

COUNTERTERROR DETERRENCE/DEFENSE AND JUST-WAR DOCTRINE

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THE CONTEMPORARY REVIVAL of just-war doctrine has tended to center around issues of nuclear deterrence and defense. Comparatively little has been done by just-war analysts regarding conventional war except for the conventional dimensions of the Vietnam War, e.g. regarding the bombing of the North.¹ In part, the literature on war and morality reflects the fact that conventional warfare has not been the principal mode of contemporary conflict. Conventional war has been restrained by the threat of nuclear escalation. However, under the precarious nuclear umbrella of the "balance of terror," revolutionary/counterinsurgency wars, complicated by armed interventions, have become the most common forms of modern warfare.

These wars can range from the upper boundaries of "low intensity warfare" to conventional war, e.g. the Vietnam conflict, to guerrilla wars such as the civil war in El Salvador, to wars that are almost wholly carried on in the form of terrorist attacks by the weaker belligerent to which the target state or regime responds with counterterror deterrence/defense measures that are generally conventional in nature, e.g. Israel's war with the PLO.

Study and analyses by just-war scholars are needed for the upper- and middle-level revolutionary/counterinsurgency wars such as the Vietnam conflict and the current wars in Central America. The task is formidable, since Catholic social thought on revolutionary war is meager and of little relevance to the modern world.² In particular, a *jus ad bellum* for revolutionary war is needed. Such a body of doctrine would require a modern statement of the right of revolution and its limits, followed by realistic analyses of the means typically employed by contemporary revolutionaries and counterrevolutionaries. No such comprehensive undertaking will be attempted in this article. However, one aspect of modern revolutionary/counterinsurgency war can be undertaken now. It need not await

¹ Paul Ramsey, *The Just War* (New York: Scribner's, 1968).

² Heinrich A. Rommen, *The State in Catholic Thought* (St. Louis: Herder, 1945) 473-76; *The Pope and Revolution*, ed. Quentin Quade (Washington, D.C.: Ethics and Public Policy Center, 1982).

the development of a comprehensive just-war doctrine on the subject. This is the phenomenon of terrorism and counterterrorism.

TERRORISM

The use of terror as a form of violent coercion defies the principles both of ordinary military arts and sciences and just-war doctrine.³ The essence of ordinary warfare is the employment of military force against military force, i.e. counterforce. All wars involve so-called "countervalue" strategies that attack nonmilitary targets, causing "collateral damage." However, an excessive emphasis on countervalue strategies is usually condemned as terror, e.g. "terror bombing," wherein the military utility of the attacks is small and the countervalue damage disproportionate.

Terror strategies make little pretense at counterforce warfare. Countervalue attacks leading to major damage to noncombatants and nonmilitary targets are not collateral; they are the principal, sometimes the sole, form of violent coercion used by terrorists. The key justification for terror is not "military necessity" but, rather, the political and psychological necessity of shocking and paralyzing a target society and/or regime. Terror seeks the multiplier effects of attacks on targets associated with everyday life—marketplaces, buses, commercial aircraft, popular restaurants and bars, department stores—that have no military significance.⁴ The threat that any of these familiar components of everyday life may be attacked violently at any time places whole societies in a state of apprehension and insecurity. The terrorists seek to erode and, ultimately, collapse all confidence in the existing political and social order.

Since the systematic use of terror as the principal, or even sole, means of warfare departs almost entirely from the familiar claims of military necessity, terror cannot meet the requirements of just-war doctrine. No matter how just the cause, no war is just that fails to meet all of the just-war *jus ad bellum* and *jus in bello* conditions, including those of proportion and discrimination.

There is no military referent for terrorist proportionality of means; its genius is shocking disproportion—unless one accepts a terrorist version of the proposition that all means are justified in the pursuit of a higher just cause. Even if one were tempted by an argument of ultimate proportionality, however, there would be no way to accept the systematic violation of the principle of discrimination that is central to terrorist strategies. The targets are almost always the innocent, the noncom-

³ See Walter Laqueur, *Terrorism* (London: Abacus, 1978); Brian M. Jenkins, R-3302-AF, *International Terrorism: The Other World War* (Santa Monica, Calif.: RAND Project Air Force, November 1985).

⁴ *Ibid.*

batant, the victims who fortuitously happen to be on the bus or in the marketplace or on the aircraft when the terrorist bomb explodes or when hostages are taken.

The only way that terrorists can justify measures that are indiscriminate by ordinary standards is to treat all persons of a targeted society or class as enemies deserving death (a position sometimes taken by PLO terrorists with respect to all Israelis, including women and children, and by some European terrorists attacking the established order and society). Such a genocidal claim can obviously not be accepted.

If there is no just terrorism, there remains the question of just counterterrorism. Just-war doctrine has never excused violations of its standards because of the unjust behavior of the adversary. The target of terrorism must not respond in kind in the manner of gangster vendettas. All of the just-war requirements must be met by the state confronted with a terrorist challenge. Israel has been meeting this kind of challenge from its early years. In recent times the United States and other nations have increasingly been subjected to terrorist attacks and attempted blackmail. Public debate over counterterror strategies has become almost continuous. While we await the development of a comprehensive just-war doctrine for revolutionary/counterinsurgency wars, we can and should confront the clear and present danger posed by terrorism and the necessity for some just-war guidelines for the conduct of counterterror deterrence and defense. This article will undertake to demonstrate how counterterror strategies can be analyzed in just-war terms, using recent examples of Israeli and U.S. counterterror measures as the bases for the analysis.⁵

COUNTERTERROR STRATEGIES

Protection against terrorist attacks takes many forms: good intelligence, effective security operations, measures to prevent aerial hijacking, tight control of borders, prompt prosecution and punishment of terrorists, and co-operative extradition agreements and practices. The incidence and effects of terrorism can be significantly reduced by such defensive means.

Such measures have their limits. International co-operation is erratic, even among friends and allies. International conventions have had little effect on the terrorist problem.⁶ There are always too many escape

⁵ I offer a more detailed account of Israeli counterterror strategies in "Counterterrorism: Lessons from Israel," *Strategic Review* 13 (1985) 32-44.

⁶ See, e.g., 1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, UST 20:2941, TIAS 6768; 1973 New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, TIAS 8532.

hatches. Notoriously, one nation's "terrorists" may be viewed with sympathy by others and protected. Even when friends agree that certain terrorists deserve punishment, they may be deterred by political or economic considerations from offending states friendly to the terrorists. Some states are so fearful of terrorist attack that they avoid offending various terrorist organizations.

More could be done to present common fronts against terrorism by like-minded states. However, even if present co-operative counterterror efforts were greatly improved, terrorism would continue. This is the heart of the counterterror problem. No combination of defensive measures can prevent some terrorists from carrying out their attacks on vulnerable targets. Terrorists commonly display a high level of fanaticism and indifference to death. Moreover, not all terrorists are killed on their missions. If imprisoned, they become the rallying point for more terrorism aimed at securing their release.

Accordingly, nations confronted with major terrorist threats turn to strategies of deterrence and to defensive counterterrorist measures. These strategies challenge modern just-war doctrine, which has never adequately come to grips with the problem of deterrence and which tends to emphasize a purely defensive interpretation of the right of legitimate self-defense. It is important, therefore, to clarify the nature of counterterror deterrence and offensive strategies.

While we are aware of the deterrent potentialities of conventional postures, nuclear deterrence has dominated empirical and normative analyses of deterrence. Since, thank God, no nuclear wars have been fought, moral analyses of deterrence have been principally concerned with the issue of threatening actions that would be morally dubious if ever carried out, in order to have a high probability that they never would be carried out. This debate has been possible because there has been no necessity of demonstrating what, in fact, a nuclear war would produce.

This is not the case in counterterror deterrence and defense. No counterterror deterrent posture has been or could be so effective that it deterred terrorism altogether. The "unacceptable damage" that is threatened by counterterror deterrence must be inflicted from time to time in order that the deterrent have credibility. Moreover, given the fanaticism of some terrorists, the unacceptable damage that is threatened cannot be limited to the terrorist forces. Terrorists need sanctuaries and bases. It is against these sanctuaries and bases that the deterrent threats must be directed and against them that those threats must be validated by offensive counterterror operations.

