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as war crimes. According to paragraph 501, any U.S. Government official who had actual knowledge or should have had knowledge, through reports received by him or through other means, that troops or other persons subject to his control were about to commit or had committed war crimes, and failed to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof was similarly guilty of a war crime. Finally, paragraph 510 thereof denies the defense of “act of state” to such alleged war criminals by providing that the fact a person who committed an act which constitutes a war crime acted as the head of state or as a responsible government official does not relieve him from responsibility for his act.

Thus all civilian officials and military officials in the U.S. Government who either knew or should have known that the Reagan Administration intended to assassinate Qadhafi and his family are “war criminals” according to the U.S. Government’s own definition of that term. The American people cannot permit any aspect of our foreign affairs and defense policies to be conducted by acknowledged “war criminals.” According to article 2, section 4, of the U.S. Constitution the “president, vice-president and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, . . . high crimes and misdemeanors.” The American people must insist upon the impeachment, dismissal or resignation of all U.S. Government officials guilty of such war crimes.

The outbreak of the First World War provides a very compelling example of the principle at stake here. This conflagration started because of a terrorist attack at Sarajevo by a Serbian nationalist against Archduke Francis Ferdinand, who was heir apparent to the throne of the Austro-Hungarian empire. With the backing of Germany, Austria-Hungary issued an ultimatum to Serbia, which in turn was supported by Russia. Eventually the world went to war and approximately 20 million people were killed. At the 1919 Paris Peace Conference, however, the Allied Powers put the responsibility for the outbreak of the war squarely upon the shoulders of the Central Powers by means of article 231 of the Treaty of Versailles.

This experience with “international terrorism” 70 years ago should have established the validity of the proposition to the satisfaction of the entire international community that the assassination of even a head of state or heir-presumptive to a throne was insufficient grounds for going to war or resorting to the threat or use of military force. Yet the Reagan Administration has foolishly and quite contemptuously tried to rewrite the tragic lessons of modern history. As George Santayana wrote: “Those who cannot remember the past are condemned to repeat it.” If the Reagan Administration’s policy towards Libya proceeds as planned, the Middle East could readily become the Balkans of the 1980s, except that there will most probably not be a peace conference at the end of World War III.

THE LEGAL AND MORAL ADEQUACY OF MILITARY RESPONSES TO TERRORISM

by Alberto R. Coll*

The modern world’s vulnerability to terrorism, and the apparent insufficiency of nonmilitary means of dealing with the problem, prompt an inquiry into the legal adequacy and moral appropriateness of military responses to terrorism. Throughout this discussion, terrorism is narrowly defined as the explicit and deliberate (as opposed to

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collateral) destruction or threat of destruction of nonmilitary, nongovernmental personnel in the course of political or other forms of warfare.

Several aspects of this definition deserve emphasis. First, terrorist acts are, properly speaking, directed at what the laws of war traditionally have described as "innocents" or "noncombatants," that is, nonmilitary and nongovernmental personnel. Tourists on a cruise ship, schoolchildren, scholars or journalists not employed by a foreign intelligence service, and persons who are not agents of the state would seem to fit this profile. On the other hand, the attacks against the U.S. Marines in Lebanon in 1983 or those assassinated in El Salvador in the summer of 1985, are best described as simply acts of war, directed specifically against American military personnel and other agents of the state, and providing the United States with ample legal justification under the laws of war for responding, even if in both instances the United States chose not to respond.

Second, terrorist acts are those explicitly and deliberately directed against nonmilitary, nongovernmental targets. They can be distinguished from acts of war which, though resulting in civilian casualties accidentally or collaterally, are specifically aimed at the destruction of military or state-related targets.

Third, the morality of the cause in the name of which a terrorist act is committed should be considered irrelevant in determining whether such an act is terroristic. No matter how worthwhile the causes of an independent Palestinian state, a nonapartheid South Africa, or a democratic Nicaragua may appear to their supporters, the moral value of such political purposes does not justify terrorist acts.

