, the consequences could prove overwhelming.²

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1. Deborah Sontag, *Explosion at the Twin Towers*, N.Y. TIMES, Feb. 27, 1993, at A1.

2. Jurisprudentially, such consequences may constitute "crimes against humanity." For definition of such crimes, see Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (entered into force on Aug. 8, 1945), for the United States on Sept. 10, 1945 for definition of such crimes). The U.N. General Assembly affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal. See *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95(I), at 1144, U.N. Doc. A/236 (1946). This affirmation was followed by Resolution 177(II), directing the U.N. International Law Commission to "(a) Formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, and (b) Prepare a draft code of offenses against the peace and security of mankind." G.A. Res. 177(II), at 112, U.N. Doc. A/519 (1947). The principles formulated are known

With these facts in mind, this Article will examine the growing dangers of nuclear terrorism for the United States and the prospective remedies that might be implemented.³ Beginning with a consideration of the authoritative criteria that distinguish permissible from impermissible forms of insurgency under international law, the Article proceeds to an identification of the threat and behavioral strategies of counter-nuclear terrorism at both national and international levels. Immediately thereafter, an examination of possible forms and effects of nuclear terrorism is undertaken, followed by a close look at preemption from both a jurisprudential and tactical standpoint. This Article concludes with a look at the controversial but increasingly rational consideration of assassination as a lawful strategy of counter nuclear terrorism.⁴

II. Identifying the Terrorists

Who are the terrorists? Operationally, pertinent departments of the government of the United States currently use the following definitions:

as the *Principles of International Law Recognized in the Charter and Judgment of the Nuremberg Tribunal*. U.N. GAOR 4th Comm., 5th Sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950).

3. During the Gulf War, Saddam Hussein spoke menacingly of an ultimate trump card — a terrorist army that could attack U.S. interests everywhere in the world. Bruce Hoffman, *Saddam Hussein's Ultimate Fifth Column—Terrorists*, L.A. TIMES, Aug. 26, 1990, at M2. Should this army be "deployed" in collaboration with supportive Palestinian terrorist figures (e.g., Abul Abbas, Abu Nidal, Ahmad Jabril), the alliance could pose a new and substantial risk of nuclear terrorism. Of course, this risk might be experienced not only by the United States, but also by Israel and the "moderate Arab" regimes which comprised much of the anti-Saddam coalition.

4. In the final analysis, of course, truly effective counter nuclear terrorism, in the fashion of truly effective remedies for international and intranational war, would require a far more profound set of strategies—a retreat from the delirious collectivism that characterizes virtually all human societies. Although inconceivable as a pragmatic remedy, such a retreat—in theory at least—would reveal a rejection of what philosopher Martin Heidegger called *das Mann*, the anonymous mass or crowd that suffocates private growth and *individual* responsibility. C.G. Jung, *Psychology and Religion*, in 2 THE WORLD OF PSYCHOLOGY: IDENTITY AND MOTIVATION 476 (G.B. Levitas ed., 1963). Aware that human inclinations to political crime have been forged from the fusion of Self into the collectivity, a genuinely promising strategy of counter terrorism would learn to accept the task of Nietzsche's Zarathustra "to be called a robber by the shepherds." According to Nietzsche, "To lure many away from the herd, for that I have come. The people and the herd shall be angry with me. Zarathustra wants to be called a robber by the shepherds." Freud, too, understood that need for such learning. Examining the "group mind" and other accounts of "collective mental life," Freud recognized fully the dangers of the crowd. Similarly, Carl Jung observed:

If people crowd together and form a mob, then the dynamics of the collective man are set free—beasts or demons which lie dormant in every person till he is part of a mob. Man in the crowd is unconsciously lowered to an inferior moral and intellectual level, to that level which is always there, below the threshold of consciousness, ready to break forth as soon as it is stimulated through the formation of a crowd.

Id. at 476-77.

NUCLEAR TERRORISM IN A CHANGING WORLD

- the unlawful use or threatened use of force or violence by a revolutionary organization against individuals or property with the intention of coercing or intimidating governments or societies, often for political or ideological purposes.

Department of Defense, 1983

- the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

FBI, 1983

- premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents.

Department of State, 1984

- violent criminal conduct apparently intended: (a) to intimidate or coerce a civilian population; (b) to influence the conduct of a government by intimidation or coercion; or (c) to affect the conduct of a government by assassination or kidnapping.

Department of Justice, 1984

- the unlawful use or threat of violence against persons or property to further political or social objectives. It is usually intended to intimidate or coerce a government, individuals or groups or to modify their behavior or policies.

The Vice-President's Task Force on Combatting Terrorism, 1986⁵

None of these definitions is truly suitable to our concerns, i.e., enhancing the role of international law in confronting the hazards of nuclear terrorism to the United States. In this connection, a genuinely useful definition, *inter alia*, must clarify the difference between lawful and unlawful insurgencies. Such an understanding must be based upon more than the selective intuitions of geopolitics. Specifically, it must rest upon well-established jurisprudential standards that reflect international law.⁶

5. These definitions can be found in Rushworth M. Kidder, *Unmasking Terrorism: The Fear of Fear Itself*, in *VIOLENCE AND TERRORISM* 14 (Bernard Schechterman & Martin Slann eds., 3d ed., 1993).

6. International law, of course, is part of U.S. law. Recalling the words used by the U.S. Supreme Court in *The Paquete Habana*, the principal case concerning the incorporation of international law into this country's municipal law:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty,

International law has consistently proscribed particular acts of international terrorism.⁷ At the same time, however, it has permitted certain uses of force. These uses derive "from the inalienable right to self-determination⁸ and independence of all peoples under colonial and racist regimes and other forms of alien domination and the legitimacy of their struggle, in particular, the struggle of national liberation movements, in accordance with the purposes and principles of the Charter⁹ and the relevant resolutions of the organs of the United Nations."¹⁰ This

and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

The Paquete Habana, 175 U.S. 677, 678-79 (1900). See also *The Lola*, 175 U.S. 677 (1900); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781, 788 (D.C. Cir. 1984) (per curiam) (Edwards, J. concurring) (dismissing the action, but making several references to domestic jurisdiction over extraterritorial offenses), *cert. denied*, 470 U.S. 1003 (1985); *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 (D.D.C. 1985) ("concept of extraordinary judicial jurisdiction over acts in violation of significant international standards . . . embodied in the principle of 'universal violations of international law'").

7. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents 28 U.S.T. 1975, 13 I.L.M. 43 (adopted by the U.N. General Assembly Dec. 14, 1973, entered into force for the United States Feb. 20, 1977); Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force for the United States Dec. 13, 1972); Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (entered into force for the United States Dec. 4, 1969) [hereinafter Tokyo Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641 (entered into force for the United States Oct. 14, 1971) [hereinafter Hague Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564 (entered into force for the United States Jan. 26, 1973) [hereinafter Montreal Convention]; *International Convention Against the Taking of Hostages*, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1983) (entered into force for the United States Dec. 7, 1984); European Convention on the Suppression of Terrorism, January 27, 1977, Europ. T.S. No. 90 (entered into force on August 4, 1978). On December 9, 1985, the U.N. General Assembly unanimously adopted a resolution condemning all acts of terrorism as "criminal." *United Nations Resolution on Terrorism*, G.A. Res. 40/61, U.N. GAOR, 40th Sess., Supp. No. 53, at 301, U.N. Doc. A/40/53 (1985). Never before had the General Assembly adopted such a comprehensive resolution on this question. Yet, the issue of particular acts that actually constitute terrorism was left largely unaddressed, except for acts such as hijacking, hostage-taking, and attacks on internationally protected persons that were criminalized by previous custom and conventions. *Id.*

8. On self-determination, see generally *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, 15 U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); *Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter*, G.A. Res. 1541, 15 U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960); *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. 2625, 25 U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter *The Principle of Equal Rights and Self-Determination of Peoples*].

9. See generally U.N. CHARTER pmbl.

10. *Report of the Ad Hoc Committee on International Terrorism*, U.N. GAOR, 28th Sess., Supp. No. 28, U.N. Doc. A/9028 (1973).

NUCLEAR TERRORISM IN A CHANGING WORLD

exemption, from the 1973 General Assembly Report of the Ad Hoc Committee on International Terrorism, is corroborated, of course, by Article 7 of the UN General Assembly's 1974 Definition of Aggression:

Nothing in this definition, and in particular, Article 3 (inventory of acts that qualify as aggression) could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.¹¹

International law has also approved certain forms of insurgency that are directed toward improved human rights where repression is neither colonial nor racist. Together with a number of important covenants, treaties, and declarations, the UN Charter codifies many binding norms on the protection of human rights. Comprising a well-defined

11. *Resolution on the Definition of Aggression*, G.A. Res. 3314, 29 U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975). Article 7 refers to the October 24, 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States. See G.A. Res. 2625, 25 U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971). See also Aureliu Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, U.N. GAOR, Subcomm. on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub. 2/404/Rev. 1 (1981) (giving a comprehensive and authoritative inventory of sources of international law concerning the right to use force on behalf of self-determination).

"regime,"¹² these rules of international law¹³ are effectively enforceable only by the actions of individual states¹⁴ and/or by lawful insurgencies.¹⁵

12. See *Universal Declaration of Human Rights*, G.A. Res. 217A(III), at 71, U.N. Doc. A/810 (1948); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature Mar. 7, 1966, 660 U.S.T.S. 195, 5 I.L.M. 352 (1966); *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967); *International Covenant on Civil and Political Rights*, G.A. Res. 2200, 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967).

13. The origins of these rules, in part, can be discovered in (1) the Magna Carta; (2) the Petition of Right; (3) the English Bill of Rights; and (4) the Declaration of the Rights of Man and of the Citizen. The Magna Carta (1215) marked an important first step toward constitutional privilege and the subjection of kings to parliamentary will. An account of the original versions of the Charter and later editions and commentaries appears in WILLIAM S. MCKECHNIE, *MAGNA CARTA 165-85* (2d ed. 1914). The final version, dated June 15, 1215, can be found in ARTHUR E. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA 17-32* (1965). The Petition of Right (1628), in the fashion of the U.S. Declaration of Independence, begins with a long recital of grievances arising from royal abuse. *Id.* at 68-71. Mentioning the Magna Carta, it condemns forced loans (identifying unlawful imprisonments made in the course of such exactions); complains of the failure to discharge men from unjust imprisonment on *habeas corpus*; and—inter alia—opposes the billeting of soldiers among the people against their will and court martials against civilians who join with soldiers in misconduct (while others escaped punishment for civilian offenses on the pretext, by royal officers, that they were triable only by court-martial law). *Id.* The King's first response to the Petition (June 2, 1628) was evasive, but on June 7, 1628, Royal assent was given. *Id.* at 72. The English Bill of Rights (1689), together with the Magna Carta of 1215 and the Petition of Right of 1628, represents one of three great documents of British Constitutional Liberty and the subsequent international law of human rights. Like the Petition of Right, the Bill of Rights suggests, by its form, the U.S. Declaration of Independence. Moreover, certain clauses of the Bill of Rights of 1689 strongly resemble provisions of the U.S. Bill of Rights of 1791. *Id.* at 91-97. The right of petition in Clause 5 is echoed in the First Amendment. ARTHUR E. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA 91-97* (1965). The restriction in Clause 6 concerning the keeping of a standing army suggests Article 1, Section 8, Clause 12 of the U.S. Constitution. *Id.* Free speech in Parliament guaranteed by Clause 9 of the Bill of Rights is reflected in Article 1, Section 6 of the U.S. Constitution. *Id.* The Declaration of the Rights of Man and of the Citizen (1789), which preceded and became a part of the French Constitutions of 1791, 1793 and 1795, is more sweeping than the U.S. Bill of Rights. See the Declaration of the Rights of Man and the Citizen, in *HUMAN RIGHTS SOURCEBOOK 744-45* (Albert P. Blaustein et al. eds., 1987). Its substance, as in the cases of the previously discussed compacts and documents, may be taken as the source of the current human rights regime. Article 1 proclaims that men are equal in rights. *Id.* Article 2 defines as fundamental the human rights of liberty, property, security, and resistance to oppression. *Id.* Article 3, which declares that "[t]he basis of all sovereignty lies, essentially, in the Nation," rejects the royal doctrine that France was merely the personal property of its kings. *Id.* Perhaps the broadest statement of human rights is contained in Article 4, which declares nothing less than the following: "Liberty is the capacity to do anything that does no harm to others. Hence the only limitations on the individual's exercise of his natural rights are those which ensure the enjoyment of these same rights to all other individuals. These limits can be established only by legislation." *Id.*

14. Such actions bring to mind the principle of humanitarian intervention. For sources supporting this principle, see ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT 226* (1987) (stating that human rights violations of genocide, slavery, and widespread torture justify humanitarian intervention); Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 185, 198* (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (discussing humanitarian intervention for human rights violations); Michael J. Bazylar, *Reexamining the Doctrine of Humanitarian Intervention in Light of*

NUCLEAR TERRORISM IN A CHANGING WORLD

Where it is understood as resistance to despotism, insurgency has roots as permissible practice in the Bible and in the writings of ancient and medieval classics. It can be found, for example, in Aristotle's

Atrocities in Kampuchea and Ethiopia, 23 STAN. J. INT'L L. 547, 597-611 (1987) (setting forth criteria for humanitarian intervention); Robert Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 345 (1967) (justifying humanitarian intervention because existing international mechanisms provide inadequate protection). Cf. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 340 (1963) (observing that the disappearance of humanitarian intervention from modern practice presents a beneficial development); LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 105 (1968) (stating law against intervention); PHILIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 169 (1948) (discussing only intervention by States to protect own nationals).