Accordingly, counterterror strategies tend to have a dual rationale: deterrence and preventive attrition. Counterterror strikes may discourage

someone—terrorists, their supporters, those whose territory they use for bases—from continuing their attacks. In any event, if the counterterror strikes hit targets vital to the terrorists' operations, they may pre-empt or prevent some attacks and they may have a long-term counterforce attrition effect on the terrorists' capabilities and will.

Neither deterrence nor preventive/attrition rationales require that the counterterror party restrict itself to case-by-case retaliation for terrorist attacks. However, the pattern of hostilities often has that appearance. This is explained by a third rationale for counterterror strategy, namely, maintenance of home-front morale. A shaken people demands that its government punish those responsible for terrorist outrages. Counterterror strikes will, accordingly, frequently be launched after a major terrorist attack or series of attacks, even though they have been long planned and could have been carried out at any time when circumstances seemed propitious. Nevertheless, counterterrorist policies of a state such as Israel that has a major and continuing counterterror requirement emphasize freedom to hit terrorist targets at times and places of the counterterrorist's own choosing.

Counterterror deterrence/defense, nevertheless, tends to react to a pace set by the terrorists. This kind of war may seem discontinuous, but although it has its ebbs and flows it never stops. When the terrorists strike, the responses of the counterterror belligerent aim at deterrence and preventive/attrition effects of three interrelated targets: the terrorists, the people whose support or acquiescence makes possible the terrorists' operations, and the sovereign state that is promoting the terrorism or allowing its jurisdiction to be a terrorist base.

The need to deter terrorism by punishing the local populations and sovereign states that support or tolerate terrorist activities within their territories leads counterterror strategies into practices that raise controversial just-war issues. Certainly, countervalue attacks against areas from which terrorists operated would tend to be both disproportionate and indiscriminate. In Israeli practice and in the U.S. attack on Libya, April 15, 1986, the intention was to conduct counterforce warfare with minimum collateral damage. The Israelis, however, despite their claim to minimization of collateral damage, argue that some collateral damage may in any case be justified by its deterrent effects. If a local population and its government are sufficiently injured and put at risk by responses to terrorist operations, they may be motivated to curb or eliminate those operations. In any event, by supporting or tolerating terrorist activities local populations and their state may lose their pretensions to neutrality and nonbelligerent status. In a typical statement justifying an Israeli raid against terrorists in Jordan following four terrorist attacks in Israel

in 1966, General Yitzhak Rabin explained blowing up 14 Jordanian houses in two villages because of their alleged use by the terrorists as follows: "The operation was intended to make it clear to Jordan, and to the population which is collaborating with Fatah, and to Fatah members themselves, that as long as this side of the border will not be quiet, no quiet will prevail on the other side. . . ."⁷ The United States has not adopted this view, which might be termed "counterforce-plus" (limited but intentional collateral damage). However, U.S. rules of engagement (ROEs) for counterterror strikes specifically emphasize the right to hit terrorist targets that are colocated with civilian targets.⁸

In the period from October 1985 to April 1987 there was a significant sample of terror-counterterror hostilities. This period will be reviewed to serve as a basis for normative analyses of the counterterror strategies employed by Israel and the United States. In this review Israeli practice will dominate, since Israel has been obliged to conduct the most active of contemporary counterterror operations. The normative analyses will include references to positive international law. However, international law is demonstrably inadequate as a guide to just conduct of counterterror strategies. Just-war doctrine provides a more comprehensive, as well as a more realistic, basis for normative analysis. In this regard it is interesting to note that the U.S. Government and the U.S. armed forces have increasingly stressed just-war concepts rather than international legal arguments in their pronouncements on and discussions of contemporary counterterror operations.

TERRORISM/COUNTERTERRORISM: SEPTEMBER 1985–APRIL 1987

The period here reviewed begins with the killing of three Israelis by terrorists in Larnaca, Cyprus, September 25, 1985. It includes the Israeli attack on PLO headquarters in Tunisia, October 1, 1985; the terrorist seizure of the cruise ship "Achille Lauro," October 7–9, 1985; the U.S. Navy's interception of an Egyptian plane carrying the PLO terrorists who had seized the "Achille Lauro" and killed the American passenger Leon Klinghofer; the terrorist attacks on El Al counters in Rome and Vienna, December 27, 1985; King Hussein's efforts to form a negotiation front with the PLO and to develop a viable peace process with U.S. cooperation; the U.S. Navy's challenges to Libya's "Line of Death" in the Gulf of Sidra; the explosion of a bomb in a TWA plane en route from

⁷ Skira Hodsheet (Monthly Survey, A Journal for IDF Officers [Hebrew]) 13, no. 4 (1966) 91, quoted in Hanan Alon, *Countering Palestinian Terrorism in Israel* (Santa Monica: RAND, August 1980) 38.

⁸ See W. Hays Parks, "Crossing the Line," *U.S. Naval Institute Proceedings* 112 (1986) 40–52.

Athens to Rome, April 2, 1986; the April 5, 1986 terrorist attack on a Berlin disco frequented by American servicemen; the April 15, 1986 U.S. attack on terrorist bases in Libya; the April 17, 1986 abortive effort to plant a bomb on an El Al plane leaving London; the terrorist scare of the summer of 1986 when Americans stayed home; the relative abatement of terrorist and counterterrorist attacks in the latter half of 1986, offset against an increase in hostage-taking in Lebanon and a renewed debate within the United States and the Atlantic alliance over counterterror policies; and continuation throughout this period of Israeli counterterror strikes in Lebanon.

The Israeli Tunis Strike

On September 25, 1985 three Palestinian terrorists boarded a small yacht in Larnaca, Cyprus marina and seized three Israelis. The terrorists, who demanded the release of 20 Palestinians recently captured by Israel, surrendered after a ten-hour siege after murdering the three Israelis.⁹ Israel responded the next day with a 20-plane attack on bases of the dissident PLO leader Abu Musa in the Syrian-controlled Bekaa Valley. On October 1 the Israeli Air Force (IAF) attacked the headquarters of Yasir Arafat's mainstream Fatah organization in Borj Cedria, 21 miles south of Tunis. Tunisian sources put the death toll at 73, including 12 Tunisians, eight of whom were policemen. Close to a hundred persons were injured in the attack.

Israel's justification for the unprecedented long-range attack in Tunisia went beyond retaliation for the Larnaca incident. Israel claimed that there had been a dramatic increase in recent months in PLO attacks in Israel and the West Bank. Defense Minister Yitzhak Rabin stated: "We decided the time was right to deliver a blow to the headquarters of those who make the decisions, plan and carry out terrorist actions." To PLO disclaimers of responsibility for the Larnaca attack Rabin responded that the Cyprus attack "was planned to make it appear that it was not related to Mr. Arafat."¹⁰ The Israeli raid hit Arafat's office, the military headquarters of Fatah, and the headquarters of "Force 17," a terrorist unit charged by Israel with responsibility for the Larnaca attack. Widespread concern was expressed around the world regarding the effects of the raid on the Middle East peace process.

The reply of Israeli Prime Minister Shimon Peres to these expressions of concern is instructive. He said: "If this attack must stop the peace

⁹ *Newsweek*, Oct. 7, 1985, 43. The sources for the factual accounts of counterterror operations are the *Washington Post* and the *New York Times* unless otherwise indicated.

