

**THE IMPORTANCE of INTERNATIONAL LAW in COUNTER-
TERRORISM: THE NEED for NEW GUIDELINES in
INTERNATIONAL LAW to ASSIST STATES RESPONDING to
TERRORIST ATTACKS**

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ABSTRACT

Terrorism, in one way or another, touches everyone's lives. Its affect could be as small as watching media stories on the nightly news and waiting longer in a security line at the airport or as significant as losing a loved one in an attack. As individuals come to grips with living with increased terrorist violence, individual nation-states and the international community have to prepare themselves to prevent, react to, and counter terrorism. This thesis examines whether international law provides an adequate framework for states victimized by terrorism to respond within the law. It highlights how international law currently addresses terrorism and the benefits and disadvantages of applying national and transnational criminal law and international human rights law compared with international humanitarian law to terrorism. Three case studies, the 11 September 2001 attacks on the United States, the 5 September 1972 attack against Israeli athletes in Munich, Germany, and the 11 March 2004 bombings of the train system in Madrid, Spain, investigate how international law has been used in actual terrorist incidents, lending insight into how international law has been interpreted and used in the face of terrorism. They also allow analysis of other factors besides international law that impact a victim-state's response. Finally, this thesis proposes criteria that can be weighed by victim-states and the international community in order to develop an appropriate response to terrorist incidents and recommendations for modifications to international law that will maintain international law's relevance as the international community fights terrorism.

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CHAPTER I

INTRODUCTION

“The law must be stable and yet it must not stand still.” –Roscoe Pound

Research Question and Analytical Framework

Imagine that you are the leader of a country that just suffered a tragic terrorist attack. A number of concerns might weigh on your mind as you decide how to respond. One concern would be the safety and security of your nation and its people. How do you respond to the terrorists so that they no longer see your country as a viable target? Another concern may be how to placate the people who have just lost loved ones, property, and their sense of freedom and security. Additionally, you are probably concerned with how to respond in a way that has the most impact on the first two concerns while also fulfilling your obligations to the international community. This last concern dictates whether other nations will support your response or condemn your actions and whether your response will uphold the values and legal standards the international community strives to advance or create future violence and bloodshed.

What does international law say about terrorism, specifically about protecting a nation from terrorist attacks, and what recourse do victim-states have against terrorists? Most importantly, is international law adequate to enable a state to respond to terrorism? The answers to these questions are not straightforward due to differing interpretations of international law. These interpretations reflect the diversity of characteristics and reactions associated with terrorism, the desire of all governments to retain political sovereignty, and the absence of a clear definition of terrorism. The overarching position this thesis aims to argue is that if international law provided a set of criteria for classifying an international terrorist incident as a criminal act or an act of war and if international law were modified to better address the status and treatment of

terrorists by all nation-states, then it would be easier for victim-states to respond to terrorism within international law and facilitate the use and success of international law.

In this thesis, I shall examine the characteristics of terrorism that make it difficult for international law to thoroughly address this approach to violence, such as the role of nonstate actors in initiating large scale violence. In turn, I discuss and compare three case studies which lead to my proposal of specific criteria for and modifications in international law that can be used by the international community and victim-states in order to legally respond to terrorism and decrease the use of terrorist methods.

I intend for my audience to be other political scientists. As such, international law pertaining to terrorism will be addressed, but it will not be the only aspect of analysis. Rather, my goal is to provide others in the field an introduction to some of the legal issues and perspectives that coincide with the broader issue of terrorism. My concern is that even though other aspects of terrorism must also be addressed, such as root causes that contribute to the increased use of terrorist tactics, without understanding and incorporating international law into the analysis of and fight against terrorism, the international community will become incapable of finding common ground from which to fight these tactics. This thesis will tackle some of the tough concerns regarding international law brought about by terrorism and propose modifications to current international law so that it is applicable to specific dilemmas powerful nonstate actors pose but still observes fundamental practices and concerns of individual nation-states.

Although terrorism manifests itself in a variety of ways, my thesis will focus on the adequacy of international law to respond to international terrorism perpetuated by nonstate actors. The role of nonstate actors does not exclude the fact that states can sponsor terrorism.

However, international law already provides guidance as to how states should interact with each other.

Further, this thesis distinguishes between international terrorism and domestic terrorism. International terrorism differs from domestic terrorism largely due to how victim-states respond to international versus domestic incidents. A domestic terrorist incident that involves perpetrators who are citizens of the state which is attacked invoke a nation's domestic law. An international terrorist incident, on the other hand, is initiated outside of a state's borders or carried out by people who are not citizens of their country. Although an incident may occur outside of a nation's borders it could still be directly targeted at the state via its citizens or embassies overseas. In addition, if the perpetrators are foreigners it is likely that they are sponsored by an organization that operates from a different country and may be provided safe haven in another country. A state may need to function outside of its own borders in order to address a terrorist threat. As a result, international terrorist incidents frequently elicit responses by the victim-state that cut across national borders.

Terrorism is a vast and complicated topic. Although I will narrow my focus to specific contexts of terrorism to be addressed in this study, a broad definition that explains a basic terrorist act is an action perpetuated by nonstate actors against innocent civilians that is violent, or uses the threat of violence, in order to coerce governments and/or private citizens into action they otherwise would not take and/or to create an atmosphere of fear. I will also draw on Lieutenant Colonel Michael Hoffman's proposed definition, noted on page eight, for a working definition of terrorism to be referenced throughout the thesis. I will recommend a more thorough definition of terrorism at the conclusion of the thesis.

This study includes analysis of existing international law to assess its applicability to instances of terrorism and examines three examples of terrorism, the 11 September 2001 attacks against the United States (U.S.), the 1972 attack at the Munich Olympics, and the 2004 Madrid train bombings, and the corresponding victim-states' responses. Each case study reviews the attack, the international community's response to the attack, the victim-state's response, and the international community's response to the victim-state's response. A comparison of similarities and differences among all three attacks exposes variables that impact both the victim-state's response and the international community's response that may or may not be accounted for in international law.

To evaluate current international law pertaining to terrorism, I consider two elements: characteristics of terrorism addressed in international law and how international law addresses and separates a criminal act from an act of war. Based on my discussion of these two factors within international law and the case studies, I explain why I believe it is imperative to develop criteria that clarify the conditions necessary for the legal use of force and the treatment of terrorists by all nation-states. This clarification of international law is necessary in two different aspects of how nation-states respond to terrorism: the legitimacy and legality of responding to a terrorist attack and the legality of the execution of the response. International law needs to be augmented to provide sufficient guidance in both respects.

Determining the legal use of force depends on the classification, either criminal or military, of the terrorist act. This classification is an important element in evaluating state responses because states can respond to terrorist attacks with military force, by applying criminal law within their jurisdiction, or with both types of authority, using military force and law enforcement. However, each of these categories has unique legal standards. Built on analysis of

international law and its significance for three cases, I make a set of recommendations for how international law needs to be modified in order to provide clear legal guidance about terrorism to the international community and individual nations.

Significance of the Study

International law is one method of uniting individual nations and demonstrating a unified posture against terrorism. It can also establish clear guidelines to help distinguish between state reprisal actions that are legal or illegal. To maintain the legitimacy and usefulness of international law and ensure that nations making and agreeing to international law are following the law, inadequacies in international law since the advent of terrorism must be investigated. The acknowledgement of shortcomings should then be followed by a reevaluation of how international law can lead to international agreement on fighting terrorism.

Terrorism has been an increasingly utilized method of political violence in the past thirty years. Its lethality and ability to provoke fear within the general population make terrorist tactics a weapon of choice for many nonstate actors trying to advance religious, political, or ideological agendas. The increased use of terrorism reflects the international community's inability to inhibit terrorist activities and counter their global proliferation. Furthermore, states who are victims of terrorist attacks respond to these attacks differently due to the lack of international agreement on how to respond to terrorists and their methods. Disharmony has been exemplified by the international community's lack of consensus regarding the legality of some nations' reprisal responses. This study will contribute to the debate over legality by summarizing the actions the international community has taken to characterize terrorism, presenting the benefits and drawbacks to classifying terrorist actions as criminal or as acts of war, and showing the

impact international law, as it is currently written, has had in actual victim-state responses to terrorist attacks.

International law is made up of two types of law: customary and conventional law. Customary law is unwritten law that consists of known, general rules. Customary law differs from conventional law in that it is general and recognized as known law whereas conventional law is written, in the form of treaties, and explicitly agreed to by individual states. For example, the 1977 Additional Protocols to the Geneva Conventions have not been ratified universally like the four 1949 Geneva Conventions. Nonetheless, some principles within the protocols, such as the treatment of people no longer participating in the hostilities, exist as customary law, requiring states to adhere to them regardless of their ratification of the written treaties. Both types of international law are important in determining legal precedent and practice in responding to terrorism. Within conventional and customary law are international human rights law (IHRL) and international humanitarian law (IHL); the latter is also known as the law of armed conflict (LOAC). Currently, terrorism is addressed in both international human rights law and the law of armed conflict. Since the international community does not have one agreed upon definition of terrorism, international human rights law addresses terrorist acts, and not terrorism per se, in a variety of treaties created to address specific aspects of terrorism. For example, instead of a Convention against Terrorism, the United Nations (U.N.) wrote a variety of conventions describing terrorist actions, such as the Convention against the Taking of Hostages, the Convention for the Suppression of Terrorist Bombings, and the Convention for the Suppression of Unlawful Seizure of Aircraft.