There are probably few pure terrorist organizations in the world, that is, groups whose sole political instrument is terrorism as defined earlier. The more common problem is the existence of numerous political groups (including sovereign states, guerrilla movements and transnational ethnic or cultural communities) that pursue their objectives through a mix of conventional political and diplomatic strategies, acts of war, and selective terrorism. The proportion of each of these in the overall mix can vary, of course. The Basque separatist extremists in Spain or the Shining Path in Peru resort to a much heavier proportion of terrorist acts in their overall strategy than other guerrilla movements. And in World War II, terrorist acts played a much larger role in the German war effort against the Soviet Union than in the Anglo-American campaign against the Nazis. To be sure, there is much value in studying closely various "terrorist groups," that is, groups whose exclusive or predominant political and military instrument is terrorism. Yet it would be unfortunate if such focus would lead one to see terrorism as a problem exclusively caused by and connected with such groups.

In reality, terrorism is a generalized phenomenon that rears its ugly head whenever there is a condition of declared or undeclared warfare between two actors in the international system. Since the earliest recorded history, the temptation to resort to terrorism has been present whenever there exists acute conflict. It is a temptation from which no actor in international society, no matter how civilized or well-established, is every completely free. There are societies, of course, whose peculiar historical traditions, moral outlook and political institutions enable them to resist the temptation more effectively than others, and states or groups whose ample military power or political legitimacy render it unnecessary for them to resort, except in the rarest occasions, to terrorism as a major instrument in their overall strategy. But the terrorist impulse is fairly universal, and its ubiquitous presence is one of the key difficulties with containing or limiting warfare.
While the effort to agree on a common international definition of terrorism will remain as difficult as it has been thus far, success will be more likely if such efforts focus more on terrorist acts per se and on ways of proscribing them and responding to them, and perhaps less on the peculiar evil of particular terrorist groups or terrorist states. Nevertheless, in the context of the dynamics of international relations in the 1980s, any discussion of terrorism almost inevitably must focus on the marked use of terrorism as an instrument of foreign and military policy by a small number of governments and transnational groups in the Middle East and North Africa. It is in that specific context that the arguments and themes of this essay are presented.

Purposes Behind Military Responses to Terrorism

There are three general purposes behind military responses to terrorism: long-term deterrence, short-term prevention, and punishment. One of the key objectives of a military action such as that taken by the United States against Libya in April 1986 is long-term deterrence: to persuade Libya and any other similarly inclined actors in the international community that the support of terrorist activities against the United States is bound to trigger an American response prohibitively costly to such actors. As with nuclear deterrence, the deterrent in counterterrorist policy has to be so fearsome as to dissuade over the long term, that is, for the indefinite future, any state or group from ever contemplating the use of terrorism as an instrument of policy against the United States. An effective deterrent also must be credible; the adversary must be convinced of one's willingness and resolution to carry out the dreaded response. Fortunately, the United States has never found it necessary to use nuclear weapons against the Soviets to persuade them of our resolve to use them in response to a future Soviet attack. With regard to Libya, however, Qadhafi's apparently increasing boldness in supporting terrorist activities suggested that an effective American counterterrorist deterrent either never had existed or had crumbled gradually; it thus seemed necessary to American policymakers to use force to restore credibility to the U.S. deterrent. While the blow of April 1986 fell on Libya, the signal it conveyed was intended for a much wider international audience.

Does such deterrence violate the traditional international legal requirements of proportionality, as some critics claimed after the Libyan raid? If so, nuclear deterrence itself would have to be pronounced illegal, something that international law has carefully avoided doing for more than four decades. By its very nature, deterrence requires the willingness to respond in a disproportionate way; the blow threatened against the adversary must be so devastating and overwhelming as to make it plainly irrational for him to believe that he ever could obtain any benefits from aggression. Whereas strict proportionality would seem to parallel the proverbial "eye for an eye, and a tooth for a tooth," deterrence requires the threat of "an eye for a tooth." While there is a body of opinion that claims that such deterrence is immoral and unlawful, there are others who argue that in the light of its contribution to international order deterrence is morally and legally acceptable.

Even though deterrence is incompatible with strict proportionality, it can still be regulated by moral and legal norms. An appropriate standard would be that the violence threatened or actually used in deterring an adversary should be the minimum necessary to persuade him not to undertake aggression in the future. This standard, while much broader than strict proportionality, restrains the employment of violence to a level no higher than that necessary to achieve deterrence.