¹⁰ "Israel Calls Bombing a Warning to Terrorists," *New York Times*, Oct. 2, 1985, 8, cols. 1-3.

process, why doesn't the killing of Jews stop it?" Asked why Israel did not attack Jordan, Peres replied: "I differentiate between Tunis and Jordan. Jordan fights terrorism and doesn't let terrorists leave its borders for Israel. Tunis gave refuge to the headquarters of the PLO."¹¹

Since this analysis will deal with American as well as Israeli counter-terror strategies, it is necessary, if confusing, to outline Washington's reaction to the Israeli Tunis raid. Initially the White House spokesman, Larry Speakes, stated: "As a matter of U.S. policy, retaliation against terrorist attacks is a legitimate response and an expression of self-defense. From the preliminary reports available to us, this appears to be what was involved in this case."¹² However, Secretary of State George Shultz, known for his strong counterterror views, was uneasy with the U.S. position. At his urging President Reagan sent condolences to Tunisian President Bourguiba. Still, White House spokesman Speakes persisted with the view that "the air strike is understandable as an expression of self-defense. . . . While the resort to violence is deplorable . . . it is useful to recall the antecedents to this attack, which included repeated attempts to infiltrate terrorists into Israel and the outrageous murder of three Israeli civilians in Larnaca."¹³

U.S. support for Israel did not survive a UN Security Council vote. On October 5, 1985 a Security Council resolution condemned "vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct."¹⁴ Israel was enjoined to refrain from further aggression and to pay reparations to Tunisia. No mention was made of the terrorist attacks on Israel that had preceded the raid.

The passage of the Security Council resolution was made possible by the abstention of the United States, which declined to use its veto as it had done routinely for many years with respect to one-sided condemnations of Israel. U.S. Ambassador to the UN Vernon Walters explained that, *inter alia*, the U.S. owed a debt to Tunisia for accepting PLO elements when they were evacuated from Beirut in 1982. Thus, the United States went from strong support of the Israeli raid and acceptance of its rationale to acquiescence in the Security Council's condemnation of the raid and rejection of its rationale.

¹¹ Ibid.

¹² "As U.S. Supports Attack, Jordan and Egypt Vow To Press for Peace," *New York Times*, Oct. 2, 1985, 1, cols. 4-5; A9, col. 1.

¹³ "U.S. Modifies Its Reaction," *Washington Post*, Oct. 3, 1985, A1, cols. 1-2; A29, col. 1.

¹⁴ "Text of the U.N. Resolution on Israeli Air Strike," *New York Times*, Oct. 6, 1985, A22, cols. 3-6.

The background of this Security Council resolution may shed light on the hypothesis proposed in this article that positive international law is inadequate as a basis for normative evaluation of counterterrorist measures. From the early days of its independence Israel has been plagued by terrorist attacks; since 1964, mainly by the PLO. Israel has always insisted that its counterterror attacks in neighboring Arab countries were self-defense measures, even though they were often characterized as retaliation. The Security Council developed precedents that rejected completely the Israeli claims of self-defense against terrorist attacks.¹⁵

The UN *jus ad bellum* of the Security Council contends that the Israeli use of force constitutes "reprisals" and that armed reprisals violate Article 2(4) of the UN Charter, which forbids the threat or use of force against the territorial integrity and political independence of any state. The Security Council has refused to consider that counterterror measures in a discontinuous armed conflict could properly be termed self-defense in the sense of Article 51 of the Charter, which reiterates this "inherent right." Curiously, the Security Council has at times confused its own position by condemning some Israeli actions as disproportionate, a *non sequitur* if such measures were illegal per se. In all of this UN law and practice there was never any condemnation of Arab terrorist attacks on Israel or of states that encouraged or permitted such attacks. The Security Council has, at most, counseled cease-fires and efforts to resolve the Arab-Israeli conflict peacefully.¹⁶

I would argue that what are often called "reprisals" or "retaliatory raids" by the Israelis themselves, by the UN, by the media, are self-defense measures in a continuing war, Israel's war with the PLO. Armed reprisals in the pre-UN *jus ad bellum* were exceptional cases of recourse to force in putatively peacetime situations because of the antecedent use of armed force by another state. They were one form of "measures short of war." Under UN law the only legally permissible use of armed forces other than UN enforcement actions ordered by the Security Council (impossible because of superpower and other rifts) is some form of self-defense as recognized in Article 51.¹⁷ If a state is continually attacked by terrorists operating from neighboring states, it would seem to be in a state of self-defense. This is true a fortiori if the terrorists have declared

¹⁵ See Derek W. Bowett, "Reprisals Involving Recourse to Armed Force," *American Journal of International Law* 66 (1982) 1-36.

¹⁶ *Ibid.*

¹⁷ See William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981) 24-27.

war on the target state and vowed to eliminate it.¹⁸ Notwithstanding the fact, explained above, that self-defense measures might often be timed to respond to terrorist attacks, the goals of deterrence and preventive/attrition would seem reasonable as expressions of self-defense against continuing terrorist attacks from countries that either supported or tolerated them.

The Israeli predicament demonstrates graphically the problem of continued adherence to the UN *jus ad bellum*. In UN practice this law is a simplistic "no-first-use" regime that ignores the development of deadly forms of indirect aggression and denies the right to take military measures against another state unless there is a clear "armed attack," presumably in the form of conventional aggression. In the case of Israel, moreover, political and ideological biases have been so great that only U.S. vetoes have protected the Israelis from an unrelieved succession of Security Council condemnations. At the same time, the UN offers Israel no relief from its security problems with terrorists operating freely from Arab states.

The legacy, then, of the Israeli Tunisian raid was perplexing. The ambivalent U.S. reaction, ranging from initial support of the raid and its rationale to acquiescence in the Security Council condemnation and the condolences to Tunisia despite its toleration of terrorist operations, undercut the U.S. counterterror posture. This would soon change as U.S. concern with terrorist threats increased dramatically.

The "Achille Lauro" and the U.S. Response

Palestinian terrorists seized the Italian cruise ship "Achille Lauro" on October 7, 1985 and held it, demanding release of 50 Palestinian prisoners in Israel, until October 9, when Palestinian intermediaries ordered them to leave the ship. The terrorists had botched their plan to seize the ship in an Israeli port. After terrorizing the crew and passengers, the "pirates" brutally killed an American Jew, Leon Klinghofer. Having first found refuge in Egypt, the terrorists were in an Egyptian plane en route to another Arab country when U.S. Navy planes intercepted their aircraft and forced it to land at a U.S./NATO base in Sicily. The United States had captured not only the accused highjackers but Mohammed Abbas, head of the PLO faction known as the Palestine Liberation Front. Abbas had originally held himself out as a mediator who had ended the highjacking. By the time of the U.S. intercept it was believed that Abbas was, in

¹⁸ On the PLO's war of national liberation to overthrow Israel, see Helena Cobban, *The Palestine Liberation Organisation* (Cambridge, Eng.: Cambridge University, 1984); William V. O'Brien, "The PLO in International Law," *Boston University International Law Journal* 3 (1984) 349-413.

fact, the mastermind of the affair and that his motive was to extricate his incompetent subordinates from an embarrassing situation, a belief since confirmed by the Italian courts. Unfortunately, the Italian authorities permitted Abbas to escape, thereby failing in their responsibilities under the Italian-American extradition treaty.

The American response to the "Achille Lauro" maritime hijacking reflected the frustrations experienced in the seizure by terrorists of TWA flight 847 in June 1985 and the 17-day ordeal of 39 U.S. hostages, as well as the murder of Navy enlisted man Robert Stethem. In that incident the terrorists were demanding release of over 700 Lebanese held by the Israelis as terrorist suspects.

When the American hostages were released on June 31, 1985, President Reagan said that those who killed American servicemen "must be held accountable" and that the United States would "fight back" against international terrorism.¹⁹ Secretary of State Shultz laid down a four-point U.S. antiterrorist policy: making no concessions to terrorists; improved intelligence; "defensive" measures such as improved security at airports and U.S. embassies; and "active defenses" that would impose "costs" on terrorists and help "pre-empt and interdict" them.²⁰ The last of these policy elements resembled Israeli preventive/attrition strategies.

However, no U.S. military retaliation was forthcoming against Lebanese terrorist factions, thought to be Hezbollah Shiites. A White House spokesman observed: "Vengeance is not a satisfactory basis for policy. . . . Hezbollah lives in urban areas. It is manifestly infeasible, and they know it, to conduct violent raids against them."²¹ In the aftermath of the TWA Flight 847 ordeal, therefore, the United States was thinking in terms of preventive/attrition attacks on terrorists but frustrated by lack of certain knowledge of the identity and location of the terrorists who had attacked U.S. servicemen, nationals, and interests as well as by scruples with respect to targets in which the terrorists would be surrounded by civilians.