The law of armed conflict also refers to the term terrorism. However, the prohibition of terrorism in the Fourth Geneva Convention and Additional Protocol II refers to regulating the

conduct of military hostilities. These conventions prohibit acts of violence during armed conflicts that do not provide a distinct military advantage.¹ However, in response to terrorism, but not necessarily within the confines of military hostilities, many states utilize military action and create an armed conflict similar to that bounded by the law of armed conflict. Therefore, it is pertinent to understand how the law describes terrorism and the efforts the international community has taken to define terrorism.

The classification of terrorism is also important. In most nations, crimes committed outside of an armed conflict and war crimes are treated differently, both in how the violators are tried and how they are punished. Nations have individual laws governing both types of criminals. However, because of national sovereignty, victim-states do not always have the means to cross borders and apprehend terrorists using domestic law. Consequently, this study will explain why and how international law must clarify the labeling of terrorist violence to augment state cooperation and consistency against terrorism.

Finally, when discussing how victim-states and the international community have interpreted international law in three case studies, my analysis will reflect on factors that influenced the victim-states' responses, consider whether the international community has supported the victim-states' responses or condemned them as violating international law, and highlight the need for clarification and change within international law. This study will conclude by proposing criteria that will enable the international community to determine whether or not the use of force in response to terrorism is justified and by recommending modifications that will bring the international community closer to a united posture against terrorism.

¹ *International Humanitarian Law and Terrorism: Questions and Answers* [on-line] (International Committee of the Red Cross, 5 May 2004 [cited 12 March 2006]); available from <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5YNLEV.14>.

Key Concepts

There are five key concepts referenced throughout this thesis. Although I will delve much deeper into them within specific chapters, the following paragraphs provide a basic introduction of the following conceptual issues: what is a terrorist, what is international human rights law, what is international humanitarian law, what is a crime, and what is an act of war. The initial descriptions are taken from the traditional understanding of these terms. Due to the challenges to international law from terrorism as discussed in this thesis, some of these concepts will be modified in my prescription for the future of international law.

The first conceptual issue addresses what a terrorist is. Although it is preferable to address terrorism as a concept instead of the terrorist, no single, comprehensive definition of terrorism agreed upon by the international body exists. Two different approaches are commonly used to define terrorism. Many authors define terrorism by identifying who the terrorists are while others define terrorism by what the terrorists do. In order to clarify the concept of terrorism used in this analysis, I will reference Michael Hoffman's suggestion to focus on the actor, or terrorist, instead of the actions associated with terrorism. This provides contrast to my basic definition of terrorism above, which focuses more on terrorist actions, as well as with my ultimate definition provided in Chapter VI.

All actions perpetuated by terrorists are considered either crimes or violations of the law of armed conflict. Society recognizes that these actions are wrong, and they contradict the values already captured in both customary and conventional international law. Additionally, nonstate actors are not legally allowed to wage private warfare. Therefore, Lieutenant Colonel Hoffman also focuses on the actors and provides the following definition of terrorism: "Terrorists are unlawful belligerents, meaning nonstate actors whose actions, in time of peace,

would qualify as armed, interstate hostilities if the same were attributed to a state; or whose conduct, in a time of legally recognizable armed hostilities, would otherwise be attributed to combatants but for the fact that they are intervening in international or internal armed conflict without legal status or authority to act as an armed force.”²

This thesis will analyze only international terrorism, and therefore actions associated with international terrorists. Terrorist attacks reference attacks in which the terrorists attack targets outside of their nation or attack domestic targets with international significance or association. Domestic terrorism is also a threat to many nations. However, because the attacks occur within a nation’s borders by citizens of the state, the state has full criminal jurisdiction over them.

The second key conceptual issue concerns what international human rights law is. International human rights law consists primarily of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. These three documents comprise the International Bill on Human Rights. Their existence is an effort by the international community to protect and promote basic human rights throughout the world. They are rooted in the purpose of the U.N. as written in the United Nations Charter, Chapter 1, Article 1, number 3: “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”³

² Michael Hoffman, "Rescuing the Law of War: A Way Forward in an Era of Global Terrorism," *Parameters* XXXV (2005): 23.

³ Marci Hoffman, *ASIL Guide to Electronic Resources for International Law* [on-line] (The American Society of International Law, [cited 12 March 2006]); available from <http://www.asil.org/resource/humrts1.htm>.; *Charter of the United Nations* [on-line] (United Nations, 24 September 1973 [cited 26 September 2006]); available from <http://www.un.org/aboutun/charter/>.

The third conceptual issue considers international humanitarian law. International humanitarian law differs from international human rights law because it applies during armed conflict whereas human rights law applies during times of both war and peace. The fundamental tenets of humanitarian law are: to limit the methods and means of warfare, differentiate between civilians and combatants, protect enemies who are no longer actively fighting, and protect adversaries from torture or other cruel punishments.⁴

The last two conceptual issues address what constitutes criminal acts and acts of war. Each term, criminal act or act of war, refers to specific behavior and can be related to international terrorism in different ways. A crime is a wrongdoing as classified by the state or federal domestic law. A specific aspect of international human rights law, known as international criminal law, addresses transnational crime, specifically organized crime and narcotics, piracy, crime against the environment or cultural property, and certain actions associated with terrorism such as those addressed in the conventions previously mentioned.

A legal definition for “act of war” does not exist in current international law. The U.N. Charter does not use this terminology. Instead, the Charter employs “use of force,” “armed attack,” “armed force,” and “acts of aggression.”⁵ Although the U.N. Charter does not provide specific definitions for these terms, it does clearly prohibit violence outside of U.N. Security Council involvement. According to Article 39, the U.N. is authorized to act upon a “breach of the peace.” An individual nation is allowed to act if its sovereignty has been attacked. However, use of force is not always an appropriate response to a breach of sovereignty because sovereignty

⁴ *Study Guides: Humanitarian Law* [on-line] (Human Rights Education Associates, [cited 12 March 2006]); available from <http://www.hrea.org/learn/guides/ihl.html>.

⁵ David J. DiCenso, *Information Operations: An Act of War?* [On-line Journal] (Air and Space Power Chronicles-Chronicles Online Journal, 12 March 2006 [cited 12 March 2006]); available from <http://www.airpower.maxwell.af.mil/airchronicles/cc/dicensol.html>.; *Charter of the United Nations*, Preamble, Chapter 1, Articles 1 and 2, Chapter 7, Articles 41, 46, 51.

can now be threatened with means other than armed attacks. Therefore, for the purposes of this thesis, an act of war will refer to armed attacks against another nation that threatens or could threaten its sovereignty. This is a very broad definition for acts of war, intended to provide only a basic description of an act of war, not be used as a tool to measure acts of aggression. Acts of war must coincide with a real perception of threat by the targeted state that is confirmed by the community of nations. Consequently, not every armed attack would qualify as an act of war. Further clarification will be provided in the chapter on categorizing terrorism as criminal or acts of war.

Literature Review

Terrorism literature is abundant. In order to grasp an understanding of terrorism as a general phenomenon as well as gain specific information about the application of international law to terrorism, I consulted a wide variety of sources. In general, this literature addresses questions regarding whether terrorism fits within the criminal law or international humanitarian law paradigms or, if it is already assumed that it does, if revisions of the law are needed. In “The Law of War: Can 20th Century Standards Apply to the Global War on Terrorism?,” Lieutenant Colonel David Cavaleri, U.S. Army (Ret), questions whether the current framework of international law, in particular, the law of armed conflict, is applicable in the current global war on terrorism.⁶ To answer his question he focuses on two factors, the history of both war and the law of war and a case study of the Mau Mau Emergency in the former British colony of Kenya. Lt Col Cavaleri provides a brief but thorough analysis on what war is and why people regulate it. He then discusses the purpose of the law of war, e.g. to lessen suffering, and what constitutes the law of war, i.e. customary and conventional law. He provides an historical look at the

⁶ David P. Cavaleri, *The Law of War: Can 20th Century Standards Apply to the Global War on Terrorism?* (Fort Leavenworth: Combat Studies Institute Press, 2005).

development of the law of armed conflict, highlighting historic events or changes that have caused world leaders to create more law or adjust current law. Lt Col Cavaleri then presents a detailed summary of the Mau Mau Emergency and briefly discusses the political fallout and impact of the popular press on the emergency and how these factors influenced or created consequences for violations of the law of war. The author concludes that the law of war should be upheld in the current global war on terrorism but contends only time will tell if this conflict will encourage change to current law.

Michael Hoffman offers a more detailed path towards how international law should confront terrorism in his paper “Rescuing the Law of War: A Way Forward in an Era of Global Terrorism.”⁷ Advocating the use of the law of war, Lt Col Hoffman promotes the use of customary international law as a starting point to develop a legal way to respond to terrorism. He argues that the Geneva Conventions adequately address international conflicts between two states, civil war, and unlawful combatants as defined by the Conventions. However, they can not appropriately be applied to privately waged warfare. Lt Col Hoffman discusses historical cases in which the U.S. government dealt with unlawful belligerents, such as men fighting in the Mexican civil war that crossed the U.S. border and raided a town in New Mexico, and proposes that customary law be quickly and clearly articulated so that it can be applied to today’s global war on terror.