15. Recalling that the sources of international law (according to Article 38 of the Statute of the International Court of Justice) are found also in international custom, the general principles of law recognized by civilized nations, judicial decisions, and the writings of highly qualified publicists, additional support for the lawfulness of certain forms of insurgency can be identified in non-treaty sources. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 334. For example, the U.S. Declaration of Independence, as an expression of natural law, is an authoritative instance of the "the general principles of law recognized by civilized nations," and it therefore sets limits on the authority of every government. See THE DECLARATION OF INDEPENDENCE (U.S. 1776). Since justice, according to the Founding Fathers, must bind all human society, the rights articulated by the Declaration cannot be reserved only for Americans. To deny these rights to others would be illogical and self-contradictory since it would undermine the permanent and universal law of nature from which the Declaration derives. Thomas Paine represented this understanding, affirming:

The Independence of America, considered merely as a separation from England, would have been a matter of but little importance, had it not been accompanied by a Revolution in the principles and practices of Governments. She made a stand, not for herself only, but for the world, and looked beyond the advantages herself could receive.

THOMAS PAINE, THE RIGHTS OF MAN 151 (Everyman ed. 1792). Indeed, in view of the longstanding support for various forms of insurgency in multiple sources of positive and natural law, it is reasonable to argue that a peremptory norm of general international law (*a jus cogens* norm) has emerged on this matter. According to the Vienna Convention on the Law of Treaties, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf.39/27, reprinted in 8 I.L.M. 679 (1969). Even a treaty that might seek to criminalize forms of insurgency that this peremptory norm protects would be invalid. According to Article 53 of the Vienna Convention, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." *Id.* art. 53. Article 64 of the Convention extends the concept to newly emerging peremptory norms: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." *Id.* art. 64.

Politics, Plutarch's *Lives* and Cicero's *De Officiis*.¹⁶ Support for such insurgency is not the creation of modern international law.¹⁷

This brings us to the first jurisprudential standard for differentiating between lawful insurgency and terrorism, commonly known as "just cause." Where individual states prevent the exercise of human rights, insurgency *may* express law-enforcing reactions under international law. For this to be the case, however, the *means* used in that insurgency must be consistent with the second jurisprudential standard, commonly known as "just means."¹⁸

In deciding whether a particular insurgency is an instance of terrorism or law-enforcement, therefore, states must base their evaluations, in part, on judgments concerning *discrimination*, *proportionality*, and *military necessity*. Discrimination, of course, concerns the essential distinction between combatants and non-combatants. Military necessity concerns the essential limitation on levels of force imposed by the overriding imperatives of restraint. Proportionality requires that the amount of destruction allowed be

16. See FRANKLIN L. FORD, *POLITICAL MURDER* 41-55 (1985). Elsewhere, Cicero, citing to the Greeks, approvingly offers further support for tyrannicide:

Grecian nations give the honors of the gods to those men who have slain tyrants. What have I not seen at Athens? What in the other cities of Greece? What diving honors have I not seen paid to such men? What odes, what songs have I not heard in their praise? They are almost consecrated to immortality in the memories and worship of men. And will you not only abstain from conferring any honors on the saviour of so great a people, and the avenger of such enormous wickedness, but will you even allow him to be borne off for punishment? He would confess—I say, if he had done it, he would confess with a high and willing spirit that he had done it for the sake of the general liberty; a thing which would certainly deserve not only to be confessed by him, but even to be boasted of.

Marcus T. Cicero, *The Speech of M.T. Cicero In Defense of Titus Annius Milo*, in *SELECT ORATIONS OF M.T. CICERO* 208 (C.D. Yonge trans., 1882) (Titus Annius Milo, leader of Lanuvium, was alleged to have committed tyrannicide.).

17. The right of insurgency, of course, is affirmed in the U.S. political tradition:

We hold these truths to be self-evident, That all men are created equal, that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

18. The laws of war, the rules of *jus in bello* or just means, include rules concerning weapons and the conduct of warfare as well as humanitarian rules. See, e.g., JAMES R. FOX, *DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW* 240 (1992). Codified primarily at the Hague and Geneva Conventions and known thereby as the law of the Hague and the law of Geneva, these rules attempt to bring discrimination, proportionality, and military necessity into belligerent calculations.

NUCLEAR TERRORISM IN A CHANGING WORLD

calculated with regard to the importance of the objective. Once force is applied broadly to any segment of human population, blurring the distinction between combatants and noncombatants, *terrorism* is taking place. Similarly, once force is applied to the fullest possible extent, restrained only by the limits of available weaponry, terrorism is underway.

The principle of proportionality has its origins in the biblical *Lex Talionis*,¹⁹ the law of exact retaliation. This "eye for eye, tooth for tooth" expectation is found in at least two separate passages in the biblical Pentateuch or the Jewish Torah.²⁰ These Torah rules are likely related to the Code of Hammurabi, the first written evidence for penalizing wrongdoing with exact retaliation.

In contemporary international law, which is of paramount interest here, the principle of proportionality can be found in the customary and traditional view that a state offended by another state's use of force can, if the offending state refuses to make amends, take "proportionate" reprisals.²¹ Evidence of the rule of proportionality can also be found in Article 4 of the United Nations Covenant on Civil and Political Rights.²² Similarly, Article 15 of the European Convention on Human Rights provides that in time of war or other public emergency, contracting parties may derogate from the provisions of the Convention, as long as the rules of proportionality are followed.²³ Article 27(1) of the American Convention on Human Rights allows such derogations in "time of war, public danger or other emergency which threatens the

19. See Antony Flew, *Retrospect and Prospect, Retribution and Deterrence*, 25 ISR. L. REV. 376 (1991) (contemporary discussions of *Lex Talionis*); Michael Davis, *Determining Penalties (I): Criteria for Sentencing, Criminal Desert, Harm and Fairness*, 25 ISR. L. REV. 524-48 (1991).

20. *Exodus* 21:22-25 (Torah); *Deuteronomy* 19:19-21 (Torah); *Leviticus* 24:17-21 (Torah).

21. See Naulilaa Arbitration 2 RIAA 1013 (1928) and Air Services Agreement Arbitration 16 RIAA 5 (1963), cited in INGRID DETTER DE LUPIS, *THE LAW OF WAR* 75 n.152 (1987).

22. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967) (entered into force Mar. 23, 1976).

23. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. Under international law, the principle of proportionality is contained in both the rules governing the resort to armed conflict (*jus ad bellum*) and in the rules governing the actual conduct of armed conflict (*jus in bello*). See, e.g., FOX, *supra* note 16, at 238, 240. In the former, proportionality relates to self-defense; in the latter, it relates to conduct of hostilities. *Id.* Proportionality, derived from the more basic principle that belligerent rights are not unlimited, is a principle which seeks to establish criteria for limiting the use of force. Like many principles, it is not simple, and its requirements in a given instance are open to debate. It can refer to two different things: (a) proportionality of a belligerent response to a grievance — in which sense it is a link between *jus ad bellum* and *jus in bello*; and (b) proportionality in relation to the adversary's military actions or to the anticipated military value of one's own actions, including proportionality in reprisals.

ADAM ROBERTS & RICHARD GUELFF, *DOCUMENTS ON THE LAWS OF WAR* 5 (2d ed. 1989).

independence or security of a party" on the condition of proportionality.²⁴

The legitimacy of a certain cause can never legitimize the use of certain forms of violence. The ends *can never* justify the means. As in the case of war between states, every use of force by insurgents must be judged *twice*, once with regard to the justness of the objective and once with regard to the justness of the means used in pursuit of that objective.²⁵

Significantly, from the point of view of international law, any use of nuclear weapons by an insurgent group would represent a serious violation of the laws of war.²⁶ These laws have been brought to bear

24. See American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 9 I.L.M. 673 (1970) (entered into force July 18, 1978).

25. The means criterion has important implications for extradition. For an inventory of extradition agreements in force between the United States and other countries, see CONGRESSIONAL RESEARCH SERVICES, HOUSE COMM. ON FOREIGN AFFAIRS, 100TH CONG., 1ST SESS., REPORT ON INTERNATIONAL TERRORISM: A COMPILATION OF MAJOR LAWS, TREATIES, AGREEMENTS AND EXECUTIVE DOCUMENTS 239-326 (1987). One problem in such agreements has been the "political offense exception" to extradition, a provision that extradition need not or shall not be granted when the acts with which the accused is charged constitute a political offense or an act connected with a political offense. *Id.* The Reagan administration addressed the problem of the "political offense exception" in the context of the Supplementary Treaty Concerning the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland. See Abraham D. Sofaer, U.S. Dep't of State, Bureau of Public Affairs, Current Policy No. 762, *The Political Offense Exception and Terrorism* (1985). Recognizing that there exist egregious examples of overly broad applications of the exception and that claims of immunity from extradition based on "relative" political offenses have always been problematic, the supplementary treaty explicitly identifies particular crimes that may no longer be regarded as political offenses excepted from the extradition process. *Id.* These crimes are those typically committed by terrorists: aircraft hijacking and sabotage; crimes against internationally protected persons; hostage taking; murder; manslaughter; malicious assault; kidnapping; and specified offenses involving firearms, explosives, and serious property damage. *Id.* Although the treaty concerns the political offense exception only between the two countries involved, it represents part of a potentially incremental process that could be expanded to include many other states. Moreover, limits on the political offense exception are already contained in other, complementary sources of international law. *Id.*

26. For assessments of nuclear weapons under international law, see *The Illegality of Nuclear Weapons: Statement of the Lawyer's Committee on Nuclear Policy*, 8 ALTERNATIVES: J. WORLD POL'Y 291 (1982); RICHARD FALK ET AL., *NUCLEAR WEAPONS AND INTERNATIONAL LAW* (1981); John H.E. Fried, *First Use of Nuclear Weapons—Existing Prohibitions in International Law*, in BULL. PEACE PROPOSALS 21 (1981); Matthew Lippman, *Nuclear Weapons and International Law: Towards A Declaration on the Prevention and Punishment of the Crime of Nuclear Humancide*, 8 LOY. L.A. INT'L & COMP. L.J. 183 (1986); Burns H. Weston, *Nuclear Weapons and International Law: Illegality in Context*, 13 DEN. J. INT'L L. & POL'Y 1 (1983); Ian Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, 14 INT'L & COMP. L.Q. 437 (1965); Francis A. Boyle, *The Relevance of International Law to the 'Paradox' of Nuclear Deterrence*, 80 NW. U. L. REV. 1407 (1986); James A. Stegenga, *Nuclearism and International Law*, 4 PUB. AFF. Q. 69 (1990); GEOFFREY BEST, *HUMANITY IN WARFARE* (1980); JAMES T. JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR* (1981); *NUCLEAR WEAPONS AND INTERNATIONAL LAW* (1987); Daniel J. Arbess,

NUCLEAR TERRORISM IN A CHANGING WORLD

upon non-state actors in world politics by Article 3 of the four Geneva Conventions of August 12, 1949,²⁷ and by the two protocols to the conventions.²⁸ Protocol I makes the law concerning international conflicts applicable to conflicts fought for self-determination against alien occupation and against colonialist and racist regimes.²⁹ A product of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts that ended on June 10, 1977, Protocol I (which the decolonization provisions of the UN Charter³⁰ and resolutions of the General Assembly³¹ justified)

The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint?, 30 MCGILL L.J. 89 (1984); E.D. Thomas, *Atomic Bombs in International Society*, 39 AM. J. INT'L L. 736 (1945); E.C. Stowell, *Laws of War and the Atomic Bomb*, 39 AM. J. INT'L L. 784 (1945); John N. Moore, *Nuclear Weapons and the Law: Enhancing Strategic Stability*, 9 BROOK. J. INT'L L. 263 (1983); Eugene V. Rostow, *The Great Nuclear Debate*, 8 YALE J. WORLD PUB. ORD. 87 (1981); Elliot L. Meyrowitz, *The Opinions of Legal Scholars on the Legal Status of Nuclear Weapons*, 24 STAN. J. INT'L L. 111 (1987); Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 MCGILL L.J. 543 (1983); John H.E. Fried, *The Nuclear Collision Course: Can International Law Be of Help*, 14 DEN. J. INT'L L. & POL'Y 97 (1985); FRANCIS A. BOYLE, THE CRIMINALITY OF NUCLEAR WEAPONS, (Nuclear Age Peace Found., Waging Peace Series Booklet #27, 1991).

27. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

28. See Protocol Relating to Victims of International Armed Conflicts, June 8, 1977, 1977 U.N. JURID. Y.B. 95, 16 I.L.M. 1391 (1977) (entered into force Dec. 7, 1978) [hereinafter Protocol I]; Protocol Relating to Victims of Non-International Armed Conflicts, June 8, 1977, 1977 U.N. JURID. Y.B. 135, 16 I.L.M. 1442 (1977) (entered into force Dec. 7, 1978) [hereinafter Protocol II].

29. According to Part I, Article I(4):

The situations referred to . . . include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

Protocol I, *supra* note 28, art. I(4).

30. The Charter of the United Nations expressly establishes the right to self-determination in Chapters I and II. See U.N. CHARTER arts. 1, 55. The principle of the right to self-determination is established indirectly in Chapter XII, which provides that one of the objectives of the trusteeship system is to promote the progressive development of the inhabitants of the Trust Territories towards "self-government or independence" taking into account, *inter alia*, "the freely expressed wishes of the peoples concerned." *Id.* art. 76(b).

31. See, e.g., G.A. Res. 2189, U.N. GAOR, 21st Sess., Supp. No. 16, at 5, U.N. Doc. A/6316 (1966); G.A. Res. 2326, U.N. GAOR, 22d Sess., Supp. No. 16, at 4, U.N. Doc. A/6716 (1967); G.A. Res. 2465, U.N. GAOR, 23d Sess., Supp. No. 18, at 4, U.N. Doc. A/7218 (1968); G.A. Res. 2548, U.N. GAOR, 24th Sess., Supp. No. 30, at 5, U.N. Doc. A/7630 (1964); G.A. Res. 2708, U.N. GAOR, 25th Sess., Supp. No. 28, at 7, U.N. Doc. A/8028 (1970); G.A. Res. 2878, U.N. GAOR, 26th Sess., Supp. No. 29, at 16, U.N. Doc. A/8429 (1971); G.A. Res. 2908, U.N. GAOR, 27th Sess., Supp. No. 30, at 2, U.N. Doc. A/8730 (1972); G.A. Res. 3163, U.N. GAOR, 28th Sess., Supp. No.

brings irregular forces within the full scope of the law of armed conflict.³² Protocol II, also additional to the Geneva Conventions, concerns the protection of victims of noninternational armed conflicts.³³ Hence, Protocol II applies to all armed conflicts not covered by Protocol I between a state's armed forces and dissident armed forces that take place within the territory of the state.³⁴

In support of the principle that foreign intervention³⁵ is unlawful unless understood as an indispensable corrective to gross violations of human rights,³⁶ most major texts and treatises on international law (an authoritative source of international law according to Article 38 of the Statute of the International Court of Justice)³⁷ have long opined that a

30, at 5, U.N. Doc. A/9030 (1973); G.A. Res. 3328, U.N. GAOR, 29th Sess., Supp. No. 31, at 7, U.N. Doc. A/9631 (1974).

32. Protocol I, *supra* note 28.

33. Protocol II, *supra* note 28.

34. See SAMUEL PUFENDORF, 2 ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 139 (Frank G. Moore trans., 1964) (an early expression of limits under the law of war). The author states:

As for the force employed in war against the enemy and his property, we should distinguish between what an enemy can suffer without injustice, and what we cannot bring to bear against him, without violating humanity. For he who has declared himself our enemy, inasmuch as this involves the express threat to bring the worst of evils upon us, by that very act, so far as in him lies, gives us a free hand against himself, without restriction. Humanity, however, commands that, so far as the clash of arms permits, we do not inflict more mischief upon the enemy than defense, or the vindication of our right, and security for the future, require.

Id.

35. See U.N. CHARTER, art. 2, ¶ 7. See also *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. 2625, 25 U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971). *Annex to United Nations General Assembly Resolution 2625*, U.N. GAOR, 25th Sess., Annex, Agenda Item 28, at 122-23, U.N. Doc. A/8028/Annexes (1970); *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131 (XX), U.N. Doc. A/RES/2131 (XX)/Rev. 1 (1966).

36. As an example of the difficulties in ensuring human rights under existing international law, all major human rights treaties require the submission of periodic reports to supervisory bodies. In this connection, the Centre for Human Rights in Geneva is the main organizational entity for carrying out the United Nations human rights programme. The Centre in Geneva services the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. See U.N. CTR. HUM. RTS. & U.N. INST. TRAINING & RESEARCH (UNITAR), *MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*, HR/PUB/91/1 (1991). But states in violation of human rights norms are most unlikely to report unfavorably on themselves.

37. According to Article 38:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or

NUCLEAR TERRORISM IN A CHANGING WORLD

state is forbidden to engage in military or paramilitary operations against another state with which it is not at war. Today, the U.N. Charter³⁸ and the authoritative interpretation of that multilateral treaty in Articles 1 and 3(g) of the General Assembly's Definition of Aggression codify the long-standing customary³⁹ prohibition against foreign support for lawless insurgencies.⁴⁰

The legal systems embodied in the constitutions of individual states provide that all states must normally defend against aggression.⁴¹ Hersch Lauterpacht expressed this peremptory principle. According to Lauterpacht, the scope of state responsibility for preventing acts of insurgency or terrorism against other states involve the following rule:

particular, establishing rules recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly-qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38(1), 59 Stat. 1031, *reprinted in* 39 AM. J. INT'L L. 190 (1945).

38. See, e.g., U.N. CHARTER art. 2, ¶ 5.

39. Article 38(1)(b) of the Statute of the International Court of Justice describes international custom as "evidence of a general practice accepted as law." Statute of the International Court of Justice, *supra* note 37, art. 38(1)(b). In this connection, the essential significance of a norm's customary character under international law is that the norm binds even those states that are not parties to the pertinent codifying instrument or convention. Indeed, with respect to the bases of obligation under international law, even where a customary norm and a norm restated in treaty form are apparently identical, the norms are treated as separate and discrete. During the merits phase of *Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice (ICJ) stated, "Even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence." See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 14 (June 27). Moreover, in many states, customary international law is binding and self-executing but an act of the legislature is required to transform conventional law into internal law.

40. In the United States, these codifications are supported by various elements of federal law. Under the terms of the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (1961); the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. § 1691 (1988); the Peace Corps Act, Pub. L. No. 87-293, 75 Stat. 612 (1961); the Export-Import Bank Act of 1945, 12 U.S.C. § 635 (1988); and the Arms Export Control Act, 22 U.S.C. § 2751 (1983), the U.S. shall not provide assistance to any country "which the President determines (1) grants sanctuary from prosecution to any individual or group which has committed an act of international terrorism, or (2) otherwise supports international terrorism." Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 620A., 75 Stat. 424 (1961). Significantly, according to section 620A(b): "The President may waive the application of subsection (a) to a country if the President determines that national security or humanitarian reasons justify such waiver." *Id.* In other words, U.S. support for international law concerning state assistance to terrorists can be reversed where the President determines that "national security or humanitarian reasons" dictate overriding support for the terrorists and/or their state patrons. *Id.*

41. See, e.g., U.S. CONST. art. I, § 8.

International law imposes upon the State the duty of restraining persons within its territory from engaging in such revolutionary activities against friendly States as amount to organized acts of force in the form of hostile expeditions against the territory of those States. It also obliges the States to repress and discourage activities in which attempts against the life of political opponents are regarded as a proper means of revolutionary action.⁴²

Lauterpacht's rule reaffirms the Resolution on the Rights and Duties of Foreign Powers as Regards the Established and Recognized Governments in Case of Insurrection adopted by the Institute of International Law in 1900.⁴³ His rule, however, stops short of the prescription Emmerich de Vattel offered. According to Vattel's *The Law of Nations*, states that support terrorism directed at other states become the lawful prey of the world community.⁴⁴ In his words:

If there should be found a restless and unprincipled nation, ever ready to do harm to others, to thwart their purposes, and to stir up civil strife among their citizens, there is no doubt that all others would have the right to unite together to subdue such a nation, to discipline it, and even to disable it from doing further harm.⁴⁵

States also have an obligation to treat captured insurgents in conformity with the basic dictates of international law. Although this obligation does not normally interfere with a state's right to regard as common or ordinary criminals those persons not engaged in armed conflict (that is, persons involved merely in internal disturbances, riots, isolated and specific acts of violence, or other acts of a similar nature), it does mean that all other captives remain under the protection and authority of the principles of humanity and the dictates of public conscience.⁴⁶

42. See HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 167 (1950).

43. *Id.*

44. See EMMERICH DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 130 (Charles W. Fenwick trans., 1964) (1758).

45. *Id.*

46. Geneva Conventions of 12 August 1949. See also the Martens clause. The Martens clause is included in the Preamble of the 1899 and 1907 Hague Conventions (not in the articles sections) and is given higher status in the 1977 Protocol I by being included in the main text of Article 1. Protocol I, *supra* note 28. In situations not covered by the Protocol or by other international agreements, the clause provides that "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience." Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (entered into force Jan. 26, 1910; for the United States Jan. 26, 1910). Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International

NUCLEAR TERRORISM IN A CHANGING WORLD

In cases where captive persons *are* engaged in armed conflict, an additional obligation of states may exist to extend the privileged status of prisoner of war (POW) to such persons. The insurgent's respect for the laws of war does not affect this additional obligation. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules do not automatically deprive an insurgent combatant of his right to protection equivalent in all respects to the protection accorded to prisoners of war. This right, codified by the Geneva Conventions, is now complemented and enlarged by the two protocols to those conventions.⁴⁷

How has U.S. foreign policy responded to jurisprudential expectations concerning insurgency? The Reagan administration, for example, embraced only one standard of judgment: Anti-Sovietism. Human rights had nothing to do with this standard. It follows that efforts to overthrow allegedly pro-Soviet regimes were always conducted by "freedom fighters" (even where these efforts involved rape, pillaging, and mass murder),⁴⁸ while efforts to oppose anti-Soviet regimes (even by the most oppressed and downtrodden peoples of genocidal regimes) were always conducted by "terrorists."

However, U.S. foreign policy is not the only source of possible nuclear terrorism against this country. Even if there were a dramatic transformation of current policy orientations under the Clinton Administration,⁴⁹ a significant hazard would remain. To reduce this

Armed Conflicts, June 8, 1977, 1977 U.N. JURID. Y.B. 95, *reprinted in* 16 I.L.M. 1391 (1977) (entered into force Dec. 7, 1978).

47. See Protocol I, *supra* note 28; Protocol II, *supra* note 28.

48. The best example of such "freedom fighters" were the Nicaraguan Contras. Ultimately, U.S. support of the Contras was determined to be in direct violation of the final judgment entered against the United States by the International Court of Justice on June 27, 1986. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4 (June 27). U.S. acceptance of compulsory jurisdiction of the International Court of Justice began on August 14, 1946, with a declaration issued by President Harry S. Truman, after two-thirds of the Senate had given their approval. *Multi-lateral Treaties Deposited with the Secretary General, Connally Reservation*, 1965-66 U.N. Jurid. Y.B. 67, U.N. Doc. ST/LEG/SER.E/1 (1981). Although this acceptance was subject to the so-called Connally reservation, it was manifest that the Nicaraguan issues were not "essentially within the domestic jurisdiction of the United States of America." *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4 (June 27). Moreover, the U.S. argument that the disagreements with Nicaragua were of a political nature and should therefore have been assigned to the Security Council (where, of course, the U.S. enjoys a veto) seemed inconsistent with U.S. views on a prior matter before the ICJ—the case filed by the United States on November 29, 1979, against Iran. See *United States Diplomatic and Consular Staff in Iran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24). There was never any valid basis in law for arguing that the case brought by Nicaragua against the United States was political while the case brought by the United States against Iran was not.

49. Significantly, however, the Clinton Administration has already acted to celebrate and even sanctify terrorism. On September 13, 1993, President Clinton hosted Israel's formal agreement with

hazard, major improvements are needed in preventing terrorist access to assembled nuclear weapons, nuclear power plants, and nuclear waste storage facilities. Included in these improvements should be measures to contain the spread of nuclear weapons to additional countries.