The challenge of terrorism was again made clear on December 27, 1985. Terrorists attacked the El Al counters in the Rome and Vienna airports, killing 20 civilians, including five Americans, one of whom was an 11-year-old girl. Well over a hundred were injured in the attacks. Libyan leader Moammar Gadhafi, whose country apparently had pro-

¹⁹ "President Hails Nation's Moment of Joy," *Washington Post*, July 1, 1985, A1, cols. 1-2; A20, cols. 3-6.

²⁰ *Ibid.*

²¹ "Military Retaliation Unlikely Option," *Washington Post*, July 1, 1985, A21, cols. 1-4.

vided bases for these terrorists, pronounced their actions "heroic."²² Evidence pointed to the renegade Palestinian terrorist Abu Nidal as the probable source of the attacks. At the end of 1985, Reagan Administration spokesmen were saying that it would be "fine with us" if Israel were to take military action against sources of terrorism.²³ On January 2, 1986 President Reagan denounced Gadhafi threats of terrorist attacks on "Americans in their own streets," condemning Gadhafi and "fellows who think it's all right to shoot 11-year-old girls."²⁴

The Hussein-Arafat Negotiations

Throughout the period described there were attempts by King Hussein of Jordan to bring the PLO into a posture of co-operation in joint Jordanian-Palestinian peace initiatives. King Hussein's efforts had been intensive in 1985 but, as so many times in the past, had come to nothing.²⁵

One troubling aspect of Palestinian behavior has been the apparent rise of terrorism in response to, in effect, the threat of peace. The Israeli government claimed in mid-October 1985 that the surge of PLO terrorist activity coincided with Hussein's efforts to bring Arafat into a peace process.²⁶ Whether this resulted from the actions of anti-Arafat PLO factions and/or the notorious adamant opposition of Syria to Hussein's initiatives, from lack of control over small groups operating independently, or from contradictory policies within Arafat's mainstream PLO, we do not know. In any event, by October 1985 Hussein's year-long efforts were frustrated at a time when he was carrying on "quiet diplomacy" with Israel's Peres. At the same time Britain gave up on talks with the PLO, which had refused to admit Israel's right to exist. Renewed Hussein-Arafat talks failed once more in February 1986 with Hussein accusing Arafat of having broken his word after being assured of U.S. concessions to facilitate progress.²⁷

From the "Line of Death" to the U.S. Libyan Raid

At the beginning of 1986 the United States had two points of conflict with Gadhafi's Libya. One was his support and possible initiation of

²²"Rabin Cites Abu Nidal in Airport Terror Raids," *Washington Post*, Dec. 30, 1985, A1, cols. 5-6; A14, cols. 4-6.

²³"U.S. Clears an Israeli Retaliation," *Washington Post*, Dec. 31, 1985, A1, col. 6; A11, cols. 1-4.

²⁴"Reagan Denounces Warning by Qaddafi on Retaliation," *Washington Post*, Jan. 3, 1986, A1, cols. 2-3; A22, cols. 1-6.

²⁵See "King Hussein: Last Chance?" (interview with Hussein), *Newsweek*, Sept. 30, 1985, 45.

²⁶"Israel Says PLO behind Terror Surge," *Washington Post*, Oct. 19, 1985, A16, col. 1.

²⁷"Hussein Ends Peace Effort with PLO," *Washington Post*, Feb. 20, 1986, A1, cols. 1-4; A33, cols. 1-2.

terrorism. The other was his claim to sovereignty over the Gulf of Sidra. The headlands of the Gulf of Sidra are ten times further apart than the 24 miles prescribed for national bays by international law. Moreover, the Gulf of Sidra is not a "historic bay" long recognized as such, since Gadhafi only claimed sovereignty over it in 1973 and maritime states have been navigating in it as part of the high seas immemorially.²⁸

The U.S. Navy had challenged Gadhafi's claims by holding "freedom of navigation" (FON) exercises in the Gulf of Sidra (1973, 1979, 1981-86). In 1981 two Libyan aircraft were shot down when they attacked U.S. F-14s during an FON exercise. Gadhafi called the line across the entrance to the Gulf of Sidra "The Line of Death." By 1986 the United States had crossed that line a number of times and intended to keep crossing it in order to preserve its right to use the high seas. At the same time the issue of Libyan support of terrorism was intertwined with the FON issue. In the spring of 1986 these two sources of U.S.-Libyan conflict converged.

U.S. Navy vessels and aircraft conducted FON exercises in the Gulf of Sidra January 24-31 and February 10-16, 1986 without incident. However, during FON exercises March 23-24, missiles were fired from a Libyan installation. The U.S. Navy was then ordered to regard any Libyan forces departing Libyan territorial waters or airspace as hostile. The Navy then attacked two Libyan missile-equipped patrol boats and the Surt-base radar installations. In his authoritative article Hays Parks comments: "After 48 hours of unchallenged use of the Gulf of Sidra, the United States believed its position had been established. A second message was thought to be equally clear: the United States was prepared to respond with force if Gadhafi continued to resort to terrorism. . . ."²⁹

Gadhafi took up the challenge. On April 3, 1986 a bomb exploded in a TWA flight from Rome to Athens, killing four U.S. nationals. On April 5, 1986 La Belle discotheque in West Berlin, popular with U.S. servicemen, was bombed by terrorists, killing two U.S. soldiers and a Turkish civilian and wounding 229 persons, including 78 Americans. After the TWA bomb explosion, apparently the work of Syrian-backed Palestinian terrorists, Gadhafi congratulated the terrorists and warned that "We shall escalate the violence against American targets, civilian and non-civilian, throughout the world."³⁰ The Berlin disco bombing bore him out. The Reagan Administration, which claimed it had evidence of Gadhafi's connection with the terrorist attacks on the Rome and Vienna airports in December 1985, now was convinced of Libya's connection with the Berlin attack.

²⁸ See Parks, "Crossing the Line" 41-42.

²⁹ Ibid. 45.

³⁰ Ibid.

Planning for a military response to Gadhafi's support of terrorism had been extensive. Principles governing such a response, rules of engagement (ROEs), and possible targets were discussed in great detail. Still, the United States did not authorize a military mission against Libya "until all reasonable efforts had been exhausted to dissuade Gadhafi from its embrace of terrorism."³¹ Intensive efforts were made to obtain European support for nonmilitary sanctions and political pressure against Libya. They failed. Parks states:

But time was of the essence. Amid press reports of impending airstrikes, Gadhafi announced that he was taking all foreigners in Libya hostage and moving them to key military bases to shield those bases from attack.

In the face of Gadhafi's threat and the intransigence of European leaders, President Reagan authorized execution of the mission. . . .³²

Cognizant of the War Powers Resolution, the President met at 4 p.m., April 15, 1986, with nine key House and Senate leaders and members of his National Security Council. After being briefed on the mission, the Congressional leaders offered no objections. Had there been objections, the President was prepared to cancel the mission.³³

Eighteen F-111 fighter bombers based in Britain and 15 A6 and A7 Navy planes from the carriers "America" and "Coral Sea" attacked Libyan targets as follows: (1) Sidi Bilal naval base, used as a commando school; light damage. (2) Azizyah Barracks, Gadhafi's headquarters at the time of the attacks; moderate damage. (3) Tripoli Military Airfield; some buildings destroyed. (4) Behghazi Military Barracks; Jamahiriyah Guard Barracks, an alternative terrorist headquarters and command and communications center; moderate damage. (5) Benina Military Airfield, hit to suppress possible Libyan MiG interceptor opposition; 4 MiG-23 Floggers, 2 Mi-8 Hip helicopters, and 2 prop planes were destroyed; moderate damage.³⁴ These targets had been picked because of their direct relevance to terrorist activity and to the success of this counterterror mission. The ROEs stressed the necessity for certainty as to target identification.³⁵

President Reagan told the American people that the series of strikes had been launched "against the headquarters, terrorist facilities and military assets that support Muammar Gaddafi's subversive activities." Reagan stated: "The attacks were concentrated and carefully targeted to

³¹ Ibid. 50.

³² Ibid. 50-51.

³³ Ibid. 51.

³⁴ Ibid. 47-48, 51-52.