Another purpose of military responses to terrorism is short-term prevention: to thwart terrorist operations while in the planning and training stages. The destruction
of facilities and infrastructure used in the preparation of terrorist acts, for example, would serve such a purpose. While preemption of terrorist activities about to take place in the immediate future can be an important by-product of military responses, short-term prevention can look farther to the future than terrorist acts about to occur. Given the stealth with which terrorist activities are often planned, it is inappropriate to restrict counterterrorist military operations to preemption of the immediate threat. A broader prevention standard is required that allows a state to destroy terrorist activities while they are being planned, even if at the time the counterterrorist preventive blow is struck, one cannot prove with absolute certainty that the particular group or facility that suffered the blow was going to be used against that state. Reasonable certainty that the group or facility in question might be involved in the future in a terrorist act against the state should suffice. For domestic and international political reasons, the state striking the counterterrorist blow is likely to be careful in choosing its targets anyway; it knows that if the objects of its attack turn out to be truly innocent or even are perceived as such by significant segments of international opinion, the counterterrorist operation hardly will be worth its political costs.

Yet another purpose of a military response is punishment of previous terrorist acts. Whether one uses the term punishment as opposed to retaliation is not important. Punishment has two amply recognized foundations in moral and legal theory: to deter future acts by the same party or others and to satisfy the requirements of justice in both the broader universe of moral order and the more concrete domestic and international legal order.

In the aftermath of the 1986 Libyan raid, distinguished critics such as Venezuela’s former President, Carlos Andres Perez, charged the United States with “improperly setting itself up as judge and avenger.” The problem, however, is that the existing decentralized international system of sovereign nation-states lacks effective institutions for impartially adjudicating claims and punishing unjust or unlawful conduct. Hence, states have no choice but to act as “judges and avengers,” even when their actions may be open to charges of partiality, prejudice and selectivity. The gross abuses committed by states in the name of enforcing the law should not obscure the occasional validity of self-help measures to punish aggressive behavior.

It is typical of modern Western societies, devoted to the ideals of humanitarianism, to downplay the centrality of punishment as one of the requirements of justice. Contemporary international law is not eager to discuss the subject, except by reference to the increasingly distant Nuremberg Trials. There may be something intellectually impoverishing, however, about denying what Vitoria and Grotius instinctively recognized, namely, that an international society, precisely because it lacks a universally acknowledged moral consensus and an effective judge to enforce it, must allow states occasionally to mete out punishment to those culpable of aggressive or grossly unjust acts such as terrorism.

**Self-Defense as an Appropriate Legal Justification for Military Responses to Terrorism**

The long-term deterrence and short-term prevention of terrorism are legally justifiable under the general provisions of article 51 of the U.N. Charter which provide: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations . . . .” Some critics argue that military responses of the type outlined here are not legal under article 51; seeking support in the recent decision of the International Court of Justice, *Nicaragua v. United States*, and other similarly narrow readings of article 51,
these critics suggest that terrorist acts do not amount to an armed attack justifying military responses in self-defense.

On the opposite side of the political spectrum are other critics who also argue that the self-defense provisions of article 51 do not justify military responses. But unlike the liberal critics who draw the conclusion that military responses should not be used, these scholars argue that the United States should go ahead and respond militarily and, instead of going through what they perceive to be the convoluted fiction of calling the response an act of self-defense, it should simply call it retaliation or reprisal. As the best-known exponent of this view, Professor Alvin Bernstein writes: "Rather than speak of 'anticipatory self-defense' we should stick to our tradition of retaliation—counter-punching, if you will."

Interestingly, both the liberal and conservative critics of justifying military responses under the rubric of self-defense argue that the provisions of article 51 should be interpreted in the light of customary international law and of the classic words of U.S. Secretary of State Daniel Webster to the effect that self-defense applies only in extraordinary circumstances where "the necessity of that self-defense is instant, overwhelming, leaving no choice of means, and no moment for deliberation." Terrorist acts supposedly do not fit this standard.