Regarding the threat of nuclear terrorism against the United States, the shortcomings of the extant nonproliferation regime are readily apparent. North Korea, it appears, has disregarded its NPT obligations and moved ominously toward a nuclear weapons capability.⁵⁰ Moreover, elements of this capability may soon be shared with Iran (if it hasn't taken place already),⁵¹ a relationship that would substantially increase terrorist group access to pertinent nuclear technologies. This is the case not only because of the expanded number of nuclear weapons states and the ideological hostility of these states to the United States in particular, but also because North Korea or Iran or both might *willingly* cooperate with anti-American terrorist organizations.⁵²

III. Recognizing the Threat

To undertake acts of nuclear terrorism, insurgent or revolutionary groups would require access to nuclear weapons, nuclear power plants, or nuclear waste storage facilities. Should they seek to acquire an assembled weapon, terrorists could aim at any of the tens of thousands of nuclear weapons now deployed in the national or alliance arsenals of the United States, four successor states of the former Soviet Union,

the P.L.O., a widely-documented terrorist organization. Elaine Sciolino, *Arafat Arrives in U.S. to 'Make Peace'*, N.Y. TIMES, Sept. 13, 1993, at A1. Such action by the United States can only give aid and comfort to terrorists generally and undermines any long-term jurisprudential remedies for nuclear terrorism. The Palestine Liberation Organization was treated formally as a terrorist group in *Klinghoffer*, where the federal court determined, *inter alia*, that it had jurisdiction over the P.L.O. *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854, 857 (S.D.N.Y. 1990).

50. A crisis atmosphere surrounding North Korean nuclearization has persisted since early this year (1994). On April 21, 1994, North Korea informed the International Atomic Energy Agency (IAEA) that it planned to remove nuclear fuel from its biggest reactor by early May, a step that would enable it to greatly expand its nuclear weapons arsenal. See David E. Sanger, *North Korea Will Remove Nuclear Fuel*, N.Y. TIMES, Apr. 22, 1994, at A3. Also on April 21, U.S. Secretary of Defense William Perry warned at a news conference in Seoul, South Korea, that spent fuel from the North Korean reactor could yield enough raw material to make four or five nuclear weapons. *Id.* The extraction of used fuel rods would mark a new phase for North Korea's nuclear program, as the material could be reprocessed into weapons-grade plutonium.

51. Cooperation on missiles between Iran and North Korea is already well-documented. See, e.g., CORDESMAN, *AFTER THE STORM: THE CHANGING MILITARY BALANCE IN THE MIDDLE EAST* 418-19 (1993).

52. Iran, of course, established Hezbollah as a surrogate terror organization. For comprehensive treatment of the Iran-Hezbollah association by this author, see Louis Rene Beres, *Israel, Iran and Prospects for Nuclear War in the Middle East*, 1993 STRATEGIC REV. 52-60.

NUCLEAR TERRORISM IN A CHANGING WORLD

France, England, India, China, and, most likely, Israel⁵³ and Pakistan. Moreover, because the number of nuclear weapons states is likely to grow, such terrorists are destined to have an enlarged arena of opportunity.⁵⁴ In the absence of the recent Gulf War,⁵⁵ this list might also have included Iraq.⁵⁶

Should they seek to manufacture their own nuclear weapons, terrorists would require both strategic special nuclear materials⁵⁷ and the expertise to convert them into bombs or radiological weapons. Both

53. On Israel's nuclear weapons see, for example, SHLOMO ARONSON, *THE POLITICS AND STRATEGY OF NUCLEAR WEAPONS IN THE MIDDLE EAST: OPACITY, THEORY AND REALITY, 1960-1991* (1992); FRANK BARNABY, *THE INVISIBLE BOMB: THE NUCLEAR ARMS RACE IN THE MIDDLE EAST* (1989); MCGEORGE BUNDY, *DANGER AND SURVIVAL: CHOICES ABOUT THE BOMB IN THE FIRST FIFTY YEARS* (1988); YAIR EVRON, *ISRAEL'S NUCLEAR DILEMMA* (1987); PIERRE PEAN, *LES DEUX BOMBES* (1982); TAYSIR NASHIF, *NUCLEAR WARFARE IN THE MIDDLE EAST: DIMENSIONS AND RESPONSIBILITIES* (1984); SEYMOUR M. HERSCH, *THE SAMSON OPTION: ISRAEL'S NUCLEAR ARSENAL AND AMERICAN FOREIGN POLICY* (1991); LEONARD S. SPECTOR, *THE UNDECLARED BOMB* (1988); SECURITY OR ARMAGEDDON: *ISRAEL'S NUCLEAR STRATEGY* (Louis R. Beres ed., 1986).

54. This brings us to Iraq, which may still be making steady progress on nuclear weapons development. Baghdad, as we know, had attempted to purchase detonation capacitors of U.S. origin suitable for use in nuclear explosives and may still be seeking components of uranium gas centrifuges from a variety of suppliers. The "feed material" for such centrifuges could come from the uranium yellowcake Iraq has already imported from Brazil, Portugal, Niger, and other sources as well as from domestic uranium recovered from phosphate mining operations. Given that Iraq now has close ties to the PLO and other Palestinian terrorist organizations, Baghdad's nuclear efforts suggest a potentially significant Middle Eastern source of opportunity for nuclear terrorism.

55. For a comprehensive compilation of authoritative documents pertaining to the Gulf War, see *Current Documents: Gulf War Legal and Diplomatic Documents*, 13 HOUSTON J. INT'L L. 281 (1991) [hereinafter *Current Documents*].

56. Coalition military action against Iraqi forces commenced on January 16, 1991. U.S. NEWS & WORLD REP., *TRIUMPH WITHOUT VICTORY: THE HISTORY OF THE GULF WAR* 215 (1992) (including a complete collection of the U.N. Resolutions concerning the Gulf War). This collective resort to force represented a last attempt to remove Iraqi military forces from Kuwait, which had been occupied since Saddam Hussein's invasion of August 2, 1990. *Id.* at 7. On the very same day of the Iraqi invasion, UN Security Council Resolution 660 (1) condemned the Iraqi invasion of Kuwait; (2) demanded that Iraq immediately and unconditionally withdraw all its forces to the positions in which they were located on August 1, 1990; and (3) called upon Iraq and Kuwait to begin immediate intensive negotiations for the resolution of their differences and to support all efforts in this regard, especially those of the League of Arab States. S.C. Res. 660, U.N. SCOR, 45th Sess., at 19, U.N. Doc. S/INF/46 (1990). See also *Current Documents*, *supra* note 55, at 306 (summarizing S.C. Res. 660). The war ended when Iraq formally accepted all of the coalition's terms for a permanent ceasefire on March 3, 1991. U.S. NEWS & WORLD REP., *TRIUMPH WITHOUT VICTORY: THE HISTORY OF THE GULF WAR* 399 (1992). Significantly, although elimination of all Iraqi nonconventional force capabilities was an integral part of the ceasefire agreement, Iraq continued after the war to seek a thermonuclear weapons capacity and to disguise this effort from UN inspectors. *Id.* at 412.

57. On this point, Senator John Glenn, chair of the Senate Committee on Governmental Affairs, reported on March 9, 1993, that "the main reason Iraq did not have a nuclear weapon is because it lacked the necessary plutonium or highly-enriched uranium called HEU. That was all they lacked, just the fissile material." *Disposing of Plutonium in Russia, Hearing Before the Comm. on Governmental Affairs*, 103d Cong., 1st Sess. 1 (1993) [hereinafter *Hearing*].

requirements are now well within the range of terrorist capabilities. Several hundred commercial nuclear power plants are operating in the world today, each with the capacity to produce bomb-capable plutonium. Moreover, several dozen plants in more than twenty countries can now process plutonium from spent reactor fuel.

Significantly, the amounts of nuclear materials present in other countries will probably expand further.⁵⁸ Pilot reprocessing plants that extract weapons-usable plutonium from spent reactor fuel rods constitute dangerous conditions. Unless immediate and effective steps are taken to inhibit the spread of plutonium reprocessing and uranium enrichment facilities to other countries, terrorist opportunities to acquire fissionable materials for nuclear-weapons purposes could reach very high levels.⁵⁹

The amount of weapons-usable material needed to make a bomb is remarkably small. As one commentator notes,

To make an atomic bomb, a terrorist or a would-be proliferator would need to get hold of only 5kg of weapon-grade plutonium or 15kg of weapon-grade uranium, less than you would need to fill a fruitbowl. At present, the world probably contains about 250 tons of this sort of plutonium and 1500 tons of the uranium. To lose one bomb's worth from the stock is the equivalent of losing a single word from one of three copies of THE ECONOMIST. But the loss would be harder to detect. The world's stock of nuclear-explosive material is dispersed and hoarded. Almost none of this material is covered by international

58. Here, it must be understood that an additional source of such bomb-grade materials is the dismantling of nuclear weapons from the former Soviet Union. With this in mind, Senator John Glenn has commented in the Senate hearings on Disposing of Plutonium in Russia that "[t]he Russian dismantlement of over 25,000 nuclear weapons and what is done with bomb-grade material must be at the top of our nonproliferation efforts." See *Hearing, supra*, note 57. In testimony before Senator Glenn's Committee hearings, Joseph E. Kelley, Director-in-Charge of International Affairs Issues for the National Security and International Affairs Division of the U.S. General Accounting Office, described U.S. efforts to help former Soviet Republics secure and destroy weapons. *Id.* These efforts have their statutory basis in the Soviet Nuclear Threat Reduction Act of 1991, 22 U.S.C. § 2551 (1990). More recent and pertinent legislation includes the Former Soviet Union Demilitarization Act of 1992, 22 U.S.C. § 5901 (1993), and the Freedom for Russia and Emerging Eurasian Democracies and Open Market Support Act of 1992, Pub. L. 102-511, 106 Stat. 3320 (1992).

59. Here in the United States, efforts are already underway to reduce such opportunities. The Department of Energy stopped making plutonium for bombs in the 1980s, but the stockpile of plutonium is growing because the United States is now dismantling some of its own (obsolete) nuclear warheads. Matthew L. Wald, *Nation Considers Means to Dispose of its Plutonium*, N.Y. TIMES, Nov. 15, 1993, at A1, A9. On September 27, 1993, President Clinton announced the formation of an inter-agency task force to consider how much plutonium the country needs in the post-Soviet era and how to dispose of surplus. *Id.* Ironically, the dismantling of nuclear weapons — both from the United States and Russia — while reducing the risks and consequences of nuclear war, may create an enlarged risk of certain forms of nuclear terrorism. *Id.*

NUCLEAR TERRORISM IN A CHANGING WORLD

accounting rules. And more than half of it is inside the chaotic relic of the former Soviet Union.⁶⁰

To manufacture its own nuclear weapons, a terrorist group would also require expertise. It is now well-known that such expertise is widely available. A 1977 Office of Technology Assessment (OTA) report, after describing the two basic methods of assembling fissile material in a nuclear explosive (the assembly of two or more subcritical masses using gun propellants and the achievement of supercriticality of fissile material via high explosive), stated that militarily useful weapons with reliable nuclear yields in the kiloton range can be constructed with reactor-grade plutonium using low technology.⁶¹ Indeed, it continued, "given the weapons material and a fraction of a million dollars, a small group of people, none of whom had ever had access to the classified literature, could possibly design and build a crude nuclear explosive device."⁶²

Another terrorist path to nuclear capability could involve the sabotage of nuclear reactor facilities. It is now apparent that such acts could pose monumental problems for responsible governmental authorities. This is especially apparent in the aftermath of the Soviet nuclear accident at Chernobyl in the spring of 1986.

Although not generally recognized, installations with large radioactive inventories that can be released are themselves potential weapons of mass destruction. Even when they are constructed with great care, nuclear reactors are vulnerable to willful destruction through disruption of coolant mechanisms both inside and outside of the containment structure. Moreover, it is likely that reactor vulnerability will be increased to the extent that terrorists acquire precision-guided munitions and associated forms of shoulder-fired weaponry.

In the aftermath of the World Trade Center bombing and the ease with which an intruder invaded the Three Mile Island nuclear plant in February 7, 1993, nuclear power plants may be far more vulnerable to terrorist destruction than previously assumed.⁶³ Indeed, Ivan Selin,

60. *How To Steal an Atom Bomb*, THE ECONOMIST, June 5, 1993, at 15. Regarding the impending surpluses of both separated weapons and civil plutonium, it should be noted that all plutonium, except relatively pure Pu-238, is weapons-usable. F. Berkhout et. al., *Disposition of Separated Plutonium*, in SCIENCE AND GLOBAL SECURITY (1992), reprinted in *Hearing, supra*, note 57, at 63. See also J. CARSON MARK, NUCLEAR CONTROL INSTITUTE, EXPLOSIVE PROPERTIES OF REACTOR-GRADE PLUTONIUM (Wash., D.C., 1990).