³⁵ Ibid. 47.

minimize casualties among the Libyan people, with whom we have no quarrel. From initial reports, our forces have succeeded in the mission."³⁶ Recalling his previous warnings to Gadhafi, Reagan said, referring to the Berlin disco bombing: "This monstrous brutality is but the latest act in Colonel Qaddafi's reign of terror. The evidence is now conclusive that the terrorist bombing of La Belle discotheque was planned and executed under the direct orders of the Libyan regime." Reagan claimed:

We have solid evidence about other attacks Qaddafi has planned against the United States installations and diplomats and even American tourists. Thanks to close cooperation with friends, some of these have been prevented. With the help of French authorities we have recently aborted one such attack: a planned massacre using grenades and small arms of civilians waiting in line for visas at an American embassy.³⁷

Stating that Gadhafi was a source of terror and aggression against his African neighbors as well as in other parts of the world, Reagan asserted: "Today we have done what we had to do. If necessary, we shall do it again. It gives me no pleasure to say that, and I wish it were otherwise."³⁸

Since the April 15, 1986 raid on Libya there have been no major terrorist attacks on U.S. nationals or interests. Some Americans in Lebanon have been kidnapped and held hostage, presumably by pro-Iranian Shiite Muslims of the Hezbollah faction. These terrorists appear to be quite removed from or opposed to the PLO and other terrorist groups backed by Libya. The main negative result of the Libyan raid was a sharp decline in American tourism in the summer of 1986.

Israeli Counterterror Operations: October 1985–March 1987

Evaluation of the effectiveness of deterrence is inherently rough and speculative. The nonoccurrence of feared attacks may be credited to the deterrent, but perhaps they did not occur for other reasons. Nevertheless, it is possible to gain a broad impression of the effectiveness of deterrence by the subsequent pattern of hostilities.

Did the October 1985 Tunis raid have deterrent and preventive/attrition effects on PLO and other terrorists? We may seek the answer in the pattern of terrorist attacks against Israel and Israeli responses since October 1985. (Additionally, one must bear in mind the relation of attacks on the U.S. and others, e.g. "Achille Lauro," Rome and Vienna, Berlin, to the terrorists' war with Israel.) Rather than detail every terrorist attack in this period, I will focus on the occasions when such

³⁶ U.S. Department of State Bulletin, No. 2111 (June 1986) 86:1.

³⁷ Ibid.

³⁸ Ibid.

attacks were deemed sufficiently serious to provoke substantial Israeli counterterror operations.

The first major counterterror operation by Israel after October 1, 1985 was in the first week of December 1985. After Katyusha rockets fell in West Galilee, the Israel Defense Forces (IDF) struck deep into Lebanon in a search-and-arrest operation in which five terrorists were killed and a number of suspects captured. Israel claimed to have foiled preparations for imminent terrorist attacks.

On January 29, 1986 terrorists infiltrated from Jordan, the first to do so since 1981. They were killed in a fight in which two IDF soldiers were killed. This rare infiltration from Jordan underscores the success of the policies of the 1960s, which by Black September 1970 had convinced Hussein that the PLO, in addition to threatening his reign, brought unacceptable damage on Jordan.

On February 15, 1986 a bomb exploded in a commuter bus in a Tel Aviv suburb, slightly injuring six persons. Up to this point, in the period studied there were only a handful of assaults on individual Israelis by terrorists.

A terrorist ambush in South Lebanon resulted in the killing of two pro-Israeli militiamen and the capture of two IDF soldiers, February 17, 1986. This incident demonstrates the complexity of counterterror operations. There is a difference between a terrorist attack on a commuter bus near Tei Aviv and a terrorist ambush of an Israeli patrol in the Israeli "security zone" in South Lebanon. Moreover, the enemy in this instance may well have been some Shiite Muslim faction rather than the PLO. Thus, this kind of counterterror activity may be quite remote from the main war with the PLO and, hence, from the effects of the raid on PLO headquarters in Tunis. The ambush led to a huge, unsuccessful IDF search in South Lebanon for the two IDF soldiers, February 17-22, in which there were several fire fights with South Lebanese Muslim forces, February 19 and 22.

Unidentified gunmen attacked Israeli diplomats and their wives in Cairo, March 19, 1986, killing one woman and wounding three Israelis. On March 27 rockets fired by PLO terrorists hit a schoolyard in Kiryat Shemona. Shortly thereafter the IAF attacked PLO targets near Sidon. Israel stated that the attacks were not in retaliation for the Kiryat Shemona attacks but were part of a continuing strategy to disrupt terrorist activity in South Lebanon.³⁹

The Israelis frustrated an effort to plant a bomb in an El Al plane ready to depart London on April 17, 1986. A Palestinian, later shown to

³⁹ "Israeli Planes Bomb 2 Sites in Lebanon," *Washington Post*, March 28, 1986, A17, cols. 1-5.

have had official Syrian connections, had given his pregnant fiancée a case in which the bomb was concealed as she prepared to board the plane. Britain later broke diplomatic relations with Syria over this incident. A bomb in a suit case at the El Al counter in Madrid exploded on June 26, 1986, injuring three.

After an attempt to land terrorists from the sea in Northern Israel was foiled, the IAF bombed and strafed PLO bases in refugee camps in Lebanon, July 10, 1986. The terrorists involved in the abortive landing were from the pro-Syrian PLO faction of Abu Musa and from the Popular Front for the Liberation of Palestine. This incident demonstrates the complexities of combating a PLO umbrella organization that has many competing factions, many of them, as here, opposed to Arafat.

Following a rocket attack on Israeli settlements in Upper Galilee, the IAF hit Bekaa Valley bases of the Abu Musa faction, August 10–11, 1986. Again, Israel insisted that the attacks were not in retaliation for the shelling but part of ongoing counterterror strategy.⁴⁰ On September 5 the IDF attacked areas from which rocket attacks had been launched recently. A house used as a PLO command center was blown up.

A synagogue in Istanbul was attacked by terrorists on September 6, 1986, killing twenty-one. The renegade Abu Nidal's group was thought to be responsible.

The bases of the Democratic Front for the Liberation of Palestine that had been used for terrorist attacks on Israel were the targets of IAF bombing attacks in the Druze-controlled hills southeast of Beirut, September 23, 1986. On October 10, 1986 the IAF made an unusual attack on PLO bases, training fields, and an ammunition dump in North Lebanon, the first in fifteen months. It was termed a "preventive action."⁴¹

Following a major terrorist attack on IDF soldiers, families, and friends worshipping at the Western Wall, the IAF attacked PLO bases near Sidon on October 16, 1986 with the loss of one plane. PLO bases near Sidon were hit again on November 27, 1986 by the IAF and bombarded by Israeli Navy gunboats on December 4, 1986 in efforts to assist the Shiite Amal forces fighting to prevent the return in force of the PLO to the area. Another rare IAF strike in North Lebanon on December 12, 1986 killed a top commander in the Abu Nidal terrorist organization, Mohammed Selim/Abut Imad, evoking threats of revenge.

In November 1986 the fatal stabbing of a yeshiva student provoked anti-Arab riots in Jerusalem that were repressed with difficulty. When

⁴⁰ "Israeli Planes Strike South Lebanon," *Washington Post*, Aug. 11, 1986, A12, cols. 1–3.

⁴¹ "Israeli Jets Hit Bases in N. Lebanon," *Washington Post*, Oct. 7, 1986, A10, cols. 1–4.

two Jewish brothers were stabbed to death in the Old City on December 17, 1986, the Israeli security forces managed to prevent serious rioting. This violence seemed to have little connection with PLO terrorist operations. Throughout this period and the early months of 1987, Arab protests around universities and elsewhere led to confrontations, violence, and some Arab casualties inflicted by Israeli security forces.

By December 23, 1986 the PLO had established itself firmly near Sidon. Arafat's forces were returning to areas from which they had been expelled in the 1982 war, over the vigorous opposition of Amal and much of the indigenous population, which feared the resumption of Israeli counterterror attacks on the PLO. Throughout this period a number of American and other Western nationals were held hostage, apparently by Shiite Hezbollah, pro-Iranian terrorists, in developments essentially distinct from the main course of the war between the PLO and Israel.