Despite these authors’ insight into the origins of the law of armed conflict, they offer vague guidance on potential changes to international law that could better apply to terrorism. Both propose that change is possible, even necessary according to Lt Col Hoffman, yet neither of them detail specific definitions or laws that need revision. Instead, Lt Col Cavaleri becomes side-tracked with details of the Mau Mau emergency while Lt Col Hoffman argues for decision-

⁷ Hoffman, "Rescuing the Law of War: A Way Forward in an Era of Global Terrorism."

making regarding the laws of war to remain under the jurisdiction of the executive branch instead of cases being heard and adjudicated by the judicial branch of the U.S. government.

Wayne McCormack, author of “Is it Crime or is it War? Toward an International Law of Terrorism,” conducts a thorough investigation of the implications of applying war terminology and rules to terrorist incidents as well as how international criminal proceedings, such as the tribunal for Yugoslavia and Rwanda, have begun to set precedent and interpret international law.⁸ He perceives the best method of addressing terrorism is to focus on the underlying organizations that sponsor terrorism. He agrees that an international definition of terrorism is needed and proposes the following: “targeted killing of civilians by members of a subnational group that has the capability to carry out a systematic campaign.”⁹ A comparison of this definition with that of Lt Col Hoffman reveals the previously two-pronged approach that can be taken when defining terrorism. Mr. McCormack concludes his paper by encouraging the application of criminal law to terrorism, not the law of war. He recommends that an international counter-terrorism task force with enforcement and operating capability in each nation be created to fight terrorism.

Jordan Paust and Dr. Davida Kellogg use a different approach in their papers, addressing terrorism as an act of war and arguing how, not if, the law of armed conflict should be applied to terrorism. Their diversity in conclusions reflects the wide range of thought concerning terrorism and international law. Jordan Paust, in his article “There is No Need to Revise the Laws of War in Light of September 11th,” argues that terrorism is not a new phenomenon and modifying the

⁸ Wayne McCormack, *Is It Crime or Is It War? Toward an International Law of Terrorism* [on-line] (Social Science Research Network, June 21, 2005 [cited 1 November 2006]); available from <http://ssrn.com/abstract=747464>.

⁹ *Ibid.*, 62.

current laws of armed conflict may have harmful consequences for states engaging terrorists.¹⁰ On the contrary, Dr. Kellogg, in her article “International Law and Terrorism,” concludes that current international law needs to be modified by new, binding laws on signatories as well as all parties to a conflict; such modification, in her view, would create the expectation that the world’s individual nations will condemn and punish violators of the law of armed conflict.¹¹ She remains mindful that many norms already exist in the current law of war, and they can be used effectively against terrorism while not undermining military actions.

Antonio Cassese focuses on examining how international law relates to terrorism to establish whether the law is flawed or if there are positive elements that can be used. He proposes two basic responses to terrorist attacks: peaceful responses or coercive responses, with the basis of distinction being whether or not the response involves the use of force outside of the area that is subject to the responding nation’s sovereignty. Cassese concludes that “Responses do not always fulfill the preconditions laid down by international law for the use of force against another State or in international territory. And we have seen that even in these circumstances the international community will, at most do no more than issue a verbal condemnation. Meanwhile terrorist attacks continue.”¹² In this context, my study also searches for a meaningful response to terrorism that triumphs verbal condemnation but proposes that modification to international law will provide a more encompassing tool for countering terrorism than Cassese’s proposal of identifying and eliminating root causes of terrorist activity.

¹⁰ Jordan J. Paust, *There Is No Need to Revise the Laws of War in Light of September 11th* [on-line] (American Society of International Law, November 2002 [cited 4 March]); available from <http://www.asil.org/taskforce/paust.pdf>.

¹¹ Davida Kellogg, “International Law and Terrorism,” *Military Review* (September-October 2005).

¹² Antonio Cassese, “The International Community’s ‘Legal’ Response to Terrorism,” *The International and Comparative Law Quarterly* 38, no. 3 (1989): 604-05.

Paralleling Cassese's conclusions that the international community has thus far failed to establish a meaningful response to terrorism, Felice Gaer discusses the United Nation's futile attempt to define terrorism. Her opening comment, "United Nations diplomats routinely affirm their opposition to terrorism and have created subcommittees and a dozen legal treaties outlawing its various forms. Yet the world body remains stalemated in its efforts to produce a single comprehensive convention outlawing international terrorism," affirms the need for consensus among the international community.¹³ In recognition of the continued accuracy of this statement, I pose criteria, modifications, and actions the international community can use to do more than verbally condemn violent terrorist acts.

Differing from the analysis of LOAC and terrorism, Kenneth Watkin analyzes the role of international human rights law when responding to terrorism. In his essay "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," he recognizes that "The unique threat posed by nonstate actors, combined with the lack of a consensus on the legal categorization of conflict, creates conditions in which the criminal law enforcement and armed conflict paradigms overlap."¹⁴ Because legal questions, such as the role of nonstate actors in armed conflict and the legal categorization of recent conflicts stemming from terrorist violence, exist and are further confused by the overlap between criminal law enforcement and armed conflict paradigms, I investigate not only the texts of international law but also the benefits and disadvantages of applying criminal law and the law of war to terrorism.

This thesis will draw on the knowledge and research concerning precedent and current applications of either criminal law or the law of war. However, it will also attempt to provide a

¹³ Felice Gaer, *Defining Terrorism: A Political Imperative?* [on-line] (United Nations Association of the United States of America, [cited 24 September 2006]); available from <http://www.unausa.org/site/pp.asp?c=fvKRI8MPJpF&b=1351233>.

¹⁴ Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," *The American Journal of International Law* 98, no. 1 (2004): 1-2.

more detailed plan for how the international community can proceed and change international law that will adequately apply to terrorism.

Research Design

I use two methods in my study. The first approach is document analysis consisting of primary legal sources of current international law and secondary sources' interpretation and application of the law. Second, I use a comparative case study method to investigate how international law has been interpreted and followed historically. These case studies, in addition to the document analysis, will provide the foundation from which I prescribe an alternate approach to the classification of terrorism via a set of criteria and modifications to international law. The document analysis of the primary sources of law will present applicable portions of international law as they currently exist. It is then important to analyze secondary sources to show how the law has been interpreted differently by nations and scholars, recognize current precedent, and identify law that has been applied differently or ignored by the international community.

The comparative case study method will present international law and its application in real-world terrorist incidents. This will show the unique challenges posed to the international community and victim-states by terrorism as well as show the diversity in international reaction to victim-state responses to terrorist attacks.

Within the analysis of legal sources noted above, I review what the international community is doing to define terrorism. This section will also explain the current status of creating an international definition and highlight specific issues that are inhibiting an agreement on one definition. In addition, I examine whether international law provides a comprehensive

explanation of terrorism and whether terrorism is a criminal act or an act of war to determine how international law characterizes terrorism.

Using secondary sources, I will further discuss the significance of classifying terrorism as a criminal act or as an act of war. How violence is categorized and conceptualized affects what type of law is applied and how legal use of force is evaluated. For the purposes of this thesis, international community refers to U.N.-member nations. The U.N. is currently made up of 191 nations. Although it does not always efficiently and effectively address international issues, it does provide a forum in which nations can express their opinions and concerns and be heard by representatives of majority of the world's other nations. Since the international community has not agreed upon a comprehensive definition of terrorism, two overlapping paradigms, international law that applies to armed conflict and that which applies to criminal law, are used inconsistently to punish terrorist actions. Consequently, nations sometime respond to terrorism using principles of the law of armed conflict and at other times using domestic law or transnational criminal law within their jurisdiction. Frequently, if a state of war existed many terrorist actions would violate the law of wars. However, because terrorists are nonstate actors, war is not declared, and their actions are considered crimes. This analysis will elaborate on the positive and negative aspects of characterizing terrorism as a crime and the positive and negative aspects of characterizing terrorism as an act of war. These benefits and disadvantages will provide insight into how best to establish a set of criteria for deciding what response, utilizing which laws, is most effective after a terrorist incident.

For the purposes of this paper, the terrorist incidents studied include only attacks that were international in nature and that elicited responses from the victim-state that crossed their sovereign national borders. These restrictions on case selection enabled me to focus on specific issues that create many of the legal questions, such as when a sovereign nation can interfere

within the borders of another sovereign nation. Similarities between the terrorist attacks will be compared with the victim-state's reprisal response and corresponding response from the international community. Analysis of three case studies will show how victim-states use international law when responding to a terrorist attack, different responses victim-states have used, and benefits and disadvantages of each response in comparison to each other.

Important factors to take into consideration for each case study include: the initial country attacked, the terrorist group that perpetrated the attack, the country attacked in the reprisal attack, the number of people killed in the terrorist attack and reprisal response, the target attacked by the terrorists and the reprisal response, the method of terrorist attack as well as the method of reprisal response, the type of response: criminal (trial and punishment) or military (overt force), and the international response (U.N. Security Council, various nations) to the terrorist attack and the reprisal attack.

The three case studies I selected are: the 11 September 2001 attacks on the United States by Al Qaeda, the 5 September 1972 terrorist attack against Israeli Olympic athletes in Munich, Germany by the Black September terrorist group, and the 11 March 2004 bombing of the Madrid train system in Spain. I will predominantly focus on analysis of the 9/11 attacks. The other two case studies present an interesting comparison due to the alternative ways each victim-state responded to terrorism. Whereas the United States invaded Afghanistan with an international coalition of military forces, Israel used both overt and covert force, and Spain withdrew its military forces from Iraq and used law enforcement to investigate and arrest terrorists responsible for the bombings. Although some aspects of the United States' execution of its response to the 9/11 attacks do not mirror international legal guidelines, the reprisal attack exemplifies a legal response approved by the international community. In comparison, Israel's response to the Munich attack is an example of a reprisal attack where the international community

was not in consensus as to whether portions of the response were legal or illegal. It also serves as an example of the international community recognizing a state action as illegal but not acting against it. Finally, the Spanish response to the Madrid bombings represents a victim-state response that did not use violence. Below is a brief synopsis of the three incidents.