61. See generally CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, NUCLEAR PROLIFERATION AND SAFEGUARDS (1977).

62. *Id.*

63. Mathew L. Wald, *Nuclear Plants Said to Be Vulnerable to Bombings*, N.Y. TIMES, Mar. 21, 1993, at 18. The emission of radioactivity from reactors cannot always be calculated reliably.

Chairman of the Nuclear Regulatory Commission, remarked that the two events have prompted his agency to rethink its security regulations.⁶⁴

What can be done to protect against sabotage of or attacks upon nuclear reactors by terrorists? According to the Report of the International Task Force on the Prevention of Nuclear Terrorism, a project of the highly-esteemed Nuclear Control Institute in Washington, D.C., the following measures need to be taken:

1. Denial of access to nuclear facilities should be the basic consideration in protecting against sabotage.
2. Thorough vigilance against the insider threat is needed.
3. Guard forces should be thoroughly trained and authorized to use deadly force.
4. The basis used for designing physical protection of nuclear plants should be reviewed to ensure that it accurately reflects the current threat.
5. Power reactors should have adequate security provisions against terrorists.
6. Research reactors should have adequate security provisions against terrorists.
7. Reactor safety designs should be reexamined to protect against an accident caused by terrorists.
8. IAEA (International Atomic Energy Agency) physical protection guidelines should be reviewed and updated.

Unlike conventional or nuclear weapons effects, reactor emissions are subject to a number of particular variables including, among others, the quantity, composition, and rate of deposition of materials. A moderate release from a reactor the size of Three Mile Island — 880 megawatts of electricity (Mwe) — that has been operating for upwards of three months could contaminate 500 square miles. A major release could affect 3 to 5000 square miles, occasioning occupation restrictions lasting decades. Moreover, because reactors might be clustered together, the dangers are enlarged if the contents of more than one were discharged and/or if there were a release of the inventories of spent fuel (inventories customarily located at reactor sites). For an informed and comprehensive consideration of reactor attack effects, see BENNETT RAMBERG, *DESTRUCTION OF NUCLEAR ENERGY FACILITIES IN WAR* (1980); Bennett Ramberg, *Attacks on Nuclear Reactors: The Implications of Israel's Strike on Osirac*, 97 POL. SCI. Q. 653 (1982-83).

64. Wald, *supra* note 63.

NUCLEAR TERRORISM IN A CHANGING WORLD

9. Protection standards should be spelled out unambiguously.⁶⁵

In the end, however, efforts at "hardening the target" will not be enough. Although physical security measures are indispensable and need to be implemented internationally,⁶⁶ an all-consuming preoccupation with guards, firearms, fences, and space-age protection devices would be counterproductive. A *behavioral* strategy of counter-nuclear terrorism, one that is directed toward producing certain changes in the decisional calculi of terrorist groups and their sponsor states, is a prerequisite.

IV. Recognizing the Adversary: Applying Behavioral Strategies

A behavioral strategy must be based upon a sound understanding of the risk calculations of terrorists. Until the special terrorist stance on the balance of risks that can be taken in world politics is understood, we will not be able to identify an appropriate system of sanctions. Although terrorists are typically able to tolerate higher levels of death and injury

65. See NUCLEAR CONTROL INSTITUTE, REPORT OF THE INTERNATIONAL TASK FORCE ON PREVENTION OF NUCLEAR TERRORISM 10-11 (1986).

66. Principal responsibility in the United States for the protection of assembled nuclear weapons rests with the Department of Defense (DOD). From the standpoint of effective worldwide standards for nuclear weapons, it appears that the most promising course would involve widespread imitation and replication of the best of those measures and procedures developed by the DOD. These measures and procedures, which are continually being upgraded and scrutinized, include the following: a Permissive Action Link (PAL) program, which consists of a code system and a family of devices integral or attached to nuclear weapons that have been developed to reduce the probability of an unauthorized nuclear detonation; a Personnel Reliability Program (PRP), which consists of the continual screening and evaluation of nuclear duty personnel to assure reliability; a series of storage area classifications that delineate viable zones of protection; an Intrusion Detection Alarm (IDA) system; security forces capable of withstanding and repelling seizure efforts by terrorists; two-man concept control during any operation that may afford access to nuclear weapons, whereby a minimum of two authorized personnel, each capable of detecting incorrect or unauthorized procedures with respect to the task to be performed and familiar with applicable safety and security requirements, shall be present; counterintelligence and investigative services to actively seek information concerning threats to nuclear weapons; and carefully prepared logistic movement procedures to ensure nuclear weapons security in transit.

than states,⁶⁷ there is a threshold beyond which certain costs become intolerable.

To understand this threshold, we must first recall that there is no such thing as "the terrorist mind." Rather, there are a great many terrorist minds, a broad potpourri of ideas, methods, visions, and objectives. To seek a uniformly applicable strategy of counter-nuclear terrorism, therefore, would be foolhardy. Nevertheless, in spite of the obvious heterogeneity that characterizes modern terrorism, it would be immensely impractical to formulate a myriad of strategies tailored to particular groups. What must be established is a limited and manageable number of basic strategies that are formed according to the principal types of terrorist group behavior. By adopting this means of "blueprinting" effective counter-nuclear terrorist action, policy makers can utilize a decision-making strategy in which options are differentiated according to the particular category of risk-calculation involved.

This is not to suggest that each terrorist group is comprised of individuals who exhibit the same pattern of behavior, i.e., the same stance on the balance of risks that can be taken in pursuit of particular preferences. Rather, each terrorist group consists, in varying degrees, of persons with disparate motives. Since it is essential, from the point of view of creating the necessary decisional strategy, that each terrorist group be categorized according to a particular type of risk-calculation, the task is to identify and evaluate the leadership strata of each terrorist group in order to determine the predominant ordering of preferences.

In terms of actually mounting an effective counter-nuclear terrorist strategy, therefore, governments must organize their activities according to the following sequence of responsibilities:

1. Appraise the terrorist group under scrutiny for the purpose of identifying leadership elements.

67. The PLO, of course, has already *declared itself* a state. But such a declaration does not satisfy the generally-accepted criteria for statehood identified under international law: control over a fixed and clearly defined territory; a population; a government; and the capacity to engage in diplomatic and foreign relations. See, e.g., Convention on Rights and Duties of States, Dec. 26, 1988, art. 1, 49 Stat. 3097; see also *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854, 858 (S.D.N.Y. 1990). Here, in seeking favorable classification for litigation, the PLO requested the court to accept its self-description as a state. More precisely, the PLO characterized itself as "the nationhood and sovereignty of the Palestinian people." *Id.* at 857. The court, however, found the PLO to be an "unincorporated association." *Id.* It determined that the PLO lacked the key elements of statehood, as articulated by long-settled norms of international law. *Id.* (citing *National Petrochemical Co. of Iran v. MIT Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 201 (1987)), *cert. denied*, 489 U.S. 1081 (1989)).

NUCLEAR TERRORISM IN A CHANGING WORLD

2. Appraise the leadership elements for the purpose of identifying predominant patterns of risk-calculation.
3. Examine the decision-making strategy for the purpose of identifying the appropriate type of counter-nuclear terrorist strategy, i.e., the strategy that corresponds with the identified pattern of risk-calculation.

In so organizing their counter-nuclear terrorist activities, governments can begin to develop a rationally-conceived "behavioral technology" that distinguishes contingencies of reinforcement according to the particular type of terrorists involved. To deal effectively with the prospective problem of nuclear terrorism, it is essential to correlate deterrent and remedial measures with the preference orderings and modus operandi of the particular terrorist group(s) in question.

For example, if a terrorist group displaying the self-sacrificing value system of certain Islamic factions in the Middle East were to threaten nuclear violence, it would be inappropriate to base deterrence on threats of physically punishing acts of retaliation.⁶⁸ Here, negative physical sanctions, unless they are devastating enough to ensure destruction of the group itself, are bound to be ineffective. Indeed, such sanctions might even have the effect of a *stimulus*. Instead of orthodox threats of punishment, deterrence in this case should be based upon threats that promise to obstruct preferences that the terrorist group values even more highly than physical safety.

Such threats, therefore, should be directed at convincing terrorists that the resort to nuclear violence would mitigate against their political objectives. To support such threats, steps would probably have to be taken to convince the terrorists that higher-order acts of violence are apt to generate broad-based repulsion rather than support. As long as the threatened act of nuclear violence stems from propagandistic motives, terrorists who associate such violence with unfavorable publicity may be inclined to less violent strategies.

Deterrence in this case might also be based upon the promise of rewards. Such a strategy of "positive sanctions" has been left out of current studies of counter-terrorism; yet, it may prove to be one of the few potentially worthwhile ways of affecting the decisional calculi of terrorist groups with self-sacrificing value systems. Of course, in

68. Islam has historically sought to establish a world public order based on divine legislation and to enforce it by the *jihad*. The *jihad* is the Islamic *bellum justum* and is the very basis of Islam's relationships with other nations. For an authoritative study of Islam and international law, see SHAYBANI'S *SIYAR: THE ISLAMIC LAW OF NATIONS* (Majid Khadduri trans., 1966).

considering whether this sort of strategy is appropriate in particular situations, governments will have to decide whether the expected benefits that accrue from avoiding nuclear terrorism are great enough to outweigh the prospective costs associated with the promised concessions.

The reasonableness of such a strategy is also enhanced by its probable long-term systemic effects. Just as violence tends to beget more violence, rewards tend to generate more rewards. By the incremental replacement of negative sanctions with positive ones, a growing number of actors in world politics, terrorists as well as states, are apt to become habituated to the ideology of a reward system and to disengage from the dynamics of a threat or punishment system. The cumulative effect of such habituation could conceivably be a more peaceful and harmonious world and national system.

There is, however, an antecedent legal question that must be raised. This question involves the principle, *nullum crimen sine poena!* (No crime without a punishment!).⁶⁹ This major principle of international law, essential to civilized international relations, obligates all states to seek out and prosecute the perpetrators of crimes, including perpetrators of terrorism. It follows that offering positive sanctions to terrorist groups, however tactically effective, would represent a violation of indispensable legal norms.

For another example, we may consider the case of a terrorist group that exhibits a preference ordering very much like that of an ordinary criminal band, i.e., its actions are dictated largely by incentives of material gain, however much these incentives are rationalized in terms of political objectives. If such a terrorist group were to threaten nuclear violence, it would be as inappropriate to base deterrence on threats of political failure or negative public reception as it would be to threaten self-sacrificing ideologues with personal harm. Rather, deterrence in this case should be based largely upon the kinds of threats that are used to counter orthodox criminality.

69. The earliest expressions of *nullum crimen sine poena* can be found in the Code of Hammurabi (c. 1728-1686 B.C.), the Laws of Eshnunna (c. 2000 B.C.), the even-earlier code of Ur-Nammu (c. 2100 B.C.), and of course, the *Lex Talionis*, or law of exact retaliation, presented in three separate passages of the Jewish Torah or Biblical Pentateuch. See M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L.J. 202, 216 (1979). At Nuremberg, the words used by the Court, "So far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished," represented an emphatic contemporary reaffirmation of *nullum crimen sine poena*. *Id.* at 284. Punishment is, quite plausibly, the original meaning of justice. For a comprehensive consideration of these concepts, and their interdependence, see ROBERT C. SOLOMON & MARK C. MURPHY, *WHAT IS JUSTICE? CLASSIC AND CONTEMPORARY READINGS* (1990); Haim H. Cohn, *On the Immorality of Punishment*, 25 ISR. L. REV. 284 (1991).

NUCLEAR TERRORISM IN A CHANGING WORLD

This is not to suggest, however, that threats of physically punishing retaliation will always be productive in dealing with this type of terrorist group. Even though this particular type, unlike the self-sacrificing variety considered in the first example, is apt to value personal safety in its ordering of preferences, threats to impair this safety may be misconceived. Indeed, a great deal of sophisticated conceptual analysis and experimental evidence now seems to indicate that, in certain cases, the threat of physical punishment may actually prove counter-productive.

Contrary to the widely-held conventional wisdom on the matter, taking a "hard-line" against terrorists may only reinforce antagonism and intransigence. Recent experience indicates that physical retaliation against terrorists often causes only a shift in the selection of targets and a more protracted pattern of violence and aggression. The threat of physical punishment against terrorists is apt to generate high levels of anger that effectively raise the threshold of acceptable suffering. This is the case because anger can modify usual cost/benefit calculations, overriding the inhibitions ordinarily associated with anticipated punishment.

To this point, the discussion of negative sanctions has been limited to physical punishment. However, there is considerable evidence that *all kinds* of negative sanctions, economic as well as physical, stiffen rather than diminish terrorist resistance. Whatever the nature of negative sanctions, they appear to generate anger, which causes terrorists to value retaliation (or counter-retaliation, whichever the case may be) more highly than the objectives that have given rise to terrorist activity in the first place.