Israeli helicopter gunships attacked Muslim militia bases in the Bekaa Valley, just north of the Israel-proclaimed "security zone," December 24, 1986. The targets were "used by terrorist organizations as a departure base for attacks," according to the Israelis.⁴² The Israeli Navy intercepted ships bound from Cyprus to Lebanon on January 3, 1987 in efforts to interdict the flow of Palestinians back into Lebanon.

On January 4 and 9 the IAF attacked terrorist bases in Lebanon, the attack on the 9th having the additional goal of assisting the anti-PLO fighting by Lebanese Muslims. Throughout February and March 1987, Israeli operations were mainly of two kinds: support of the pro-Israeli South Lebanese Army in the "security zone" and of Lebanese factions resisting the PLO's attempts to return and to re-create some kind of "state-within-a-state" in Lebanon.

The lull in PLO terrorist attacks in Israel and the occupied territories ended on April 19, 1987. PLO infiltrators on a hostage-taking mission were intercepted inside Israel's northern border. In the fighting three infiltrators and two IDF soldiers were killed. This was the first attempted infiltration of the area by the PLO in more than a year. Israel reacted with an air strike against a building outside of Tyre that was used to plan terrorist attacks. The Israelis interpreted this operation by the PLO as an effort by Yasir Arafat to demonstrate his commitment to the war with Israel on the eve of the critical meeting of the Palestine National Council in Algiers, April 20-25.⁴³ At the Algiers meeting PLO unity was restored and Arafat's leadership re-established when the mainstream

⁴² "Israel Raids Moslem Bases in Lebanon's Bekaa Valley," *Washington Post*, Dec. 25, 1986, A36, cols. 2-4.

⁴³ "PLO Squad Is Crushed inside Israel," *Washington Post*, April 20, 1987, A1, col. 4; A20, cols. 1-5.

Fatah elements accepted the hard-line positions of the more radical elements. Emphasis was placed on the armed struggle against Israel and rejection of the efforts of King Hussein and others to resolve the conflict through negotiations.⁴⁴

Following the Algiers conference, PLO activity picked up markedly, with rocket attacks from Lebanon against civilian targets in Israel. Israel responded with air strikes on PLO targets in Lebanon on May 1, 6, and 8.⁴⁵ While PLO-Israeli hostilities escalated, King Hussein pressed his efforts to organize an international conference on the Middle East in which the permanent members of the Security Council would participate. Hussein believed that such a conference would make possible direct negotiations between Israel and Jordan in which there would be Palestinian but not PLO participation. As of May 1987 Hussein's initiative was frustrated by profound divisions within the Israeli coalition government between Prime Minister Shamir and Foreign Minister Peres. The PLO, for its part, opposed Hussein's efforts. Once again peace initiatives had to compete with escalating terror-counterterror hostilities.⁴⁶

The lull in PLO terrorist attacks on Israel, then, lasted from October 1985 until April 19, 1987. Several observations may be made about this period following the October 1, 1985 Israeli raid on the PLO headquarters in Tunisia. First, while this account has not mentioned all of the terrorist attacks in Israel, the West Bank, and Gaza during this period, they were few in number and minor in character. Second, a substantial amount of Israeli counterterror activity was directed at adversaries in South Lebanon who attacked Israel with occasional rocket assaults and ambushed Israeli and pro-Israeli militia patrols in the Israeli "security zone" in South Lebanon. These hostilities were modest. Third, the Israeli Navy was highly effective in interdicting PLO elements seeking to return to Lebanon or to attack Israel. Finally, some preventive/attrition strikes against the PLO along the coast had the additional purpose of aiding anti-PLO Lebanese factions.

A detailed, sophisticated analysis of the significance of events following October 1, 1985 would require greater detail and elaboration as well as comparison with the experiences of other periods. No effort has been

⁴⁴ "PLO Acts To Reunite Factions," *Washington Post*, April 21, 1987, A1, col. 6; A26, cols. 1-6; "Arafat: Still First among Equals," *Newsweek*, April 27, 1987, 42.

⁴⁵ "Israeli Jets Bomb PLO in South Lebanese Camps," *Washington Post*, May 2, 1987, A24, cols. 4-6; "Israeli Raid Kills 10 at Refugee Site," *Washington Post*, May 7, 1987, A43, cols. 1-2; "Israeli Warplanes Strike Palestinians," *Washington Post*, May 9, 1987, A16, cols. 1-3.

⁴⁶ "Jordanian Pledge To Limit Russians in Talks Reported," *New York Times*, May 12, 1987, 1, col. 5; 4, cols. 1-4; "U.S. Backs Middle East Conference," *Washington Post*, May 18, 1987, A1, col. 1; A22, cols. 5-6.

made in the foregoing summary to estimate civilian casualties in Israeli counterterror attacks. Available figures from opposing sources vary greatly and it is difficult to distinguish noncombatants from combatants. Among noncombatants it is hard to separate people closely related to PLO operations by their own choice and people who simply had the bad fortune to live in an area chosen by the PLO as a base. It appears that in the operations mentioned there were no cases of extreme collateral damage—but this is a judgment that could be challenged if reliable data from objective sources was available.

I believe that the essential elements necessary for normative analysis of Israeli counterterror deterrence/defense strategies can be found in the summary presented here. It should be noted that most of the typical forms of terrorist/counterterrorist interaction, including the multiple and often conflicting terrorist actors, are present in the summary sample. The Israeli and American counterterror strategies will now be evaluated in terms of the criteria of modern just-war doctrine.

ISRAEL'S COUNTERTERROR STRATEGY: A JUST-WAR ANALYSIS

My just-war analyses are organized as follows:

Jus ad bellum

Competent Authority

Just Cause

Comparative justice

Proportionality in the light of probability of success

Exhaustion of peaceful alternatives

Right Intention

Jus in bello

Proportion

Discrimination

Jus ad bellum

Competent Authority. There is no question about the competent authority of the Israeli government to carry out the counterterror measures described. They reflect long-standing policy, supported, indeed demanded, by the Israeli people.

Just Cause. While opinions vary about the merits of the Arab-Israeli conflict, it is widely accepted and assumed here that Israel exists as a state and has a right of legitimate self-defense. The *comparative justice* of the adversaries in this conflict is also a matter of controversy. However, at least some of the Arab states most opposed to Israel's existence, e.g. Syria, Iraq, and Libya, have very unjust regimes and their victory over Israel by any combination of direct or indirect aggression would be fatal to Israeli society. In Israel's war with the PLO this consideration is less

important, given the modest prospects of a total PLO victory.

Israel's self-defense as a just cause is not, as in the case of the United States' defense against terrorism, an occasional and marginal matter. Israel is at war with the PLO, which is pledged to the elimination of the "Zionist entity."⁴⁷

Israel's *probability of success* in this war with the PLO is high and, given the goals of the PLO, Israel's counterterror means are *proportionate* to the end of preserving the Jewish state and relieving its population from the constant threat of terrorism. This view of *jus ad bellum* proportionality, of course, does not predetermine the proportionality of discrete self-defense measures such as that of the October 1, 1985 raid on PLO headquarters in Tunisia. This must be evaluated under the *jus in bello*.

The condition that *peaceful alternatives to war be reasonably exhausted* is well met during this period by Peres' quiet diplomacy with King Hussein and the United States, diplomacy that went far beyond previous approaches to make possible joint Jordanism/Palestinian (but not PLO) negotiations and explored the controversial concept of an international conference including the Soviet Union. Hussein's conclusion was that the PLO made any progress impossible.

Right Intention. Israel displayed right intention by limiting its counterterror operations to the functional necessities of deterrence and defense and by holding out the prospect of alleviation of the conflict through negotiations. During this time anti-Arab sentiments and violence in Israel, aroused by Arab terrorist attacks in Israel and the West Bank, were suppressed firmly by the Israeli government.

Jus in bello

Proportion. The purpose of Israeli counterterror measures described here was to deter further terrorist attacks and to inflict damage on the terrorists' forces, bases, and infrastructure, as well as on local populations and states that lent their support to terrorist operations. These measures appear to have been successful.