It is well to recall the context in which Webster wrote his now famous words. In 1837, a rebellion broke out in colonial Canada, which quickly received active support from American volunteers and private suppliers operating out of the United States. The American steamship *Caroline* was involved in these activities, regularly transporting men and arms from the United States to Canada across the Chippewa Channel. The U.S. authorities knew what was going on but looked the other way. Finally, a British military force departed from the Canadian side of the Channel and boarded the *Caroline* docked at Fort Schlosser on U.S. territory at night, set it on fire and towed it into the current which quickly carried it down Niagara Falls to its destruction. Two men aboard the *Caroline* were shot dead.

An exchange of diplomatic notes followed between the American and British governments. In response to the U.S. complaint, the British argued that the attack was legally justified as necessary for self-defense and self-preservation since the American authorities had not stopped the illegal infiltration. The British also pointed to the future threats posed by the *Caroline*. Webster replied that the United States generally accepted the concept of self-defense as justification for a violation of foreign territorial sovereignty and the principle of nonintervention, but he limited the concept's applicability in the form already described. The British accepted Webster's definition of self-defense and suggested that their raid met its requirements, but expressed their regrets for what they perceived as a necessary violation of U.S. territory. The Americans, while unable to agree with the British that the facts of the case merited the applicability of the doctrine of self-defense, accepted the British expression of regret and the dispute was finally closed in 1842.

One of the key facts to be kept in mind about the *Caroline* incident was that, prior to their attack, the British had not asked the U.S. Government through diplomatic means to stop the threatening activities or expressed their serious concern about them. Thus, Webster could write that this was not a case in which there was "no choice of means, and no moment for deliberation." Presumably, had the British taken such diplomatic steps and the American Government still failed to act, then there would have been "no choice of means, and no moment for deliberation" left, and a military response would have been proper. It is unpersuasive to suggest that what Webster meant was that, since the American partisan activities were low-intensity warfare,
incapable of adding up to an overwhelming blow, there never would have existed a British justification for the harsh raid on the *Caroline* in the name of self-defense.

The world has changed much in the last 150 years. Whether in the realm of nuclear weapons or in that of terrorist strategy and tactics, modern technology, communications and transportation have enhanced the destructive possibilities open to aggressive behavior while simultaneously reducing the time available to a victim for effecting a successful self-defense. Moreover, there have been impressive advancements in military capabilities for stealth and surprise attack. While Webster's definition of self-defense remains basically sound, its key components have to be interpreted rather broadly, given the radically different world in which we live. The key words, "instant, overwhelming, leaving no choice of means, and no moment for deliberation," deserve a more expansive meaning today than they had in 1837.

At bottom, conservative scholars such as Professor Bernstein read the concept of self-defense as restrictively as the liberal critics of American military responses to terrorism, a key difference between both schools being that the former see self-defense as a self-defeating and highly hampering legal fiction, to be discarded in favor of bolder notions that will permit freer use of force, while the latter view self-defense as applicable only in narrow circumstances, outside of which all use of force is illegal and unjustified. This author obviously disagrees with the liberal critics, but also thinks that the conservatives are missing an important point.

Self-defense need not be seen as the liberal critics see it, as a straitjacket. Nor is it applicable only in response to an imminent terrorist attack or as an on-the-spot reaction to an unexpected threat. Neither Daniel Webster in 1841, nor such hard-headed supporters of the U.N. Charter as Dean Acheson and John Foster Dulles, intended to distinguish self-defense from defense in general or from "the overall system of active and passive measures that safeguard a nation's existence and ensure its security." Whatever restrictive connotations one may want to attach to the notion of self-defense as distinct from defense are more imaginary than real, perhaps no more than an indication of how successful liberal critics have been in persuading many of us that article 51 of the Charter should be read as narrowly as they claim.

Self-defense is vitally important as a justification because in a world in which self-defense has become the contending opposite of aggression, it is important to make the point that military responses to terrorism are essentially defensive in character; their spring is not aggressive, but on the contrary, the prevention and long-term deterrence of that particular form of aggression that operates through terrorist strategy and tactics. Psychologically, morally, and legally, this is an important point to make both to one's adversaries and to the people of a democratic polity.