On 11 September 2001, Al Qaeda operatives hijacked four commercial airliners and flew three of the four planes into U.S. buildings in New York and Washington D.C. The fourth plane crashed into a field in Pennsylvania. The attack killed 2,762 people and injured many others. In response, the United States used both domestic and military legal frameworks. However, an extensive military force invading Afghanistan was the predominant response. Military action continues today, five years after the attack. This case study allows analysis of how a victim-state responded to an attack within the context of both domestic and international law. More specifically, studying the U.S. response lends insight into how the U.S. interpreted international humanitarian law and whether or not this interpretation was accepted by the international community.

On 5 September 1972, eight members of the Black September terrorist group entered the Munich Olympic Village, killed two Israelis, and took nine Israeli hostages. In a botched rescue attempt, the remaining nine Israeli athletes and coaches were killed. Israel responded in two distinct ways. First, on 8 September 1972, Israel launched an air strike against guerrilla targets in Lebanon and Syria. They also engaged Palestinian terrorists on the ground in Lebanon. Three Syrian planes were shot down, and at least two hundred people were killed.¹⁵ Second, the Israeli government authorized the targeted assassination of all individuals involved in the Munich attack. The campaigns involving these assassinations were named Operation *Wrath of God* and

¹⁵ Aaron J. Klein, *Striking Back: The 1972 Munich Olympics Massacre and Israel's Deadly Response* (New York: Random House, 2005), 94.

Operation *Spring of Youth*. On 10 April 1973, under Operation *Spring of Youth*, Israeli Defense Force Special Forces units attacked the headquarters and residences of the Palestinian Liberation Organization and its leaders in Lebanon. Other targets included a building that housed activists of the Popular Front for the Liberation of Palestine (PFLP), the headquarters of the Fatah's Gaza sector, and two workshops that assembled rockets and mines. It is suspected that the final assassination connected with Operation *Wrath of God* occurred in 1979, seven years after the terrorist attack. Although Israel employed military force similar to the U.S., the Munich case study portrays a response that was much more legally contentious, due to tactics such as targeted killing, and occurred when the world was divided by the Cold War. These two factors impacted how the international community responded to Israel's interpretation of international law.

Lastly, on 11 March 2004, a series of bombs were detonated on Madrid's train system killing 191 people and injuring thousands more. Spain positively identified many of the perpetrators as members of an Islamic terrorist cell. Although it is suspected that they were trying to act on behalf of Al Qaeda, direct ties to the terrorist organization remain tenuous. Spanish authorities utilized national criminal law to track and arrest many of the terrorists. Soon after the attack, they also pulled their military forces out of Iraq but kept Spanish troops in Afghanistan as part of an international coalition fighting Taliban and Al Qaeda fighters. In contrast to both 9/11 and the Munich attack responses, Spain responded to the Madrid bombings by using law enforcement action. Therefore, this case study permits analysis regarding Spain's use of criminal law instead of international humanitarian law and factors which differed in this attack leading to a response unlike the U.S. and Israel responses.

Throughout the primary and secondary source analysis and the case studies, this thesis will show the variety of international legal quandaries terrorist attacks can present to a victim-

state trying to respond to a terrorist attack as well as identify why the international community responds differently to victim-state responses. Understanding how international law currently guides or fails to provide guidance for responses to terrorism, being aware of the benefits and disadvantages of classifying terrorism within criminal or humanitarian law frameworks, and applying lessons learned from the three case studies will support my contention that international law can clarify criteria to determine if a terrorist attack is either a criminal act or an act of war. Additionally, this understanding and awareness support my assertion that if the international community modifies international law to reflect the ability of nonstate actors to engage in direct conflict against a state, declares that terrorists are unlawful combatants, and clarifies standards of treatment for detained terrorists, then victim-states can more easily respond to terrorism using international law. It is my hope to show that nations can address terrorism as necessary but also legally, facilitating the continued usefulness and legitimacy of international law.

Synopsis of Chapters

Following this first introductory chapter, Chapter II discusses how international law addresses terrorists and terrorist acts. By separating international humanitarian law from international human rights law and introducing current terrorism legislation, this chapter establishes the international legal foundation that victim-states presently consult when responding to a terrorist attack. I show how the international community has struggled to create law that is specific enough to provide a comprehensive guide to victim-states but also general enough to encompass new tactics employed by terrorists. I conclude that the U.N. must decide how to create or modify international law to curb terrorist violence while remaining sensitive to individual state sovereignty.

In Chapter III, I weigh the benefits and disadvantages of correlating terrorism with both criminal acts and acts of war and with classifying terrorism within criminal and warfare legal frameworks. I conclude that because terrorism is unpredictable and diverse, a varied legal approach to terrorism is necessary. Criminal law is not always useful against terrorism while a military response is also not always appropriate.

Chapter IV includes the first case study. I recount the events of the Al-Qaeda terrorist attacks on the United States on 11 September 2001 and the United States' and world's reaction to the attacks. I then analyze aspects of the U.S. response that used law enforcement action and compared the United States' military action and international response to U.S. action with international law. Noting the importance of the unanimous recognition by the international community that the attacks were terrorist attacks and of the scope to justify the United States' use of force, I conclude that despite this international consensus, legal questions have plagued the execution of the U.S. response. Namely, issues regarding the status of detained terrorists highlight the need for clarification within international law.

In Chapter V, I present case studies of the Black September attack against Israeli athletes at the Munich Olympics and the Madrid train bombings in Spain. A comparative analysis of the case studies and application of criteria to determine whether a terrorist attack warrants the use of force as proposed by Sean Murphy follows a review of the two attacks and their corresponding responses.¹⁶ The criteria are the magnitude of the incident and its comparison with a military attack, the perception of the attacks by the victim-states as comparable to military attacks, the acceptance of this interpretation by the international community, and precedent establishing that terrorist attacks can be similar to armed attacks. I conclude that each attack presents an

¹⁶ Sean D. Murphy, "Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter," *Harvard International Law Journal* 43, no. 1 (2002).

opportunity for the international community to take a stand against terrorism despite the international community's past record of letting many of these opportunities slip by. Further, continued inconsistency by victim-states responding to terrorism and by the international community responding to both the attacks and the victim-state responses encourages the continued use of terrorism. Although leeway provided to victim-states by the international community immediately following a terrorist attack may be positive, this flexibility should have boundaries.

Finally, I conclude my thesis in Chapter VI. This chapter summarizes lessons that can be learned from the three case studies. I propose five criteria the international community can implement to help determine whether a terrorist attack warrants the use of force, suggest how terrorists should be identified within international law, and recommend modifications to international law that could increase the international community's success in fighting terrorism.

CHAPTER II

THE CURRENT FOUNDATION IN INTERNATIONAL LAW FOR ADDRESSING TERRORISM

Introduction

Imagine you are a soldier or law enforcement officer trying to protect your nation, its citizens, and yourself from terrorists. You live in hostile times when indiscriminate terrorism is the weapon of choice and the perpetrators are men, women, and even children who blend into the fabric of society. Although many ordinary citizens might keep the thought of an attack in the back of their minds, you are on the front lines actively pursuing terrorists trying to preempt another attack. The escalation of suicide terrorism, in particular, makes you wary when dealing with anyone or anything suspect. When someone is willing, even eager, to die for their cause you are faced with a momentary decision, act with limited knowledge and eliminate the threat or pause to consider different alternatives and ramifications. The first course of action might cost an innocent person, the presumed terrorist, their life. However, not taking any action could potentially cost many other innocent bystanders their lives. Dr. Haim Harari provides an outstanding example of the quandary you might face in *A View from the Eye of the Storm*. The location and circumstances can be altered to make the following scenario a reality in any country in the world.

It is high noon on a hot summer day in Israel. Parents come to a kindergarten to collect their children after school. An armed security guard is watching the scene. An Arabic-looking young man wearing a heavy topcoat - in the hot weather - approaches the parents and their children. No one else in sight is wearing more than a T-shirt. Under these circumstances, a heavy coat is likely to conceal an explosive suicide belt. Why would anyone wear such a coat on a hot summer day in Israel? A dozen children and their mothers are in immediate danger of horrible death. But the guard has no absolute proof that there is a suicide belt. Perhaps the young man is sick, mentally or otherwise. There could be any number of other explanations, although most would be far-fetched. What

should the guard do? Kill the man instantly? Interrogate him, knowing that at any time he might pull the cord and explode, taking with him children, parents, and the guard?¹⁷

The answers to these questions will never be easy, but they can be greatly augmented by legal guidance.

Before analyzing how international law can be used to counter terrorism, it is important to have a basic understanding of what international law is. Therefore, on a broad scale I will analyze how the international community conceptualizes the legal management of terrorism, discuss how international law is created and becomes binding on nations, and then describe international law that can be used to address terrorism. The international community has attempted to comprehensively define terrorism but has not yet been successful. By discussing how international law provides a limited framework in which to address terrorism and what the international community is doing to strengthen its fight against terrorism, I will provide a foundation from which I will argue that both branches of international law, IHL and IHRL, address aspects of terrorism but neither is currently written to encompass all of the necessary facets. In order for terrorism to be better understood and fought, both by individual nations and by the entire world community, the roles both branches of international law have when confronting terrorism need to be clarified, and the international community needs to move beyond its current impasse regarding a definition of terrorism.