There was a 19-month decline in terrorist attacks, both in terms of total numbers and of particularly provocative attacks such as the Larnaca incident, after the October 1, 1985 Israeli raid on PLO headquarters in Tunisia. The picture is necessarily less clear in Lebanon, because there the Israelis are trying to deter and defend against various PLO and Lebanese factions and are obliged to intervene on behalf of the South Lebanese Army in the "security zone." Nevertheless, the overall magnitude of the fighting in Lebanon has been modest. The Israeli counterter-

⁴⁷ See Yehoshafat Harkabi, *The Palestinian Covenant and Its Meaning* (Totawa, N.J.: Mitchell, 1979).

ror and/or counterguerilla actions described seem to have been effective in minimizing terrorist attacks from Lebanon.

If this assessment is valid, there is a strong case for accepting these counterterror measures as proportionate. They have been proportionate both to the goal of deterring terrorist attacks and to the goal of inflicting counterforce damage on the terrorists as part of a preventive/attrition strategy. Suggestions that the Tunis raid was disproportionate because it hurt the "peace process" may be answered with Peres' reply that the price of pursuing an unpromising peace process should not be passive acceptance of terrorist killing of Jews.

Discrimination. As against those who interpret the principle of discrimination, i.e. the prohibition against direct intentional attacks on noncombatants and nonmilitary targets, with the assistance of the principle of double effect, I consider an act discriminate if it is aimed at a military target and if the collateral damage it produces is proportionate to the military necessity of attacking the target.⁴⁸

In the Tunisian raid the targets were the headquarters of the PLO and of Force 18. In these headquarters the mainstream PLO terrorist strategies were formulated, ordered, and supported. These were clearly legitimate military targets. The substantial civilian casualties undoubtedly included a number of people who worked for the PLO in one capacity or another. Many of the casualties were police apparently assigned to the area by the Tunisian government. The headquarters of an organization engaged in planning and initiating terrorist attacks against Israel and the occupied territories, as well as international terrorism such as the highjacking of the "Achille Lauro," is as much a war zone as any command and control center in a conventional war. It can be assumed that most persons living and working close to such a headquarters choose to take on the risks of enemy attacks in an ongoing war.

Evaluation of the extent to which the principle of discrimination was respected in the Israeli counterterror operations in Lebanon is more difficult than in the case of the raid on the PLO's Tunisian headquarters. The Israeli actions covered a wide area whose diverse populations had varying relations with the PLO, ranging from direct support to reluctant acquiescence under coercion to PLO activities. When innocent people have been injured simply because they had the bad fortune to live in areas used by the PLO, two arguments are advanced in justification of the collateral damage caused by counterterror operations. The first is that the terrorist organization must share responsibility for this damage because it has deliberately colocated its bases with civilian centers; in

⁴⁸ O'Brien, *Conduct of Just and Limited War* 42-47. The double-effect principle is refined and employed in Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977).

effect, it is hiding behind innocent people. The United States takes the same position as does Israel on this issue. A belligerent cannot spare important legitimate military targets because the enemy has located them in civilian areas.⁴⁹

Second, the concept of counterterror deterrence assumes that over time civilians unwillingly coexisting with terrorists will demand that their government remove the source of danger. If their own government is unwilling or unable to do so, local people may organize their own militias to resist continued terrorist activities carried on in their neighborhoods. This has happened repeatedly in Lebanon, where there has been no government sufficiently strong to control and/or eject the PLO for many years.⁵⁰

Notwithstanding these two arguments, the Israeli counterterror operations in Lebanon do raise questions about the extent to which the principle of discrimination is respected. In order to answer these questions, one would have to conduct a number of case-by-case reviews to determine the extent of civilian damage and the relation of the civilians involved to the terrorists.

Two kinds of cases come to mind. In the first case, the IDF raids a village in South Lebanon from which terrorist attacks have been emanating. Suspects are detained, buildings are blown up, many people are interrogated. Presumably, all this is done on the basis of good intelligence. Nevertheless, it is certainly possible that innocent people and their property may be harmed in such an operation. One would want to know how much care was taken to minimize such harm and then a judgment would have to be made concerning the proportionality of damage done to innocent noncombatants and their property to the legitimate necessities of the operation. After studying a number of such cases, one could make a judgment about the pattern of counterterror operations and the extent to which they generally conformed to the principle of discrimi-

⁴⁹ Parks states ("Crossing the Line" 47): "Although the law of war establishes certain responsibilities, such as the obligation to minimize collateral civilian casualties, it is neither a suicide pact nor a one-way street. It also establishes certain rights that serve as important planning factors for any combat operation.

"A legitimate target may be attacked at any time, wherever it is located.

"The defender cannot use the population as a screen in order to render a target immune from attack. At the same time, it is not illegal for a defender to place its positions in built-up areas."

⁵⁰ See the discussion of the decision of the Lebanese Government to annul the 1969 Cairo Agreement giving the PLO the right to conduct terrorist operations against Israel from Lebanese territory subject to certain Lebanese restrictions and controls which proved ineffective: "Lebanon Annuls PLO Agreement," *Washington Post*, May 22, 1987, A29, cols. 5-6.

nation.

A second kind of case is presented when the Israelis attack PLO targets by air. Quite often these targets are described as "refugee camps" and it is assumed that the strikes involve direct intentional attacks on noncombatants. However, the Palestinian "refugee camps" in Lebanon are also fortified complexes that have been the scene of major battles with Lebanese factions as well as with the Israelis. If target selection is good and reasonable efforts are made to minimize collateral damage, an air attack on a "refugee camp" can be discriminate. To the extent that there is collateral damage, responsibility must be shared by the PLO, which colocates its military facilities with refugee camps.

The preventive/attrition attacks conducted by the Israelis during the period described were overwhelmingly counterforce in character. They were directed at legitimate military targets for the purpose of reducing the PLO's capabilities for waging terrorist warfare and to deter the use and/or support of terrorism. I would consider that these measures were both proportionate and discriminate. That they were effective is demonstrated by the fact that terrorist activity against Israel, as well as against other targets, declined markedly after the Tunis raid and seem to have been kept at a modest level in Lebanon by relatively minor Israeli counterterror operations.

U.S. COUNTERTERROR STRATEGY: A JUST-WAR ANALYSIS

The *jus ad bellum* analysis of the April 15, 1986 U.S. raid on Libya differs from that of recent Israeli counterterror operations. Israel is clearly at war with the PLO and has a right to invoke the just cause of legitimate self-defense. A just-war approach in the Israeli case can produce this judgment irrespective of the refusal of the UN Security Council to concede Israel's right of self-defense as a matter of international law.

The case of counterterror by the United States against Libya—or other states supporting terrorism in the future—is different. Despite the war-like rhetoric of terrorists and their supporters, any terrorist "war" against the United States is extremely limited, especially compared to the PLO's war against Israel. Nevertheless, the basis for the U.S. raid on Libya was the claim that the terrorist threat to American lives and interests was of such a magnitude as to warrant self-defense measures in the form of military actions against terrorist sanctuaries that had both a deterrent and a preventive/attrition rationale.

Jus ad bellum

Competent Authority. President Reagan clearly had competent authority to order the Libyan raid. He consulted with key Congressional leaders

before the attack and was prepared to cancel the mission had there been serious Congressional opposition. The last-minute timing of the consultation was reasonable in light of the necessity of secrecy. Reagan had thus complied with the requirement of Section 3 of the War Powers Resolution that the President shall "in every possible instance . . . consult with Congress" before sending American troops "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by these circumstances."⁵¹

Just Cause. Issues of comparative justice are of little relevance in this case. There is no question of the United States being defeated and its people subjected to unjust treatment, as there is, for example, in the just-war analysis of nuclear deterrence. The just cause was self-defense. It was not the classic self-defense of a state's independence and territorial integrity. This is a new, emerging kind of self-defense that may be invoked by any state that is threatened with recurring terrorist attacks against its diplomats and diplomatic facilities, its armed forces and foreign military bases, its nationals, its international commercial interests, its airlines, and its shipping.