This is not to say, of course, that self-defense is the only appropriate justification for military responses in all circumstances. There is still room for acts of reprisal and, more controversially perhaps, for acts of retaliation or punishment. Reprisals are technically illegal acts carried out in response to a previous illegal act, for the purpose of persuading its perpetrator to cease and desist. Reprisals require that peaceful methods of redress be tried first and that the reprisal be proportional; such proportionality need not be a strict, "tit-for-tat" proportionality, since there may be occasions in which "deterrent proportionality," that is, a larger blow than the initial one, may be required to persuade the other party to cease its illegal conduct. While many scholars argue that reprisals became illegal under the U.N. Charter, the point is highly debatable; the lack of consensus suggests that current state practice is the best guide to what is acceptable conduct, and on this issue the evidence seems to suggest the continuing
relevance of reprisals in the face of U.N. impotence to provide its members with pro-
tection against illegal uses of force.

As noted earlier, the general acceptability of retaliation or punishment as a legal
justification for antiterrorist responses is much more controversial than that for repri-
sals. While this writer is sympathetic to the notion of incorporating punishment into
the overall rationale for antiterrorist responses, it is difficult to see what practical ad-
vantages are gained from retaliation or punishment that are not available through self-
defense or reprisals. Moreover, it is important to recognize that ultimately, in moral
and legal theory, retaliation as well as reprisals have their soundest foundation in
defense which, as has been argued earlier, is indistinguishable from self-defense. The
strongest reason for punishing or for carrying out reprisals against terrorists is the
same: to persuade present-day terrorists and future would-be imitators that their
strategy does not pay and, in so doing, protect American citizens against terrorist acts.

The Limited Effectiveness of Nonmilitary Responses to Terrorism

In theory, military measures would be unnecessary if there existed effective nonmili-
tary instruments for the long-term deterrence, short-term prevention, and punishment
of terrorism. Unfortunately, such is not the case.

The most common nonmilitary responses to terrorism are political-diplomatic, eco-
nomic, and legal, and they all suffer from serious shortcomings. The decentralized
nature of the international system leads states to put their individual economic or
political interests ahead of international efforts to suppress terrorism. Efforts to or-
ganize coalitions to put effective political and diplomatic pressure on terrorist groups
and their supporters are as problematical as the League of Nations' ill-famed attempt
to impose economic sanctions on Italy in the aftermath of its 1935 invasion of Ethio-
pia. Between December 1985 and the spring of 1986, the United States unsuccessfully
lobbied its European allies to impose diplomatic and economic sanctions on Libya. By
then, the evidence of Qadhafi's mischief in supporting terrorist acts was overwhelm-
ing. Yet, somewhat understandably, Europe relented. Its geographical proximity to
Libya made it highly vulnerable to any retaliatory actions the mercurial Colonel might
take. And, perhaps more important, Europe's economic ties to Libya were too signifi-
cant to suspend even for a brief period of time. The yearly total of exports to Libya by
countries such as Italy, Spain, Great Britain and West Germany totaled billions of
dollars.

International legal responses to terrorism encounter similar problems. The so-
called "political exception" to extradition provides a giant loophole through which
terrorists routinely escape from the mechanisms of extradition treaties. Fundraisers
for the Irish Republican Army and individuals widely suspected of supporting terror-
ist acts by that organization have enjoyed a great deal of freedom in the United States,
much to Great Britain's consternation. When the hijackers of the Achille Lauro, who
had murdered an innocent American on board, landed in Italy accompanied by a
certain Abu Abbas who was suspected of having encouraged the hijacking in the first
place, he was released from custody by the Italian authorities with unusual alacrity,
quickly fleeing to Yugoslavia. The enraged Americans suspected that Italian Prime
Minister Craxi had acted speedily so as to prevent the issue of the applicability of the
Italian-American extradition treaty from arising. Obviously embarrassed by the inci-
dent, Craxi hardly concealed what most Italians knew: the Prime Minister did not
want to embroil his government or his country in the bitter crusade pursued by vari-
ous Middle East groups against the United States, which he would have done had he
allowed Mr. Abbas to be turned over to the United States.
Extradition treaties and domestic antiterrorist laws do not exist in a legally impartial, politically sanitized vacuum. They are interpreted, applied and enforced in a context of highly charged political sympathies and pressures by governments vulnerable to domestic and international manipulation. In those numerous cases in which the mechanism of extradition is missing, the only instrument available is domestic law against terrorist acts, yet most non-Western judicial systems enjoy little independence from the executive. Hence, even though the laws of Egypt presumably do not look benignly on the act of dumping a wheelchair-bound passenger overboard, President Mubarak sent the hijackers of the *Achille Lauro* out of Egypt, away from the reach of Egyptian law or whatever political pressures the Italians or Americans might have exercised. Mubarak’s action was, in turn, the result of intense pressure from domestic constituencies and Middle East forces which he would have been foolish to ignore.