For a third example, we may consider the case of a terrorist group that exhibits a primary concern for achieving one or another form of political objective, but lacks a self-sacrificing value-system. If this sort of terrorist group were to threaten nuclear violence, it would be appropriate to base deterrence on a suitable combination of all of the negative and positive sanctions discussed thus far. This means that steps should be taken to convince the group that (1) nuclear violence would mitigate against its political objectives, (2) certain concessions would be granted in exchange for restraint from nuclear violence, and (3) certain physically punishing or otherwise negative acts of retaliation would be meted out if nuclear violence were undertaken.

In deciding upon what exactly constitutes a suitable configuration of sanctions, governments will have to be especially discriminating in their manner of brandishing threats of physical punishment. In this connection, it is worth noting that threats of mild punishment may have a greater deterrent effect than threats of severe punishment. From the vantage

point of the terrorists group's particular baseline of expectations, such threats — when threats of severe punishment are expected — may even appear to have positive qualities. Catching the terrorist group by surprise, such threat behavior is also less likely to elicit the high levels of anger and intractability that tend to override the inhibiting factor of expected punishment. Moreover, the threat of mild punishment is less likely to support the contention of official repression, a contention that is often a vital part of terrorist group strategies for success.

In reference to the actual promise of rewards as an instrument of deterrence, governments may find it worthwhile to consider whether a selected number of particular concessions would produce a gainful net effect. In other words, recognizing that threats of severe punishment produce rationality-impairing stress, which in turn produces greater resistance rather than compliance, governments may discover that the promise of rewards communicates feelings of sympathy and concern, which in turn diminish terrorist resistance. With such an understanding, governments may begin to delimit the particular concessions that they are prepared to make.

A fourth and final example that illustrates the need to correlate deterrent and situational measures with particular preference orderings centers on the case of terrorist groups spurred on by the need for spectacular self-assertion, by destruction as a release from powerlessness. From the standpoint of preventing nuclear violence, this type of terrorist group presents the greatest problem. Faced with terrorist groups that long to act out desperate urgings, governments may be confronted with genuine psychopaths and sociopaths. Clearly, since the preference that would need to be obstructed in this case is neither political success nor personal profit but the violent act itself, and since personal safety is unlikely to figure importantly in the terrorist risk-calculus, deterrence of nuclear terrorism must be abandoned altogether as a viable strategy. Instead, all preventive measures must concentrate upon limiting the influence of such terrorists within their particular groups and maintaining a safe distance between such terrorists and the instruments of higher-order weapons technologies.

If the apparent danger is great enough, governments may feel compelled to resort to a "no holds barred" counter-terrorist campaign. In such cases, governments must be aware that the inclination to escalate violence would signify the erosion of power. Violence is not power. Where the latter is in jeopardy, the former is increased. Understood in terms of anti-terrorism measures, this suggests that the imprudent escalation of violence by public authorities can destroy power. Taken to

NUCLEAR TERRORISM IN A CHANGING WORLD

its outermost limits, such escalation can lead to rule by sheer violence and the substitution of "official" terror for insurgent terror.⁷⁰

V. Behavioral Strategies at the International Level

Counter-nuclear terrorist strategies within states require differentiating sanctions according to the particular type of terrorist group involved. However, since nuclear terrorism might take place across national boundaries, raising questions of jurisdiction,⁷¹ the basic principles of these strategies must also be applied internationally.

Of course, there are specific difficulties involved in implementing behavioral measures of counter-nuclear terrorism internationally. These difficulties center on the fact that certain states sponsor and host terrorist groups and that such states extend the privileges of sovereignty to insurgents on their land. While it is true that international law forbids a state to allow its territory to be used as a base for aggressive operations against another state with which it is not at war, a state which seeks to deal with terrorists hosted in another state is still in a very difficult position.

To cope with these difficulties, like-minded governments must create special patterns of international cooperation. These patterns must be based upon the idea that even sovereignty must yield to gross inversions of the norms expressed in the authoritative human rights regime and humanitarian international law. They must, therefore, take the form of collective defense arrangements between particular states that promise protection and support for responsible and law-enforcing acts of counter nuclear terrorism.

Such arrangements must entail plans for cooperative intelligence gathering on the subject of terrorism and for the exchange of the information produced; an expanded and refined tapestry of agreements on

70. Yet, as we will consider later in this Article, effective counter nuclear terrorism could potentially require, both intranationally and internationally, official resort to assassination. Such an argument, of course, is viscerally distasteful and not likely to be welcome within the orthodox body of jurisprudential analysis. At the same time, however, in view of the need to consider the right of the community to be safeguarded from nuclear terrorism against ordinary human rights of due process under international law, a reasonable *balance of harms* calculation may be essential. Recognizing the extraordinary and unprecedented destructive potential of nuclear terrorism, the alternative to such a calculation may be nothing less than the willful sacrifice of entire societies.

71. For an authoritative inventory of bases of jurisdiction in international law, see Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935). See also Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in INTERNATIONAL CRIMINAL LAW 4 (M. Cherif Bassiouni ed., 1986); Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109 (1982); and L. HENKIN ET AL., INTERNATIONAL LAW 420 (2d ed. 1987).

extradition of terrorists;⁷² multi-lateral forces to infiltrate terrorist organizations and, if necessary, to take action against them; concerted use of the media to publicize terrorist activities and intentions; and even counter-terrorism emergency medical networks. Such arrangements might also entail limited and particular acts directed toward effective counter-nuclear terrorism.

International arrangements for counter-nuclear terrorist cooperation must also include sanctions for states that sponsor or support terrorist groups and activities. As in the case of sanctions applied to terrorists, such sanctions may include carrots as well as sticks. Until every state in the world system calculates that support of counter-nuclear terrorist measures is in its own interests, individual terrorist groups will have reason and opportunity to escalate their violent excursions.

The contemporary international legal order has tried to cope with transnational terrorism since 1937, when the League of Nations produced two conventions to deal with the problem.⁷³ These conventions proscribed acts of terror-violence against public officials, criminalized the impairment of property and the infliction of general injuries by citizens

72. At this time, the United States has extradition agreements with over 100 countries. The treaties range in age from an 1856 agreement with the Austrian Empire, which is still in force with respect to one of its successor states (Hungary) to the protocol with Canada, which entered into force in November 1991. See *Consular Conventions, Extradition Treaties and Treaties Relating to Mutual Legal Assistance in Criminal Matters (MLATS): Hearing Before the Comm. on Foreign Relations*, S. Rep. No. 674, 102d Cong. 10 (1992). The Office of International Affairs (OIA) in the Criminal Division of the Department of Justice plays an important role in extradition matters. From OIA's inception in 1979, its attorneys have cooperated with the Department of State in negotiating all new extradition agreements. According to testimony by Robert Mueller, III, Assistant Attorney General, Criminal Division, Department of Justice:

In general, our goal in extradition negotiations in recent years has been threefold: First, to expand the number of offenses for which extradition can be obtained by including all conduct that is criminal under the laws of both countries and punishable by a specified minimum period of incarceration; Second, to limit the exceptions to extradition, particularly the exception for so-called political offenses; and Third, to improve the way in which extradition treaties function by simplifying and clarifying provisions that were inadequately addressed in older treaties.

Id.

73. The origin of the idea of an established international criminal court is embedded in the First Hague Convention for the Pacific Settlement of International Disputes, July 19, 1899, 32 Stat. 1779, 26 Martens Nouveau Recueil (ser. 2d) 720. For development of this idea, see generally M. Cherif Bassiouni & Christopher L. Blakesley, *The Need for an International Criminal Court in the New International World Order*, 25 VANDERBILT J. TRANS'L L. 151 (1992); M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987); Symposium, *Draft International Criminal Court*, 52 REVUE INTERNATIONALE DE DROIT PENAL 331 (1984); *Draft Statute for an International Commission of Criminal Inquiry*, reprinted in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTIETH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION 445, 454 (1983).

NUCLEAR TERRORISM IN A CHANGING WORLD

of one state against those of another, and sought to create an International Criminal Court with jurisdiction over terrorist crimes.⁷⁴ The advent of the Second World War, however, prevented the ratification of either document.⁷⁵

An International Criminal Court is unlikely to come into being. Nevertheless, there are other measures under international law that could, and should, be used in the arsenal of international counter-nuclear terrorism measures.

First, the principle of *aut dedere aut punire* (extradite or prosecute)⁷⁶ needs to be applied appropriately to terrorists. Moreover, the customary excepting of political offenses as a reason for extradition must be abolished for genuine acts of terrorism.⁷⁷ Although such

74. Bassiouni & Blakesley, *supra* note 73, at 153 n.7 and accompanying text.

75. *Id.* In the absence of an authoritative international criminal court, the courts of individual states should be used regularly to adjudicate terrorist crimes. Constitutionally, the United States has already reserved the right to enforce international law within its own courts. See U.S. CONST. art. I, § 8. Here, the Constitution confers on Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." *Id.* Pursuant to this Constitutional prerogative, the first Congress passed the Alien Tort Statute in 1789. Alien Tort Statute of 1789, 28 U.S.C. § 1350 (1988). This statute authorized United States Federal Courts to hear civil claims by aliens alleging acts committed "in violation of the law of nations or a treaty of the United States" when the alleged wrongdoers can be found in the United States. *Id.* At that time, of course, the particular target of this legislation was piracy on the high seas. Over the years, U.S. federal courts have rarely invoked the "law of nations," and then only in such cases where the acts in question had already been proscribed by treaties or conventions.

In 1979, a plaintiff seeking damages for foreign acts of torture filed suit in federal court. See *Filartiga v. Americo Norberto Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In a complaint filed jointly with his daughter, Dolly, Dr. Joel Filartiga, a well-known Paraguayan physician, artist, and opponent of President Alfredo Stroessner's genocidal regime, alleged that members of that regime's police force tortured and murdered his son, Joelito. *Id.* On June 30, 1980, the Court of Appeals for the Second Circuit held that because an international consensus condemning torture had crystallized, torture violated the "law of nations" for purposes of the Alien Tort Statute. *Id.* The court further held that U.S. courts therefore have jurisdiction under the statute to hear civil suits by the victims of foreign torture if the alleged international outlaws are found in the United States. *Id.*

Although this case was a civil suit brought by a dissident against a representative of the Paraguayan regime, the court held, in effect, that torture is a violation of the law of nations and can be redressed in United States courts. We must now move toward a treaty that will establish a universal criminal jurisdiction especially for terrorists. Such a treaty would further assist domestic courts in upholding international law.

76. This expectation is deducible from the principle, *nullum crimen sine poena*. Existing since antiquity, the expectation to "extradite or prosecute" has roots in both natural law (especially Jean Bodin, Hugo Grotius, and Emmerich de Vattel) and in positive law. See CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW AND THE PROTECTION OF HUMAN LIBERTY* (1992) (giving an excellent and comprehensive scholarly elucidation of extradition and prosecution under international law).

77. In general, U.S. courts have not allowed the political offense exception to bar extradition of terrorists, but prominent and inappropriate exceptions have occurred. See *U.S. v. Mackin*, 668 F.2d 122 (2d Cir. 1981) (refusing to extradite an IRA member who allegedly shot a British policeman); *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), *aff'd*, 786 F.2d (2d Cir. 1986)

abolition would appear to impair the prospects of even those legitimate rights to self determination and human rights, persons proclaiming such rights cannot be exempted from the prevailing norms of humanitarian international law. At the moment, states acting upon extradition requests often still give the ideological motives of the accused too much weight. While ideological motive should be considered as a mitigating factor in the imposition of punishment, it should not be regarded as the basis for automatic immunity.

Where requests for extradition are improperly denied, states may act upon the understanding that terrorists are "common enemies of mankind" (*Hostes humani generis*),⁷⁸ international outlaws who fall within the scope of "universal jurisdiction." In Vattel's *The Law of Nations*, the following argument is advanced:

While the jurisdiction of each State is in general limited to punishing crimes committed in its territory, an exception must be made against those criminals who, by the character and frequency of their crimes, are a menace to public security everywhere and proclaim themselves enemies of the whole human race. Men who are by profession poisoners, assassins, or incendiaries may be exterminated wherever they are caught; for they direct their disastrous attacks against all Nations, by destroying the foundations of their common safety.⁷⁹

Second, states must creatively interpret the Definition of Aggression approved by the General Assembly in 1974.⁸⁰ As we have seen, this definition condemns the use of "armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State," but supports wars of national liberation against "colonial and racist regimes or other forms of alien domination."⁸¹ Where it is interpreted too broadly, such a distinction leaves international law with too little leverage in counter-nuclear terrorist strategies. However, where it is interpreted too narrowly, it places international law in the position of defending the status-quo at all costs.