It is clearly a matter of case-by-case judgment whether the incidence and seriousness of terrorist attacks on a state's nationals and interests warrant recourse to armed force against states from which these attacks emanate. The U.S. government agonized for years over the threat caused by Libyan support for anti-American terrorism and over the broader issues of military responses to terrorism. There was great concern over the standard for evaluating evidence of support for terrorism and the level of terrorist activity resulting from such support that would justify an American military reaction. The United States seems to have wanted a kind of "smoking gun" incident that would clearly link Gadhafi to a particularly egregious terrorist attack against the U.S. The Berlin disco attack and the evidence of Gadhafi's role in it was considered to be such a "smoking gun" incident. Indeed, President Reagan was criticized for revealing too much about the evidence he possessed at the risk of disclosing the sources and methods of U.S. intelligence.

The just-war condition of *proportionality* of the coercive means to the just cause in the light of *probability of success* is much more critical in the American than in the Israeli case. Israel has no choice but to react to terrorism. The United States has choices, since the threat and damage of terrorism, while significant, are not unendurable. Libya and the United States are not at war in the sense that Israel and the PLO are at war. Indeed, the situation was very much like the classic setting for "measures

⁵¹ Parks, "Crossing the Line" 51.

short of war" in the form of "reprisals" which were not intended to be part of a continuing war but were discrete instances of self-help in the form of limited military coercion.

The UN Security Council (at times with American concurrence) has denied the legal permissibility of such a return to the old-fashioned military reprisals. Prime Minister Margaret Thatcher has declared that they are illegal, a view she apparently abandoned when she gave the United States permission to fly the F-111s from Britain in the Libyan raid.⁵² That legal view is not persuasive. There is no reason why self-defense cannot be limited to a few discrete occasions of recourse to force, if they are thought to suffice, rather than wage a full-scale war. In this regard, the U.S. case is more interesting and of broader application than the case of Israel.

No other country has Israel's security problem. Most victims of terrorism are not threatened by forces that have any plausible hope of victory to the extent of eliminating the target state or regime. States victimized by terrorism—whether Britain threatened by the IRA, France attacked by a variety of Middle East terrorists, the Federal Republic of Germany plagued by antiestablishment terrorists, or, for that matter, the Soviet Union were it to experience racial or ethnic violent resistance—are not likely to wage a full-scale war against states harboring and supporting the terrorists that attack them. They might, however, take measures comparable to the U.S. raid on Libya. As a general proposition, prescinding from the international-law *jus ad bellum* which has proved to be inadequate to meet this rampant security threat, a good case could be made for self-help/self-defense measures that are limited to whatever level is deemed proportionate to the task.

Since the U.S. raid on Libya was an isolated instance of recourse to force, its proportionality must be judged primarily in *jus ad bellum* terms. The *jus in bello* requirement of proportionality tends here to be subsumed into the *jus ad bellum* requirement. On the positive side, the raid now appears to have been justified as a deterrent demonstration, since Libyan support for anti-American terrorism, whatever it may continue to be, has not resulted in any continuation of the wave of terrorist attacks that preceded it. The United States, moreover, claims that it had evidence of a great number of pending terrorist attacks on American and allied targets. These threatened attacks never eventuated. This was partly the case, the United States asserted, because of the preventive/attrition

⁵² On Jan. 10, 1986 Prime Minister Thatcher said that the use of retaliatory or pre-emptive strikes against another country to punish or prevent terrorism was "against international law" and a policy that could lead to "a much greater chaos" ("Thatcher: Reprisal Strikes Illegal," *Washington Post*, Jan. 11, 1986, A1, col. 1).

effects of the American raid. Additionally, it may reasonably be assumed that the shock of the raid, particularly on the dictator Gadhafi, contributed substantially to deterrence of terrorism.

At the *jus ad bellum* level, the main negative effect of the raid would be its possible effect on the policies of Middle East states that are important to any prospective peace process. Here Reagan could invoke an argument borrowed from Peres. How many Americans must be killed by terrorists whom the Middle East states support or at least tolerate in order to pursue the elusive peace process?

With respect to the just-war requirement of *exhaustion of peaceful alternatives*, the United States claims that every effort was made to organize collective political-economic coercive measures sufficient to discourage Gadhafi's support of terrorism. These efforts failed, much as efforts to organize military collective resistance to aggression have often failed. There was no prospect of obtaining anything like the kind of serious collective nonmilitary sanctions against Gadhafi that would have turned him away from the sponsorship of terrorism. Indeed, this experience epitomizes the dilemma of counterterrorism. For a great variety of reasons, states decline to take the hard measures that would make possible broad fronts against terrorists and those who support or tolerate them. This reduces the victim of terrorism to a choice between unilateral military action against the sources of terrorism or acceptance of the inevitability of continuing vulnerability to terrorist attacks.

Right Intention. The United States attempted to convey its right intention by limiting its military action to the source of terrorist activity and emphasizing that its quarrel was with Gadhafi and his active support of terrorism and not with the Libyan people.

Jus in bello

Proportion. Viewed as a military operation, the U.S. raid on Libyan military targets was certainly proportionate. The targets were all either directly related to terrorist activities or were part of Libyan defenses that needed to be neutralized to assure success of the raid.

Discrimination. Serious efforts were taken to ensure that the attacks on Libyan military targets would be discriminate. Oil-field installations were not bombed because they were not directly related to terrorist operations and because of the danger to civilians, including foreigners, working in or near them. Targets near residential areas were avoided but, as seems to be inevitable in air attacks, some bombs went astray, causing damage to civilians and civilian targets.

The rules of engagement laid down for the mission were impressive and there is every reason to believe that they were followed to the best

of the ability of the American pilots. Indeed, when one reads these ROEs and the rationales for target selection in Hays Parks's authoritative account of the raid, one is struck by the progress that has been made in incorporating normative considerations integrally into the planning and conduct of U.S. military operations.⁵³

CONCLUSION

Both the October 1, 1985 Israeli attack on PLO headquarters in Tunisia and the April 15, 1986 U.S. attack on Libyan targets related to terrorism were successful in terms of deterrence. Terrorism declined clearly in the period extending to April 1987. There is always the possibility of renewed terrorist attacks against the United States from Libyan sources and the certainty of such attacks against Israel continuing. It is rare that terrorism can be deterred and defeated definitively. The threat of renewed attacks, however, does not diminish the significance of the long period of relief from terrorism that followed the Israeli and American counterterror actions in 1985 and 1986. Moreover, the limited counterterror operations of Israel in this period have appeared to contain terrorist threats from a variety of sources in Lebanon, a country in a state of anarchy. In addition to serving a deterrent purpose, these Israeli and American counterterror operations have had some preventive/attrition effects.

The Israeli and American counterterror deterrence/defense measures met the standards of just-war doctrine. Their costs have been proportionate to the positive results. Collateral damage has been minimized by the explicit intentions and efforts of those ordering and conducting counterterror operations. Indeed, the contrast between the counterterrorists' efforts at ensuring proportion and discrimination and the terrorists' efforts, strongly encouraged by states such as Libya, to maximize damage to innocent civilians is stark. This is as it should be but not to be taken for granted.

Despite much concern over the effects of these counterterror measures on relations with Middle East states and the "peace process," it appears from the experience of 1986 that very significant contacts and negotiations are possible in the wake of major counterterror measures. What has most hindered better Middle East relations and the peace process has been terrorism, state support of terrorism, and the intractable refusal

⁵³ Parks, who participated in the planning of the Libyan raid as law-of-war adviser, states: "While terrorism depends on the indiscriminate attack of innocent civilians, U.S. planning would emphasize discrimination and proportionality. At no time was Libya's civilian population (nor civilian objects) considered as a possible target for intentional attack by U.S. military forces." He elaborates with details as to the principles followed in planning and conducting the raid ("Crossing the Line" 47).

of those whose main instrument of policy is terrorism to consider seriously the alternatives of good-faith negotiations.

These conclusions manifestly differ from those of the UN Security Council and from those of persons who persist in propping up an international-law *jus ad bellum* which is not only ineffective but unjust. Just-war doctrine, on the other hand, makes possible normative evaluations of counterterror strategies that are both realistic and, in my view, just.