While suggestions are recurrently made for the creation of new legal institutions exclusively concerned with terrorism, such as an international antiterrorist criminal code or an international tribunal for terrorist offenses, such laudable proposals face similar obstacles to those encountered by already available legal and diplomatic instruments. Statesmen doubtlessly should encourage the development of nonmilitary international institutions and processes for the suppression of terrorism, but so long as such mechanisms remain in their present state of ineffectiveness it seems morally and legally proper to take military measures.

When judiciously used, military responses actually enhance the efficacy of economic, diplomatic and legal instruments. The use of force need not be seen as antithetical to, or defeating the purposes of, peaceful antiterrorist strategies. On the contrary, both types of responses are often complementary, and a military response can have a catalytic effect in rendering nonmilitary instruments more authoritative. The Libyan raid of 1986 illustrates this interplay. The American attack helped to persuade the European allies of the need to impose more serious economic and diplomatic sanctions against Libya than they had previously considered acceptable. Faced with the credible prospect of further American military strikes and all their attendant political and economic risks, the allies thought it appropriate to toughen their own nonviolent measures against Libya, in the hope of persuading the United States that future military strikes would no longer be necessary. Moreover, the American military measures provided European statesmen with much needed political space for their legal and economic sanctions. Domestically and internationally, the economic and diplomatic sanctions now appeared moderate and acceptable, when contrasted with the harsher American military response. Moreover, contrary to the initial predictions of critics of the raid, the use of force demoralized, confused, and weakened the more radical elements in the Middle East, including Qadhafi himself, while making more comfortable the position of moderate forces. Within the Libyan military, there seemed to be substantial elements who held Qadhafi responsible for the destruction his proterrorist adventures brought upon their country, and elsewhere in the Arab world some leaders used the occasion to remind the Colonel privately once again of the disadvantages of supporting terrorism. In the Libyan case at least, military measures seem to have enhanced the usefulness and credibility of legal, diplomatic, and economic sanctions, while making a critical contribution to deterring, at least momentarily, Libya’s support for terrorist activities against the West.
Types of Military Responses

Attacks on Harboring States

States that unwittingly or purposely allow their territories to be used for the preparation of terrorist acts incur a grave obligation under international law to suppress such activities. The state victim of terrorist acts is, of course, under a duty to resort initially to diplomatic means in requesting the government in whose territory terrorist acts are being planned or trained for to take suppressive measures, but once it becomes reasonably evident that the harboring state is unable or unwilling to act, the injured state should be free to use the minimum of force required to stop the terrorist threat. Obviously, the military measures should be directed at the actual "terrorist" sanctuaries and should avoid collateral damage to innocent population. Yet, to deny the right to military responses against harboring states seems morally problematical and, from a legal viewpoint, likely to encourage the growth of sanctuaries from which terrorist acts can be organized and directed with impunity.

Attacks on Sponsoring States

States that furnish financial or military support for terrorist activities are engaged in aggression. Their failure to respond to diplomatic requests to cease their aggressive behavior should justify military measures by the victim state to achieve long-term deterrence, prevention, and, if appropriate, punishment of terrorist acts. Terrorism is a sufficiently grave injury as to justify the use of force against its sponsors. To argue that the defensive provisions of article 51 of the U.N. Charter do not permit such use of force is to give that article an unrealistically narrow reading inappropriate for the evolving modes of international violence in the last two decades of the 20th century.