Defining Terrorism as an International Community

Even though the international community has made great strides towards developing legislation to specifically address terrorism, the phenomenon itself remains a vague, undefined issue. Until the international community solidifies its stance and acts when its guidelines have been broken, illegal and violent behavior will continue. Victim-states will also continue to

¹⁷ Haim Harari, *A View from the Eye of the Storm: Terror and Reason in the Middle East* (New York: Regan Books, 2005), 29.

search for an appropriate and effective response. This section will review a variety of methods used to define terrorism in legal terms and the current progress made towards a universal definition of international terrorism. As a result, I will propose issues the United Nations will continue to face or be confronted with in the future as it fights terrorism.

Current Terrorism Conventions

As previously stated, one comprehensive treaty or convention on terrorism does not exist. In its absence, thirteen conventions and multiple resolutions passed by the U.N. tackle specific aspects of terrorism. The international community began creating conventions on terrorism in 1963 and continues today to work toward international solidarity against terrorism. Existing conventions are listed below followed by the year they came into force and the number of states that are a party to the convention: Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963, 180), Convention for the Suppression of Unlawful Seizure of Aircraft (1970, 181), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, also known as the Montreal Convention, (1971, 183), Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973, 159), Convention against the Taking of Hostages (1979, 153), Convention on the Physical Protection of Nuclear Material (1980, 116), Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988, 156), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988, 134), Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988, 123), Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991, 123), International Convention for the Suppression of Terrorist Bombings (1997, 145), International Convention for the Suppression of the Financing of Terrorism (1999, 150), and the International

Convention for the Suppression of Acts of Nuclear Terrorism (This convention has not yet entered into force. It is open for signatures until 13 December 2006. As of 8 March 2006, the convention had one hundred signatories but no ratifications).¹⁸

Although fewer states were signing and ratifying conventions throughout the 1980s and 1990s, the 2001 Al Qaeda terrorist attacks against the United States brought terrorism to the attention of both the international community and to national domestic governments. Between October 2001 and August 2006, the number of states who ratified and became a party to these conventions increased by an average of fifty states.¹⁹

Elements of Terrorism According to the International Community

One of the most helpful insights to be gained by reviewing these conventions is an understanding of what the international community currently recognizes as terrorism and what steps have already been taken to counter it. Each convention speaks to specific actions. The first three conventions listed, as well as the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, address violent offenses involving aviation. These conventions focus on allowing aircraft commanders to take appropriate measures to preserve in-flight safety, criminalizes aircraft hijacking, outlaws any acts that endanger anyone during aircraft flight, prohibits the placement of explosive devices on an aircraft, requires states to take into custody offenders and return the plane to the lawful commander as well as to punish hijackers and to cooperate with other states to ensure offenders are arrested and tried, and criminalizes all of these acts at airports. Therefore, international law

¹⁸ *International Law and Terrorism* [on-line] (United Nations, [cited 8 March 2006]); available from <http://www.un.org/sc/ctc/law.shtml>.

¹⁹ *Status of International Conventions on Terrorism* [on-line] (United Nations Association of the United States of America, 2 October 2001 [cited 13 October 2006]); available from <http://www.unausa.org/site/pp.aspx?c=fvKRI8MPJpF&b=379693>.; *Inventory of International Nonproliferation Organizations & Regimes* [on-line] (Monterey Institute of International Studies, 6 October 2006 [cited 13 October 2006]); available from <http://cns.miis.edu/pubs/inven/index.htm>.

clearly perceives any action that threatens an aircraft or its passengers as an illegal terrorist action.

The fourth convention, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, protects internationally protected persons such as diplomats. This convention protects government officials and diplomats from attack in addition to requiring states party to the Convention to criminalize acts that threaten these protected persons. Another convention, much like the aviation conventions, protects maritime navigation. This convention was passed through the U.N. in further efforts to prevent and combat terrorism, establishing similar legal provisions to those of international aviation for terrorist activities aboard ships. Two of the conventions focus on technology that could have widespread consequences or create additional suffering if used. The Convention on the Physical Protection of Nuclear Material and the Convention on the Making of Plastic Explosives for the Purpose of Detection are meant to prohibit unlawful possession and use of or the threat to use nuclear material and ensure control over unmarked plastic explosives within the parties' respective territories. This treaty is a result of the 1988 Pan Am 103 bombing in which plastic explosives hidden in a cassette recorder were detonated while the airplane was in flight costing 270 people from 23 countries their lives.²⁰

The Protocol protecting the safety of fixed platforms is also similar to the convention protecting the safety of international aviation. Finally, the last two conventions for the Suppression of Terrorist Bombings and the Suppression of the Financing of Terrorism highlight a common and effective method used by terrorists as well as one of the primary facets of terrorist

²⁰ *Victims of Pan Am Flight 103* [on-line] (Victims of Pan Am Flight 103, Inc. [13 December 2006]); available from <http://www.victimsofpanamflight103.org/victims.htm>; Raju Chebium, *From Lockerbie to Camp Zeist: The Pan Am 103 Trial* [on-line] (Cable News Network [cited 13 December 2006]); available from <http://www.cnn.com/LAW/trials.and.cases/case.files/0010/lockerbie/overview.html>.

operations that allow terrorist groups to continue their violence, money. The first convention outlaws the unlawful and intentional use of explosives and other lethal devices and establishes universal jurisdiction to punish offenders. The final convention allows for terrorist funds to be frozen and obliges states to create accountability for those who finance terrorism and be proactive in preventing and stopping all methods of financing terrorism.²¹ Therefore, international law has also clearly established the illegality of terrorist bombings and the funding of any of the organizations that propagate terrorist acts.

Other Factors Considered when Defining Terrorism

In addition to identifying what the international community considers terrorism by analyzing the conventions mentioned above, many other factors are considered when scholars or government officials try to create a definition for terrorism. Some people focus on what terrorism is or the actions that constitute a terrorist attack. Others concentrate on who terrorists are or why terrorism occurs. These angles try to explain underlying causes of terrorism. Identifying who can be victims of terrorism can also be part of the definition of terrorism. Consequently, multiple definitions of terrorism exist. In order to demonstrate the variety of currently referenced definitions within the political sphere, below are definitions used by the United Nations General Assembly, the United States, and the United Kingdom. In 1996 the U.N. General Assembly passed Resolution 51/210. In this resolution, the U.N. reiterated that, “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable,

²¹ *Conventions against Terrorism* [on-line] (United Nations, [cited 24 September 2006]); available from http://www.unodc.org/unodc/en/terrorism_conventions.html.

whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.”²²

The United States differs in that it only focuses on political motivation. In compliance with Title 22 of the United States Code, Section 2656f, which requires annual reports on terrorism, terrorism is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” This is tailored to international terrorism with the specification that the terrorist actions involves citizens or the territory of more than one country.²³

The United Kingdom’s (U.K.) definition is more closely aligned with that of the United Nations but provides further detail. According to the Terrorism Act of 2000, the U.K. defines terrorism as the use or threat of action where the act of terrorism involves serious violence against a person or endangers a person’s life, other than the perpetrators, damage to property, creates a serious risk to the health or safety of the public, or is designed to interfere with or seriously to disrupt an electronic system, the use or threat is designed to influence the government or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause. Finally, an act is considered to be terrorism if the use or threat of action involves the use of firearms or explosives and meets one of the first four conditions even if the use or threat does not meet the fifth and sixth conditions.²⁴

²² General Assembly, *Resolution 51/210*, 88th, 17 December 1996.

²³ *Glossary* [on-line] (U.S. Department of State, [cited 1 November 2006]); available from <http://www.state.gov/s/ct/info/c16718.htm>; *Chapter 1: Legislative Requirements and Key Terms* [on-line] (U.S. Department of State, [cited 31 October 2006]); available from <http://www.state.gov/documents/organization/65464.pdf>.

²⁴ *Terrorism Act 2000*, [on-line] (United Kingdom, 7 December 2000 [cited 6 December 2006]); available from <http://www.opsi.gov.uk/Acts/acts2000/00011--b.htm>.

Due to the variety of factors that can be taken into consideration when defining this single term, the international community has yet to agree on one comprehensive definition despite years of resolutions and conventions with that goal.