(refusing to extradite an IRA member charged with murdering a British soldier); In re Mackin, 80 Cr. Misc. 1 (S.D.N.Y. 1981), *appeal dismissed sub nom.*

78. Under traditional international law, this term is applied primarily to pirates. According to Blackstone, whose *Commentaries on the Laws of England* are the starting point for understanding our common law: "The crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *Hostes humani generis*." EDWARD COKE, 4 OF PUBLIC WRONGS 66 (Robert M. Kerr ed., 1962).

79. See VATTEL, *supra* note 44, at 93.

80. *Resolution of the Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975).

81. *Id.* art. 3(g).

NUCLEAR TERRORISM IN A CHANGING WORLD

The problem, of course, is allowing international law to serve the interests of national and international order without impairing the legitimate objectives of international justice.⁸² Who is to determine the proper balance? Like all things human, force wears the Janus face of good and evil at the same time. It is an age-old problem, and one not adequately answered by identifying the institutional responsibility of the Security Council. The deliberate vagueness of the language of the Definition of Aggression is less of an obstacle than an opportunity if states can see their way clear to sensible *ad hoc* judgments.

But how can they make such judgments? What criteria can be applied to distinguish between lawful claims for human rights and/or self-determination and unlawful acts of terror? Given the context of a decentralized system of international law, individual states must bear the ultimate responsibility for distinguishing between terrorists and "freedom fighters." At a minimum, the principles of "just cause" and "just means" should inform their judgments.

VI. Nuclear Terrorism: Identifying Forms and Effects

A. Nuclear Explosives

The low-technology nuclear explosives that might be manufactured by terrorists could range anywhere from a few hundred tons to several kilotons in yield. The destructive potential of such explosives would

82. A related problem is ensuring that criminal acts of terrorism are punished. An essential element of all legal systems is the ancient principle, *nullum crimen sine poena*, or no crime without a punishment. Yet, it is apparent that this expectation is seldom fulfilled, especially in the most egregious violations of international law. Consider, for example, that many terrorists have yet to be sought, apprehended, and prosecuted for their crimes. See *1973 Resolution on Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973). Other resolutions affirm that a refusal "to cooperate in the arrest, extradition, trial and punishment" of such persons is contrary to the United Nations Charter "and to generally recognized norms of international law." See *e.g.*, G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, at 88, U.N. Doc. A/8429 (1971); see also, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973); G.A. Res. 96, at 188, U.N. Doc. A/64 (1946). As to the responsibility of states toward Geneva Law in particular, common article 1 of the Geneva Conventions addresses the obligation of all signatories "to respect and to ensure respect" for the Conventions "in all circumstances." See, *e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 1, 6 U.S.T. 3516, 75 U.N.T.S. 287. Common article 146 of the Geneva Civilian Convention recognizes that "[e]ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches . . ." *Id.* art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386; see also Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968).

depend on such variables as type of construction, population density, prevailing wind direction, weather patterns, and the characteristic features of the target area. Such potential would be manifested in terms of three primary effects: blast (measured in pounds per square inch of over-pressure); heat (measured in calories/cm²); and radiation (measured in Radiation Effective Man—REM—a combined measure that includes the Radiation Absorbed Dose—RAD—and the Radiation Biological Effectiveness—RBE—or the varying biological effectiveness of different types of radiation).

Relatively crude nuclear explosives with yields equivalent to about 1,000 tons of high explosive would be far easier to fabricate than explosives with yields equivalent to about 10 kilotons of high explosive. Nonetheless, explosives with a yield of only one-tenth of a kiloton would pose significant destructive effects. A nuclear explosive in this limited range could annihilate the Capitol during the State of the Union Address or knock down the World Trade Center towers in New York City. An even smaller yield of 10 tons of TNT could kill everyone attending the Super Bowl.

In assessing the destructiveness of nuclear explosions,⁸³ it is important to remember that such explosions are typically more damaging than chemical explosions of equivalent yields. This is the case because nuclear explosions produce energy in the form of penetrating radiations (gamma rays and neutrons) as well as in blast wave and heat. Moreover, a nuclear explosion on the ground—the kind of nuclear explosion most likely to be used by terrorists—produces more local fallout than a comparable explosion in the air.

B. Radiological Weapons

Radiological weapons are not as widely understood as nuclear explosives, but they are equally ominous in their effects. Placed in the hands of terrorists, such weapons could pose a lethal hazard for human beings anywhere in the world. Even a world already dominated by every variety of numbing could not fail to recoil from such a prospect.

Radiological weapons are devices designed to disperse radioactive materials that have been produced a substantial time before their

83. There is now a huge literature that deals with the expected consequences of a nuclear war. For works by this author, see for example, LOUIS R. BERES, *APOCALYPSE: NUCLEAR CATASTROPHE IN WORLD POLITICS* (1980); LOUIS R. BERES, *MIMICKING SISYPHUS: AMERICA'S COUNTERVAILING NUCLEAR STRATEGY* (1983); LOUIS R. BERES, *REASON AND REALPOLITIK: U.S. FOREIGN POLICY AND WORLD ORDER* (1984); and LOUIS R. BERES, *SECURITY OR ARMAGEDDON: ISRAEL'S NUCLEAR STRATEGY* (1986).

dispersal. The targets against which terrorists might choose to use radiological weapons include concentrations of people inside buildings, concentrations of people on urban streets or at sports events, urban areas with a high population density as a whole, and agricultural areas. The form such weapons might take include plutonium dispersal devices (only 3.5 ounces of plutonium could prove lethal to everyone within a large office building or factory) or devices designed to disperse other radioactive materials. In principle, the dispersal of spent nuclear reactor fuel and the fission products separated from reactor fuels would create grave hazards in a populated area, but the handling of such materials would be very dangerous to terrorists themselves. It is more likely, therefore, that would-be users of radiological weapons would favor plutonium over radioactive fission products.

The threat of nuclear terrorism involving radiological weapons is potentially more serious than the threat involving nuclear explosives. This is because it would be easier for terrorists to achieve nuclear capability with radiological weapons. Such weapons, therefore, could also be the subject of a more plausible hoax than nuclear explosives.

C. Nuclear Reactor Sabotage

In the aftermath of the Chernobyl disaster, even the average layperson has become familiar with the meaning of "reactor-core meltdown." Such an event, in which a reactor deprived of its temperature-controlling coolant melts in its own heat and produces lethal clouds of radioactive gases, could be the objective of future terrorism. Significantly, incidents involving violence or threats of violence at nuclear facilities at home and abroad are already a matter of record.

In comparison with a low-yield nuclear explosion, a reactor-core meltdown and breach of containment would release a small amount of radiation. However, the consequences of such an event would still involve leakage of an immense amount of gaseous radioactive material that could expose neighboring populations to immediate death, cancer, or genetic defects. To better understand the nature of the threat, we must first try to understand the fundamentals of nuclear reactors.

Essentially, these reactors may be characterized as giant teakettles that turn water into steam. The steam is piped to large turbines that turn generators. When a typical "teakettle" is operating at full power, the radioactivity in its fuel core can reach 17 billion curies, enough—in principle—to kill everyone on the planet. Within the uranium fuel rods in the core, the fission reaction can unleash energy to drive the temperature above 4,000 degrees Fahrenheit—a temperature hot enough to melt through all protective barriers.

From the standpoint of radiation discharged, the consequences of a successful conventional attack upon nuclear reactors could equal those of the worst accidental meltdown. This form of nuclear terrorism could result in moderate to major releases of radioactivity into the environment. Additional problems would arise through the release of the inventories of spent fuel customarily located at reactor sites. Early fatalities are possible, although late cancers and genetic effects would dominate. In densely populated countries deaths could number in the tens of thousands.

Whatever form nuclear terrorism might take—nuclear explosives, radiological weapons, or nuclear reactor sabotage—its effects would be social and political as well as biological and physical. In the aftermath of a nuclear terrorist event, both governments and insurgents would be confronted with mounting pressures to escalate to higher-order uses of force. With terrorists more inclined to think of nuclear weapons as manifestly "thinkable," both governments and terrorists would find themselves giving serious consideration to striking first.

VII. Identifying the Preemption Option

In view of the enormously destructive consequences of nuclear terrorism, governments may have to resort to strategies of preemption in certain cases.⁸⁴ Where the terrorist group functions within the target state, the authorities must be concerned with the protection of civil liberties. Where the terrorist group operates from the territory of one or more sympathetic host states, the authorities in the prospective target state must be concerned with the normative constraints of international law, specifically the parameters of *anticipatory self defense*.⁸⁵

International law is not a suicide pact. The right of self defense by forestalling an armed attack was already established by Hugo Grotius in

84. See STEVEN SLOAN, *BEATING INTERNATIONAL TERRORISM: AN ACTION STRATEGY FOR PREEMPTION AND PUNISHMENT* (1986) (giving an unusually frank discussion of "terrorism preemption" from a tactical point of view).

85. For more by this author on anticipatory self defense under international law, see Louis R. Beres, *Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law*, 26 *VANDERBILT J. TRANS'L L.* 111 (1993); Louis R. Beres, *After the Gulf War: Israel, Preemption and Anticipatory Self Defense*, 13 *HOUSTON J. INT'L L.* 259 (1991); Louis R. Beres, *Striking 'First': Israel's Post-Gulf War Options Under International Law*, 14 *LOY. L.A. INT'L & COMP. L.J.* 1 (1991); Louis R. Beres, *Israel and Anticipatory Self Defense*, 8 *ARIZ. J. INT'L & COMP. L.* 89 (1991); Louis R. Beres, *After the Scud Attacks: Israel 'Palestine', and Anticipatory Self Defense*, 6 *EMORY INT'L L. REV.* 71 (1992). For an examination of assassination as a permissible form of anticipatory self defense, see Louis R. Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 *HOFSTRA LAW REV.* 321 (1991); Louis R. Beres, *On Assassination as Anticipatory Self-Defense: Is It Permissible?*, 70 *U. DET. MERCY L. REV.* 13 (1992).

1625.⁸⁶ Recognizing the need for "present danger" and for threatening behavior that is "imminent in a point of time," Grotius indicates that self defense is to be permitted not only after an attack has already been suffered but also in advance, where "the deed may be anticipated."⁸⁷ Or, as he says a bit further on in the same chapter, "It be lawful to kill him who is preparing to kill"⁸⁸

A similar position is taken by Emmerich de Vattel:

The safest plan is to prevent evil, where that is possible. A nation has the right to resist the injury another seeks to inflict upon it, and to use force and every other just means of resistance against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor.⁸⁹

The customary right of anticipatory self defense has its modern origins in the case of *The Caroline*, which concerned the unsuccessful rebellion of 1837 in Upper Canada against British rule (a rebellion that aroused sympathy and support in U.S. border states).⁹⁰ In an exchange

86. HUGO GROTIUS, 2 DE JURI BELLI ET PACIS 206-07 (William Whiwell trans., 1853) (1625).

87. *Id.*

88. *Id.* at 207. In other sections of his *Commentary on the Law of Prize and Booty*, Grotius wrote:

Now, as Cicero explains, this [justification for preemption] exists whenever he who chooses to wait [for formal declarations] will be obliged to pay an unjust penalty before he can exact a just penalty; and, in a general sense, it exists whenever matters do not admit of delay. Thus it is obvious that a just war can be waged in return, without recourse to judicial procedure, against an opponent who has begun an unjust war; nor will any declaration of that just war be required For—as Aelian says, citing Plato as his authority—any war undertaken for the necessary repulsion of injury, is proclaimed not by a crier nor by a herald but by the voice of Nature herself.

HUGO GROTIUS, DE IURE PRAEAE COMMENTARIUS 96 (James Brown Scott ed., Gladys L. Williams & Walter H. Zeydel trans., 1964) (1604).

89. EMMERICH DE VATTEL, 3 THE LAW OF NATIONS 130 (Charles G. Fenwick trans., 1916) (1758). Let us recall, here, Pufendorf's argument in *On the Duty of Man and Citizen According to Natural Law*:

where it is quite clear that the other is already planning an attack upon me, even though he has not yet fully revealed his intentions, it will be permitted at once to begin forcible self-defense, and to anticipate him who is preparing mischief, provided there be no hope that, when admonished in a friendly spirit, he may put off his hostile temper; or if such admonition be likely to injure our cause. Hence, he is to be regarded as the aggressor, who first conceived the wish to injure, and prepared himself to carry it out. But the excuse of self-defense will be his, who by quickness shall overpower his slower assailant. And for defense, it is not required that one receive the first blow, or merely avoid and parry those aimed at him.

PUFENDORF, *supra* note 34, at 32.

90. See *The Caroline*, JOHN B. MOORE, 2 A DIGEST OF INTERNATIONAL LAW 412 (1906), reprinted in LOUIS HENKIN ET. AL, INTERNATIONAL LAW 622 (2d ed. 1987).

of diplomatic notes between the governments of the United States and Great Britain, then U.S. Secretary of State Daniel Webster outlined a framework for self defense that did not require an actual attack.⁹¹ There, military response to a threat was judged permissible so long as the danger posed was "instant, overwhelming, leaving no choice of means and no moment for deliberation."⁹² Following this case, the serious *threat* of armed attack has generally been taken to justify militarily defensive action.