The Use of Commandos or "Hit Teams" for the Kidnapping or Summary Execution of Known Terrorists

This is, legally, the most problematical of all military responses because it often involves violating the sovereignty of an innocent state that is not purposely harboring or sponsoring terrorist acts and that may be unaware of the presence of terrorist agents on its soil. There also has been at least one occasion in which the individual executed by the commandos turned out to have been an innocent party mistaken as a terrorist by the commandos and their intelligence service. The temptation to use this military instrument usually arises in one of the following settings:

- The host country where the known terrorist is temporarily present is not politically inclined to hand him over to his pursuers. It is inconceivable, for example, that if the hijackers of the Achille Lauro had not been kidnapped in the air by the United States and had arrived in Tunis, the Tunisian Government would have put them on trial or handed them over to anyone else for that purpose.
- There is no extradition treaty with the host country, or if there is one, its loopholes are sufficiently ample for the host government to deny an extradition request.
- Under the host country’s own laws, the terrorist may not have committed a justiciable offense.
- In some situations, an official request for extradition can tip off the terrorist about his impending arrest and prompt him to flee.
- In certain societies torn by civil war or social chaos, such as Lebanon throughout the 1980s, there is no governmental authority strong enough to apprehend known terrorists.
Generally, since the use of antiterrorist "hit teams" involves violating the sovereignty of innocent states it can be considered illegal. Measures against harboring or sponsoring states involve states that have acquiesced in, or abetted, acts of aggression and are therefore justifiable as defensive responses to aggression carried out by or from those states. The same cannot be said of the use of "hit teams" that violate the sovereignty of a country which, through no fault of its own, happens to have some known terrorists living on its territory and which does not serve as a station from which terrorist acts are planned or executed.

Yet, the obvious illegality of such measures is not the end of the matter. Occasionally, acts that are technically illegal under international law are morally justifiable. At times, what one could call the "Eichmann principle" applies in international law to give moral credibility to an otherwise illegal act and in the process of so doing, brings that act within or very close to the sphere of what is lawful or at least legally tolerable. Imagine a well-known terrorist such as "Carlos," whose legendary viciousness parallels his repeated violations of the most basic laws of humanity. Suppose that he were identified as living in one of the settings just described, in which there is no legally effective way to bring him to justice. Assume that his kidnapping could be carried out bloodlessly. Under the "Eichmann principle," Carlos' kidnapping would be morally proper, and its propriety sufficiently compelling to soften immeasurably the hues of illegality connected with the deed. Arguably, the "Eichmann principle" was also applicable to the U.S. midair kidnapping of the hijackers of the *Achille Lauro*. It is evidence of the close supporting relationship of generally held perceptions of morality to perceptions of what is lawful, that in both the *Eichmann* and the *Achille Lauro* cases, for all the accusations of illegality and violations of sovereignty directed at Israel and the United States, there was no general sense of moral outrage about their deeds. Perhaps there was an unspoken recognition in each case that here was a very real dilemma involving two competing, worthwhile legal norms, one of which had to yield of necessity, albeit reluctantly, to the other. The result could be seen as, in the long run, supportive of international law and its basic values. A world in which revolutionaries refrain from threatening innocent human beings with destruction or dumping handicapped passengers overboard is as important an objective of international law and as conducive to a genuine international legal order as one in which states scrupulously respect each other's formal sovereignty.

Another policy alternative with obvious appeal is for a government to offer rewards or bonuses to any person who, while acting in his or her private capacity, brings within that government's jurisdiction a well-known terrorist for judicial prosecution. To avoid egregious injustice, the reward or bonus could be given only for terrorists appearing in a list published and regularly updated by the U.S. Department of Justice specifically for this purpose. The list would contain the names of persons whose alleged crimes against humankind would be sufficiently supported by evidence adequate to sustain an indictment by a federal court grand jury. To disassociate the U.S. Government from the legal problems raised by the use of "hit teams," the government would make it clear that it will not offer diplomatic protection to American citizens kidnapping terrorists overseas. Such Americans would not be considered government agents, since whatever illegal acts they committed overseas would be carried out in their independent capacity as private citizens and not under the direction of the U.S. Government; the bonus or reward would be offered for the act of bringing the terrorist within U.S. jurisdiction, not for any illegal deeds committed in the course of that act. Moreover, to avoid political problems with allies or other countries with whom the United States has a relationship of a sensitive nature, the State Department working in