United Nation's Work toward a Comprehensive Definition

The U.N. General Assembly formed an Ad Hoc committee on terrorism in 1996 in an effort to create the Comprehensive Convention against International Terrorism. Although this committee successfully drafted the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism, a comprehensive convention against terrorism remains only in draft form. The current draft of this convention, “defines terrorism as acts by a person that ‘unlawfully and intentionally’ causes death or serious damage ‘when the purpose of the conduct ... is to intimidate a population ... or to compel a government or international organization’ to act in a particular manner. It would criminalize acts that are threatened or attempted, conducted by accomplices or by persons who direct or organize such actions.”²⁵

The Ad Hoc committee did not finalize the convention by the end of 2005 but pledged to return to the issue in 2006 when the committee reconvened. Currently, three principal debates plague widespread agreement within the committee. First, committee members are debating whether the activities of official armed forces should be included within the convention. Some members argue they should not be included since international humanitarian law already governs their actions. Second, the committee questions whether armed resistance groups fighting against

²⁵ Gaer, *Defining Terrorism: A Political Imperative?*.

colonial domination and foreign occupation should also be exempted. Finally, there is not consensus on whether official actions could be considered acts of terrorism.²⁶

Although the United Nations and the multiple treaties its members have signed regarding suppressing terrorism call for states to not support terrorists through funding, encouraging their movements, training, or otherwise perpetuating their capabilities, it is clear from continued terrorist attacks that piecemeal law placing responsibility on individual states will not defeat terrorism. Instead, a comprehensive treaty empowering both the individual state and international community to protect peace and security is imperative. Meanwhile, the U.N. will continue to be confronted with multiple challenges stemming from terrorism. For example, different motivations and scenarios of armed violence will continue to divide the international community between what distinguishes legitimate from illegitimate violence, and the methods and means of perpetuating violence will reflect endless creativity. The U.N. will struggle with creating law that is specific enough to provide a comprehensive guide to its individual member states but also general enough to encompass new tactics. Furthermore, the U.N. will have to decide how to successfully intercede in situations that produce the best solution for the entire international community while also being sensitive to the security needs and threats perceived by individual states.

Fundamentals of International Law

The international community's impasse regarding defining terrorism reflects an absence of a unified position on terrorism and the means to combat it. Further, the historical significance of international law and a review of who it applies to and when it applies shows not only that international law needs to evolve to meet the challenges posed by terrorism but also that in order

²⁶ *Ad Hoc Body Elaborating Comprehensive Convention on Terrorism to Reconvene Early Next Year, Sixth Committee Decides* [on-line] (Department of Public Information, 29 November 2005 [cited 13 October 2006]); available from <http://www.un.org/News/Press/docs/2005/gal3292.doc.htm>.

to best address terrorism, international law needs to be clarified so the overlap between humanitarian law and human rights law does not hinder victim-state responses or the overall response by the international community to terrorism. Learning from conflict, peace, good communication, and failures of communication, the international community has developed an extensive set of rules to govern national conduct. These rules make up international law and consist of two types of law, customary law and conventional law.

Customary Law versus Conventional Law

Customary law is a body of unwritten rules made up of consistent state practices and the belief that states are obligated to conduct themselves within international law.²⁷ It is created by all nations and becomes binding once specific practices receive widespread support. Over an eight year period, the Intergovernmental Group of Experts for the Protection of War Victims, commissioned at the International Conference for the Protection of War Victims in Geneva, Switzerland, August-September 1993, analyzed customary international humanitarian law in order to make the implementation of humanitarian law more effective. Their final report listed 161 customary rules that exist today within international humanitarian law. For further insight into the important role of customary law and examples of this law reference Jean-Marie Henckaerts' brief synopsis of these rules and the methodology of the committee in his article, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict."²⁸

Conventional law consists of written and signed agreements among nations. Often referred to as treaties, these written agreements are also known as conventions, charters, and

²⁷ Michael Byers, *War Law: Understanding International Law and Armed Conflict* (New York: Grove Press, 2005), 4.

²⁸ Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," *International Review of the Red Cross*, March 2005.

protocols. These terms will be used interchangeably throughout this thesis. Creating a binding treaty takes two separate processes. First, a country signs the treaty indicating its intention to take part in the treaty. Second, a country then ratifies the treaty and becomes legally bound to abide by it. Each state, by signing the U.N. Charter and other treaties it is a party to, makes an allowance for a small loss of sovereignty. Also, “clear treaty provisions prevail over customary international law.”²⁹ Consequently, when a state signs and ratifies a treaty, they are making themselves accountable to a different legal precedent than previous customary law.

International Humanitarian Law

Within both customary and conventional law are international humanitarian law and human rights law. International humanitarian law, otherwise known as the law of armed conflict or the law of war, consists primarily of The Hague Conventions, the Geneva Conventions, and Protocol I and Protocol II of the Geneva Conventions. These laws apply within the context of armed conflict. Issues outside of armed conflict are governed by international human rights law and domestic law. A variety of definitions exist for the term “armed conflict.” For example, the Department of Peace and Conflict Research created the following useful definition: “a contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related deaths.”³⁰ According to Christopher Greenwood, author of “Scope of Application of Humanitarian Law,” “an international armed conflict exists if one party uses force of arms against another party. This shall also apply to all cases of total or partial military occupation, even if this occupation is met with no armed resistance (Article 2, paragraph 2) common to the

²⁹ Byers, *War Law: Understanding International Law and Armed Conflict*, 99.

³⁰ Peter Wallensteen and Margareta Sollenberg, "Armed Conflict, 1989-99," *Journal of Peace Research* 37, no. 5 (2000): 648.

Geneva Conventions).”³¹ The International Committee of the Red Cross (ICRC) takes a very broad position when defining armed conflict, which they consider “any difference arising between two States and leading to the intervention of members of the armed forces.”³²

Although international law does not provide a specific definition for armed conflict, Geneva Convention I, Article 2 states that the Convention is to be applied in “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.”³³ Protocol I, Article 1, part 4 expands armed conflict, as addressed in the Geneva Conventions, to, “include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”³⁴ These Protocols were written to expand the Geneva Conventions due to the increase in violent conflict in the 1970s that occurred between a state and a group of people instead of traditional state versus state conflict. The first two definitions provided are more inclusive and could include a violent conflict spurred by a terrorist attack. However, when “armed conflict” is used within the analysis of international humanitarian law, the term is used as it is defined, or described, by the Geneva Conventions and its Protocols above since this is how it is addressed in current conventional law.

³¹ Christopher Greenwood, "Scope of Application of Humanitarian Law," in *The Handbook of Humanitarian Law in Armed Conflict*, ed. Dieter Fleck (New York: Oxford University Press, 1999), 40-41.

³² *Ibid.*, 42.

³³ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* [on-line] (Office of the High Commissioner for Human Rights, [cited 21 September 2006]); available from http://www.unhcr.ch/html/menu3/b/q_genev1.htm.

³⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* [on-line] (Office of the High Commissioner for Human Rights, [cited 21 September 2006]); available from <http://www.unhcr.ch/html/menu3/b/93.htm>.

In order to show the important role international humanitarian law can play in the fight against terrorism I will first discuss the distinction that once existed between a state of war and a state of peace and the role the development of the nation-state played in controlling war. Using this background I present challenges terrorism poses to this “political order” and use three questions to analyze if and how international humanitarian law can be applied to terrorism. I then propose that terrorists are not combatants as described within LOAC and that LOAC does lay out criteria which addresses terrorism but does not thoroughly explain how states should respond to actors who do not follow its limited guidance. This argument will be supported by an evaluation of the Geneva Conventions and Protocols I and II.

Next, I will discuss the five basic principles of LOAC, proportionality, discrimination, necessity, chivalry, and humanity, and argue that LOAC uses these principles to address the use of force. However, these principles apply only within the context of armed conflict. They do not address the violent actions first used to initiate conflict. Moreover, Protocol I only clarifies the use of force by dissident armed forces and is not comprehensive enough to include current terrorist activity. Therefore, I use legal precedent found in the *Abella v. Argentina* case to propose standards by which to measure whether a violent conflict triggers international humanitarian law. Analysis of international humanitarian law will show that debate exists concerning the interpretation of international humanitarian law, but in general, experts conclude that terrorists should not be classified as combatants within the context of the law of war, certain conditions must be met for terrorism to be considered a part of armed conflict, and LOAC addresses terrorism, but only in a very limited manner.

When international law first became recognized as binding and an important diplomatic tool among nations, a distinction between times of war and times of peace more clearly existed.

Conflicts were more total in nature. Unlike today, when a state might use armed force within another country but also maintain embassies and economic ties with this country, war was once much more comprehensive, usually entailing not only armed force but a severance in diplomacy and economics. After the Treaty of Westphalia in 1648, the nation-state gained the authority to declare and wage war. This political advancement helped to establish order and control hostilities by creating more disciplined national armies in place of destructive mercenaries; it subjected citizens to the laws and regulations of their governments, contrary to previously held loyalties that overlapped between politics and religion. The advent of the state system also furthered the role of international humanitarian law by establishing national authorities responsible for large populations and accountable for their people and territories. These political changes influenced international law by establishing a hierarchy of control. The nation-state became responsible for vast amounts of people and thus caused private warfare to decline. The recent struggles for independence from ethnic and religious groups and the rise of terrorism have once again allowed nonstate actors to wage war. This change requires a new look at international law.

Since World War II, countries have rarely formally declared war. Instead, many countries participate in hostilities without either country stating they are at war or states are involved in conflicts with nonstate actors who cannot legally declare war. Although traditionally the state has been responsible for controlling violence within its own borders, today, “nonstate actors have enhanced ability to engage in conflict on an international level. This reintroduction of a form of private war challenges the state-based international regime, built on state sovereignty, for the maintenance of order in new and significant ways.”³⁵ An analysis of IHL

³⁵ Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," 34.

must therefore be completed to determine its ability to address these new challenges. I will ask the following three questions in order to present the benefits or shortfalls of current IHL. First, who does the law of armed conflict protect? Second, when can nations use force or the threat of force? Last, what acts of war, or armed conflicts, initiate LOAC? These questions help answer if LOAC specifically classifies terrorists into a category that is protected by the law, if humanitarian law allows states to take aggressive force against terrorists that have attacked them, and if terrorists acts can be considered acts of war or violent enough to instigate the law of armed conflict.