Today, some scholars argue that the specific language of Article 51 of the UN Charter has overridden the customary right of anticipatory self-defense articulated by *The Caroline*.⁹³ In this view, Article 51 fashions a new and far more restrictive statement on self-defense, one that relies on the literal qualification contained at Article 51, "if an armed attack occurs."⁹⁴ However, this interpretation ignores the argument that international law cannot reasonably compel a state to wait until it absorbs a devastating, or even lethal, first strike before acting to protect itself. Moreover, in the nuclear age—when waiting to be struck first may be equivalent to accepting annihilation—the right of anticipatory self defense is especially apparent.

What about the territorial sovereignty of states that host terrorist groups? Wouldn't preemptive attack against terrorists contemplating use of nuclear weapons violate such sovereignty and represent, therefore, an act of aggression?⁹⁵ Not at all! As we have already noted, states have

91. *Id.*

92. *Id.*

93. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. CHARTER art. 51.

94. *Id.*

95. Since World War Two, aggression has typically been defined as a military attack not justified by international law directed against the territory of another state. The question of defining aggression first acquired particular significance with the Draft Treaty of Mutual Assistance of 1923. See *Report of the Permanent Advisory Commission of the League of Nations*, LEAGUE OF NATIONS O.J. Spec. Supp. 16, at 7 (1923). By a resolution of November 17, 1950, the U.N. General Assembly decided to refer to the International Law Commission a proposal of the U.S.S.R. concerning the definition of aggression. See G.A. Res. 378B, U.N. GAOR, 5th Sess., Annex 1, Agenda Item 72, at 4, U.N. Doc. A/C.1/608 (1950). The U.N. General Assembly adopted an authoritative definition of aggression without a vote. See G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975). Article 1 is based on U.N. Charter Article 2(4), enjoining members from "the threat or use of force against the territorial integrity or political independence of any state." *Id.* art. 1. Article 2 provides that the first use of armed force represents "*prima facie*" evidence of unlawful conduct, but that "other relevant circumstances" may also be taken into account. *Id.* art. 2. The requirement that to be aggression, the first use of force must be "in conformity with the Charter" clarifies that there may exist some first use of force that is entirely

NUCLEAR TERRORISM IN A CHANGING WORLD

the obligation under international law to prevent their territory from being used as a base for terrorist operations against another state. Where this obligation is not met, the normal prerogatives of sovereignty are forfeited with regard to the preemption choices of certain victim states.⁹⁶

In certain residual instances, such forfeiture may even justify assassination as a limited strategy of counter-nuclear terrorism. Of course, there are very specific rules of international law that must still be followed.⁹⁷ For example, it is essential that the intended victims be painstakingly identified as prospective nuclear terrorists; that they be distinguished from lawful insurgents according to the previously discussed criteria of *jus ad bellum* and *jus in bello*; that they be authoritatively presumed to be preparing for specific forms of nuclear terrorism; that such a presumption be determined "beyond a reasonable doubt;"⁹⁸ and that all alternative strategies of counter-nuclear terrorism be determined unworkable.

Under the U.S. Constitution, Amendments IV, V, VI, and VIII comprise a "bill of rights" for accused persons, and the phrase "due process of law" derives from Chapter 29 of Magna Carta (1225).⁹⁹

lawful. *Id.* It follows, *inter alia*, that to qualify as aggression, use of force must be carried out to achieve a prohibited objective, i.e., that *animus aggressionis* is an essential element of the offense.

96. Here it is instructive to recall Vattel's argument on the observance of justice between nations:

Justice is the foundation of all social life and the secure bond of all civil intercourse. Human society, instead of being an interchange of friendly assistance, would be no more than a vast system of robbery if no respect were shown for the virtue which gives to each his own. Its observance is even more necessary between Nations than between individuals, because injustice between Nations may be followed by the terrible consequences involved in an affray between powerful political bodies, and because it is more difficult to obtain redress An intentional act of injustice is certainly an *injury*. A Nation has, therefore, the right to punish it The right to resist injustice is derived from the right of self-protection.

See VATTEL, *supra* note 44, at 135.

97. See Louis R. Beres, *Victims and Executioners: Atrocity, Assassination and International Law*, 7 CAMBRIDGE REV. INT'L AFFAIRS 1 (1993).

98. The "beyond reasonable doubt" standard that has characterized the Anglo-American criminal justice system for more than two hundred years is a component of the broader question of the theory of evidence. Evidentiary doctrines are associated with arrest, pretrial examination, and grand jury indictment. Historically, the study of reasonable doubt has been linked to the work of juries. English law was affected by John Locke's AN ESSAY CONCERNING HUMAN UNDERSTANDING (1690), which presented an ordered account of levels of probability. Locke's criteria for evaluating testimony emphasized the number of witnesses, their integrity, their skill at presenting evidence, and the testimony's agreement with the circumstances and the presence or absence of contrary testimony. Samuel Pufendorf links the concept of "conscience" to notions of moral certainty and beyond reasonable doubt. PUFENDORF, *supra* note 34, at 17, 21. For Pufendorf, the "satisfied conscience" of a jury required rational, unbiased, and unemotional acts of the understanding. *Id.*

99. The Magna Carta marks an important first step toward constitutional privilege and the subjection of kings to parliamentary will. An account of the original versions of the Charter and of

There, the King promises that "no free man (*nullus liber homo*) shall be taken or imprisoned or deprived of his freehold or his liberties of free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land: (*per legem terrae*)."¹⁰⁰ Yet, the foundations of English and American constitutional protections were not confronted with the altogether unique technological hazards of the present moment, and there may develop certain circumstances where total faithfulness to ordinary civil protections could produce "death" to an entire commonwealth. This does not suggest, to be sure, a capricious disregard for constitutional safeguards as a permissible element of counter-nuclear terrorism, but an *ad hoc* balance of foreseeable harms as a reasonable standard of judgment when assassination is under consideration.

VIII. Conclusion

The end of the Cold War has not brought the United States into a more harmonious era of international relations. Quite the contrary. With the end of bipolar capabilities for conflict management, this country may now be confronted with increased involvement in foreign wars and with expanded risks of terrorist attack. Under certain circumstances, as we have already seen, such risks could include even nuclear terrorism.

International law, though limited in its potential for preventing nuclear terrorism, should not be disregarded. At a minimum, it can provide explicit, identifiable, and indispensable criteria for distinguishing between permissible and impermissible forms of insurgency. At a maximum, it can offer effective guidelines for the preemption option, including — under genuinely extraordinary conditions — assassination as an essential strategy of counter-nuclear terrorism. Ironic as such a strategy may appear, especially because assassination can also be considered a form of terrorism in times of peace, there are circumstances where the prospective benefits would greatly outweigh the expected costs.¹⁰¹

later editions and commentaries appears in WILLIAM S. MCKECHNIE, *MAGNA CARTA* 165-85 (2d ed. 1914). The final version, dated June 15, 1215, is reprinted in ARTHUR E. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA* 17-32 (1965).

100. See SUTHERLAND, *supra* note 99.

101. On this point, see Louis R. Beres, *Victims and Executioners: Atrocity, Assassination and International Law*, in *CAMBRIDGE REV. INT'L AFF.* 1 (1993); Louis R. Beres, *On Assassination as Anticipatory Self-Defense: Is It Permissible?*, 70 *U. DET. MERCY L. REV.* 13 (1992); Louis R. Beres, *Assassinating Saddam: A Post-War View from International Law*, 19 *DEN. J. INT'L L. & POL'Y* 613 (1991); Louis R. Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20

NUCLEAR TERRORISM IN A CHANGING WORLD

We live in troubling times, the times W.B. Yeats foresaw in his poem, THE SECOND COMING:

Turning and turning in the widening gyre
The falcon cannot hear the falconer;
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,

The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.¹⁰²

To survive these times, the "best" will need to recover "all conviction." As for the "worst," who will now have the capacity for inflicting nuclear terror upon U.S. civilian populations, they are certain to remain "full of passionate intensity." It follows that international legal remedies for nuclear terrorism must focus upon (1) creating distance between terrorists and pertinent nuclear technologies, (2) creating cooperative processes and arrangements between pertinent states, and (3) creating appropriate incentives and disincentives for terrorist decision-making. Taken together, these focal points could immobilize the effects of "passionate intensity" and restrain terrorist activity within tolerable and enforceable limits.

There is one more thing. International legal remedies, pursuant to Article VI of our Constitution and several decisions of the U.S. Supreme Court, are part of the law of the United States.¹⁰³ Hence, such remedies carry with them not only tactical, but also jurisprudential imperatives. Thus, the official U.S. witnessing of the September 13, 1993 agreement between Israel and the P.L.O.¹⁰⁴ not only violated international law, but also U.S. municipal law. When, on September 28,

HOFSTRA L. REV. 321 (1992); Louis R. Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 TEMPLE INT'L & COMP. L.J. 231 (1991).

102. See THE LETTERS OF W.B. YEATS 94 (Allan Wade ed., 1954).

103. See *supra* note 6.

104. For full text of the agreement, see *The Text: 'Put an End to Decades of Confrontation and Conflict'*, N.Y. TIMES, Sept. 1, 1993, at A8. Significantly, from the standpoint of international law, this agreement is *not* a treaty. According to the Vienna Convention on the Law of Treaties, a treaty is always an international agreement "concluded between States." See VIENNA CONVENTION ON THE LAW OF TREATIES, May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/CONF. 39/27 (1969) (entered into force Jan. 27, 1980). For the requirements of statehood under international law, see Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934, for the United States Dec. 26, 1934).

1993, the Senate Foreign Relations Committee approved the Middle East Peace Facilitation Act of 1993¹⁰⁵ — an approval that clearly undermines this country's capacity to prevent nuclear terrorism — it exacerbated these violations.¹⁰⁶ Conflicting with the most essential norms of international law and, therefore, with the "supreme law of the land"¹⁰⁷ in the United States, this Act — which "permits" U.S. contributions to international organizations that provide benefits to the P.L.O. and allows the P.L.O. to establish an office in Washington — is clearly unlawful.

To prevent nuclear terrorism, the United States cannot have it both ways. It simply will not do to celebrate certain terrorist organizations on the one hand, while condemning assorted terrorist organizations on the other hand. Washington must display a uniform and consistent opposition to all terrorist groups, irrespective of considerations for short-term political gain by the President or by members of Congress. In the absence of such opposition, terrorist leaders worldwide will likely calculate that the benefits of persistent violent action outweigh the costs and — most ominously of all — that the prospective benefits of nuclear violence may be *especially* cost-effective.

105. See Middle East Peace Facilitation Act of 1993, H.R. REP. No. 283, 103d Cong., 1st Sess. (1993). The Act, which has not yet been printed, will appear in the future as Public Law 103-125.

106. Regarding the criminal responsibility of individual PLO perpetrators of terrorist crimes committed under the direction of PLO Chairman Yassir Arafat, the principle is well-established that orders pursuant to "domestic law" (in this case, by analogy, PLO "law") are no defense to violations of international law. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331; Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz), 1932 P.C.I.J. (ser. A/B) No. 46, at 167; Treatment of Polish Nationals in Danzig (parties abbreviated), 1932 P.C.I.J. (ser. A/B) No. 46, at 24; see also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3.2. On the principle of command responsibility (*respondeat superior*) as it pertains to Yassir Arafat and PLO terrorist crimes, see In re Yamashita, 327 U.S. 1 (1945); The High Command Case (The Trial of Wilhelm von Leeb), 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 71 (United Nations War Crimes Commission Comp. 1949); Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973); O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 GEO. L.J. 605 (1972); U.S. DEPT OF THE ARMY, ARMY SUBJECT SCHEDULE No. 27-1 10 (1970). The direct individual responsibility of Yassir Arafat for PLO crimes is altogether unambiguous in view of the London Agreement of August 8, 1945, which denies defendants any right of the act of state defense, a right which would in any event be inadmissible for the leader of a non-state insurgent organization. OFFICE OF THE JUDGE ADVOCATE GENERAL, DEPARTMENT OF THE ARMY, REPORT ON IRAQ, WAR CRIMES (DESERT SHIELD/DESERT STORM) 116 (1992) (unclassified version). Significantly, in addition to his responsibility for PLO terrorist crimes, Yassir Arafat gave his approval to crimes for war, crimes against peace, and crimes against humanity Saddam Hussein committed during the second Gulf War. *Id.* Indeed, units of the Palestine Liberation Army (P.L.A.) served with Saddam's forces in occupied Kuwait, making them (and him) complicit in multiple crimes of extraordinary horror and ferocity. *Id.*

107. See U.S. CONST. art. VI.