Who is Protected?

The law of armed conflict was written to protect specific populations and lessen the impact of war as much as possible. Unlike international human rights law that applies to all human beings during times of both war and peace, international humanitarian law is more specific as to when it applies, what parties are responsible to the law, and what protections are due to different classifications of people. The most frequently referenced law is found in four conventions called the Geneva Conventions. The Fourth Convention, reaffirming the previous three conventions and ensuring protection to civilians during wartime, was signed into international law in 1949. As of 2004, 191 states had both signed and ratified all four conventions.³⁶ Two additional protocols to the Geneva Conventions were created in 1977. One hundred sixty-three nations are a party to Protocol I, and 159 nations are a party to Protocol II. Although not all of the 191 nations who are members of the United Nations have agreed to the

³⁶ Inter-Agency Standing Committee Task Force on Humanitarian Action and Human Rights, *Frequently Asked Questions on International Humanitarian, Human Rights and Refugee Law in the Context of Armed Conflict* [on-line] (United Nations, [cited 21 September 2006]); available from <http://ochaonline.un.org/GetBin.asp?DocID=3234.14>.

Additional Protocols, many nations who have not ratified the treaties, such as the U.S., follow them as customary law since they have been widely accepted.

The Conventions discuss: the treatment of the armed forces' wounded and sick on land, the treatment of the armed forces' wounded, sick, and shipwrecked at sea, the treatment of prisoners of war, and the treatment of civilians during war. The Additional Protocols supplement rules governing international armed conflicts and extend the protections of the conventions to internal conflicts.

The Conventions each begin with a statement with common Article 1 which recognizes the application of the Conventions to conflict between two states and binds the "High Contracting Parties" to respect and adhere to the Conventions. The framework upon which the Conventions were written was that of a nation-state system. Consequently, signatories are limited to states, and the content of the Conventions are limited to international conflict and conflicts, non-international in nature, only when a state is fighting armed resistance within its own territory. Protocol I and II contain different introductory phrases. However, they also note the responsibility of the State to conform to the Protocols and all principles within the Charter of the United Nations. Each of the Geneva Conventions and additional Protocols describe who is protected by that Convention. The following paragraphs will detail to which actors the Conventions and Protocols are written.

The First and Second Geneva Conventions are devoted to the wounded, sick, and shipwrecked armed forces on land and at sea. Within this context, Article 13 of each Convention states that the Conventions apply to:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of the other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside of their own territory, even

if this territory is occupied (3) Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power. (4) Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany. (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions in international law. (6) Inhabitants of a non-occupied territory, who on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.³⁷

People who make up militias or volunteer corps must comply with the following conditions in order to be protected by the Conventions: (1) a person responsible for subordinates must be in command (2) members must wear a fixed and distinctive sign that can be recognized at a distance (3) they must carry their arms openly and (4) they must abide by the laws and customs of war.³⁸

The Third Convention speaks to prisoners of war (POW). Article 4 of the Third Convention specifies that those listed in Article 13 qualify for prisoner of war treatment. Article 4, part B also provides POW status to:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment. (2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126, and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned,

³⁷ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.*

³⁸ *Ibid.*, Article 14; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* [on-line] (Office of the High Commissioner for Human Rights, [cited 24 September 2006]); available from http://www.unhcr.ch/html/menu3/b/q_genev2.htm, Article 13.

those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.³⁹

The last Convention addresses the safety of civilians during war, protecting “the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion and are intended to alleviate the sufferings caused by war.”⁴⁰ In Article 4, Convention IV specifically addresses spies in addition to those persons previously noted under the First through Third Geneva Conventions. Those people protected under the other Conventions are not considered protected persons under the Fourth Convention. Further, in Article 5, the Convention states that if an individual is suspected to be involved in hostile acts against the State, that person loses their entitlement to the rights of a protected person. Spies can also be denied certain rights but must still be treated with humanity.

Before proceeding with the Protocols, it is important to make a distinction between the term “belligerent” as it is used in the thesis Introduction compared with its use in the Geneva Conventions. Article 14 of both Geneva Conventions I and II ensures the protection of the wounded and sick of a belligerent nation. Belligerent as used in the Introduction described nonstate actors whose actions, in time of peace, would qualify as armed, interstate hostilities if the same were attributed to a state; or whose conduct, in a time of legally recognizable armed hostilities, would otherwise be attributed to combatants but for the fact that they are intervening in international or internal armed conflict without legal status or authority to act as an armed

³⁹ *Geneva Convention Relative to the Treatment of Prisoners of War* [on-line] (Office of the High Commissioner for Human Rights, [cited 24 September 2006]); available from <http://www.unhchr.ch/html/menu3/b/91.htm>, Article 4.

⁴⁰ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* [on-line] (Office of the High Commissioner for Human Rights, [cited 24 September 2006]); available from <http://www.unhchr.ch/html/menu3/b/92.htm>, Article 13.

force. The term belligerent is also mentioned in the Geneva Conventions but in reference to belligerent nations, not individual actors. Individuals who fight on behalf of a belligerent nation are not entitled prisoners of war status. However, individual belligerents are protected under the Fourth Geneva Convention. The possible usefulness of further detailing unlawful combatant protection outside of the protections warranted under Geneva Convention IV will be discussed in the third chapter.

As detailed above, the Geneva Conventions are specific as to the type of conflict which invokes the Conventions and the status of people partaking in hostilities. Common Article 3 of the Geneva Conventions provides the only extended coverage to non-international armed conflicts. This article is important because it is binding not only on governments but also on insurgents.⁴¹ The Protocols were written to be more inclusive. Protocol I explicitly applies the principles of human rights to all situations. Article 1, paragraph 2 states, “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom,

⁴¹ *Study Guides: Humanitarian Law*; Common Article 3 states: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*.

from the principles of humanity and from dictates of public conscience.”⁴² Protocol I is also unique in that it departs from the more restrictive terminology used in the Geneva Conventions and provides combatant status to qualifying armed forces of nonstate national liberation movements.⁴³

Protocol II further expands the scope of international law of armed conflict. According to Article 1, paragraph 1:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operation and to implement this Protocol.⁴⁴

These Conventions and Additional Protocols clearly define the combatant, the civilian, and protected persons, such as medical and religious personnel, as well as what rights coincide with each classification. The classification of combatant allows an individual to kill the enemy and destroy military targets free of prosecution. They are only held accountable for actions that disobey international humanitarian law. The classification of “civilian” grants general protection from military action and harm. However, civilians who fight in a conflict that does not correlate with a *levée en masse* are not named in international law. They are commonly known as unprivileged or unlawful combatants.

⁴² *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts.*

⁴³ Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," 7.

⁴⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* [on-line] (Office of the High Commissioner for Human Rights, [cited 24 September 2006]); available from <http://www.unhcr.ch/html/menu3/b/94.htm>.

Applying the definitions of combatants, civilian, and protected person provided by IHL to terrorists reveal that terrorists can not be categorized as a combatant under current humanitarian law. In addition to terrorists not meeting all four conditions that allow individuals to spontaneously take up arms to defend themselves, having a command structure, wearing a fixed and distinctive sign, carrying arms openly, and abiding by the laws and customs of war, Protocol I only recognizes and protects individuals acting on behalf of a State or entity subject to international law.⁴⁵ They are also not civilians because they have chosen to become actively involved in an armed conflict. A civilian is a person who may be arbitrarily involved in a conflict but is not actively taking up arms and seeking confrontation with one of the warring parties. Therefore, terrorists are best categorized as unlawful combatants.⁴⁶ According to current international humanitarian law as explained by the International Committee of the Red Cross, terrorists are consequently not guaranteed prisoner of war status upon falling into enemy custody but should still receive fundamental rights and can be prosecuted under domestic law.⁴⁷

Using Force and Initiating LOAC

The second and third questions asked regarding LOAC were, when can nations use force or the threat of force to defend themselves against terrorist acts, and what are acts of war that initiate LOAC? Answering these questions will assist in determining the applicability of international humanitarian law to states who are victims of terrorist attacks and want to respond with force and whether or not terrorist attacks can be considered acts of war.

⁴⁵ *The Relevance of IHL in the Context of Terrorism* [on-line] (International Committee of the Red Cross, [cited 24 September 2006]); available from <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705>.

⁴⁶ *Ibid.*; Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," 7.

⁴⁷ *The Relevance of IHL in the Context of Terrorism*.

LOAC addresses the use of force through five principles: proportionality, discrimination, necessity, chivalry, and humanity.⁴⁸ Proportionality refers to using the appropriate weapons and tactics necessary for military gain within the context of the occurring conflict. Discrimination highlights the importance of differentiating between combatants and civilians during armed conflict. The next principle, necessity, refers primarily to targeting. Armed units should not attack targets or use force unless the destruction or submission of the target directly impacts a military objective. The principle of chivalry forbids dishonorable conduct during armed conflict. Although a nation can utilize tactics such as camouflage and spreading false information to cause the enemy to surrender, it prohibits perfidy. “Perfidy involves killing, injuring or capturing the enemy by his adherence to the law of armed conflict.”⁴⁹ Last, humanity prevents unnecessary suffering during armed conflict. Although many methods to neutralize an enemy exist, the principle of humanity limits the types of weapons and tactics that can be employed to subdue the enemy.

Outside of these principles, which constrain warfare once it has already begun, the law of armed conflict does not specifically state when nations can use force or define specific actions that initiate conflict in a broad context or directly related to terrorism. Furthermore, IHL is not clear as to when it should be applied to the use of force outside of a state versus state conflict. Although the Geneva Conventions do apply when a state is fighting armed resistance within its own territory, and Protocol I applies when dissident armed forces or other organized groups under responsible command exercise can execute sustained and concerted military operations, IHL does not cover the use of force in “situations of internal disturbances and tensions, such as

⁴⁸ *Law for Air Force Officers*, ed. Department of Law Faculty, 2nd ed. (United States Air Force Academy, 2000), 17-3.

⁴⁹ *Ibid.*, 17-8.

riots, isolated and sporadic acts of violence and other acts of a similar nature.”⁵⁰ Since there is not a prescribed method to assess when a threat justifies the use of force, the decision to use force in defense after a terrorist attack, similar to the decision to use armed force outside of one’s own borders, is predominantly made by a nation’s executive branch as stipulated by their domestic constitution.⁵¹ In order to better determine when international humanitarian law is applicable in situations in which violence is perpetuated by a party that is not either a nation or a hierarchal group that controls territory, case law can be used to shed light on what previous courts have established in similar situations.

Legal precedent, in cases where a small group waged violence against a state, was established by the Inter-American Commission on Human Rights after Argentina took action against violent members of a political group. In Argentina, on 23 January 1989, members of a legalized, political group, “All for the Fatherland Movement,” attacked a military barrack in the La Tablada Province of Buenos Aires. Twenty-nine of the attackers and a few state agents were killed. The remaining attackers who survived were tortured.⁵² Juan Carlos Abella, one of the survivors, filed a petition on behalf of forty-nine persons who claimed Argentina violated their human rights according to both international humanitarian and human rights law. The Inter-American Commission on Human Rights heard the case *Abella v. Argentina* to examine the case and determine whether the charge of violations to human rights was factual.

The Inter-American Commission on Human Rights referenced three factors when determining whether international humanitarian law applied: the “concerted nature of the hostile

⁵⁰ Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," 25.

⁵¹ *Ibid.*, 29.

⁵² *Argentina* [on-line] (REDRESS, [cited 24 September 2006]); available from <http://www.redress.org/studies/Argentina.pdf>.6. and *Juan Carlos Abella v. Argentina, Case 11.137, Report No. 55/97, Inter-Am. C.H.R. (Endnotes)* [on-line] (University of Minnesota, [cited 26 September 2006]); available from <http://www1.umn.edu/humanrts/cases/1997/argentina55-97c.html>.; *Juan Carlos Abella v. Argentina, 55/97* (1997).

acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence.”⁵³ The Commission’s conclusion regarding the applicability of humanitarian law to internal disturbances and tensions followed from guidance provided by the ICRC. “In its 1973 Commentary on the Draft Additional Protocols to the Geneva Conventions, the ICRC defined, albeit not exhaustively, such situations by way of the following three examples:” riots, or similar disturbances, that do not have a defined leader or organized intent, isolated and sporadic acts of violence, and acts which trigger mass arrests due to behavior or political opinion.⁵⁴ Applying this guidance to the *Abella* case, the Commission found that because the attackers organized, planned, and executed the attack and governmental armed forces were directly involved, the armed engagement at La Tablada was not an internal disturbance but qualified as a military operation triggering humanitarian law. Despite the short duration of the armed conflict, common Article 3 and any other rules pertaining to the conduct of internal hostilities applied to the situation. Therefore, despite the conflict being internal in nature, the regional organization interpreted LOAC as still being applicable.

In conclusion, the nature of organized violence has continually evolved. Private warfare gave way to declared war between two states which then changed to undeclared armed conflicts between two states or between states and dissenting, organized groups. Whereas these conflicts often developed from colonial domination, organized violence has recently seen another shift towards armed resisters united by religion or ideology fighting across many national borders. Although LOAC is meant to govern individuals and nations once they are participating in an armed conflict, the spirit of the law can be applied to initiating attacks. At the initiation of conflict or once violence has already begun, LOAC does not classify terrorists as combatants but

⁵³ Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," 16. and *Juan Carlos Abella v. Argentina*.

⁵⁴ *Juan Carlos Abella v. Argentina*.

as armed resisters unlawfully engaged in violence and not applicable to receive all of the protections afforded combatants by the Geneva Conventions or its Protocols. Moreover, not all violence triggers IHL. To better clarify when international armed conflict should be governed by IHL, the law should include the following standards: the conflict should involve at least one state government, reach a high threshold of violence, and be perpetuated in a way that is threatening to the State.⁵⁵ These considerations will be further elaborated on in my final proposal for modification to international law in Chapter V.

Due to these shortfalls in IHL, an analysis of human rights law may provide further insight into how the law can address terrorism. “International humanitarian law – the *jus in bello* – governs *how* wars may be fought and applies to the reality of a conflict. It is distinct from the law governing *when* wars may be fought alternatively written as the reasons for or legality of using force: the *jus ad bellum*.”⁵⁶ Consequently, international human rights law becomes the governing law for actions leading up to war and other types of armed conflict.

International Human Rights Law

The second branch of international law to be analyzed for its applicability to terrorism is international human rights law. International human rights law was developed under the spirit of protecting people and providing them with what are now known as fundamental human rights.

The Universal Declaration of Human Rights of 1948 is the foremost law of human rights during

⁵⁵ A high threshold of violence that qualifies as an armed conflict can vary widely. For example, the Ploughshare Monitor, which reports annually on armed conflicts worldwide, requires a minimum of 1,000 combat deaths to occur during the course of the entire conflict before the violence is considered an armed conflict. Ernie Regehr, "The 2000 Armed Conflicts Report," *Ploughshares Monitor*, March 2000. The Correlates of War Project uses a similar 1,000 battle-deaths, but these deaths must occur within a one-year time frame. The Uppsala Data Conflict Project uses a much smaller threshold, qualifying violence as armed conflicts if 25 battle-field deaths occur in one year. Nils Petter Gleditsch et al., "Armed Conflict 1946–99: A New Dataset," in *42nd Annual Convention of the International Studies Association* (Chicago, IL: International Studies Association). Since my primary purpose is not to advocate for a specific definition of war or armed conflict, I do not provide a specific definition for what determines a “high” threshold. However, the “Armed Conflict 1946-99: A New Dataset” paper provides a good structure as to how to determine a number of deaths in a certain time period to qualify for a specific level of armed conflict.

⁵⁶ Byers, *War Law: Understanding International Law and Armed Conflict*, 115.

peacetime. Many other important treaties augment the Declaration such as the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights of 1966, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, and the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. Prior to the Declaration of Human Rights, human rights were an internal matter of each state. Consequently, fewer states became signatories of this convention than the Geneva Conventions.

Similar to the review of international humanitarian law, international human rights law will be analyzed by answering three questions. First, who does international human rights law apply to? Second, when can nations use force or the threat of force under human rights law? Force can be displayed in a variety of ways, especially by powerful states that have a strong influence economically as well as militarily. The use of force discussed in this analysis pertains to deadly force or force that can cause serious injury or substantial damage to infrastructure. Last, how does international human rights law define acts of war or determine what is internal violence versus a threat to international peace? When terrorists act, they deny people their fundamental rights guaranteed to them by human rights law. However, when a state responds to a terrorist attack, it is its obligation to ensure they are in compliance with human rights law and maintain the rights of the terrorists. Analyzing human rights law will help determine whether human rights law applies to terrorists, whether states can use force against terrorists while still upholding the law, and how human rights law differentiates between internal violence and violence that threatens international peace.

Who is Protected?

International human rights law applies to every individual of the human race except during specific circumstances that occur during armed conflict for which, as previously discussed, international humanitarian law provides. According to the International Covenant on Civil and Political Rights and the Declaration of Human Rights, these rights originate from the “inherent dignity of the human person.”⁵⁷ In an effort to protect and provide for every person in every nation, these human rights declarations and covenants do not discriminate except when necessary to maintain the security and freedoms of others.⁵⁸ Therefore, regardless of a terrorist’s classification under IHL, they should always be afforded their fundamental human rights.

The Use of Force in IHRL

The next question pertaining to when nations can use force or the threat of force against other nations under human rights law is outlined most clearly in the Charter of the United Nations. The threat or use of force is forbidden except for U.N. enforcement actions or peace-keeping operations and self-defense when a nation is the victim of an armed attack.⁵⁹ Chapters VI and VII of the Charter address peaceful settlements of disputes and action with respect to threats of the peace, breaches of the peace, and acts of aggression. Articles 33 and 37 state that parties to a dispute are first obligated to try to reconcile by means of negotiation, inquiry, mediation, or other peaceful means and refer the dispute to the Security Council if the parties can not settle it themselves. The Charter also gives the Security Council the authority to investigate into any matter between two or more states that might endanger international peace or security.

⁵⁷ *International Covenant on Civil and Political Rights* [on-line] (United Nations, 25 January 1997 [cited 24 September 2006]); available from <http://www.hrweb.org/legal/cpr.html>, Preamble.; General Assembly, *Universal Declaration of Human Rights* [on-line] (United Nations, 10 December 1948 [cited 26 September 2006]); available from <http://www.un.org/Overview/rights.html>, Preamble.

⁵⁸ General Assembly, *Universal Declaration of Human Rights*, Article 29, paragraph 2.

⁵⁹ *Charter of the United Nations*, Chapter 7, Article 42, 51.

By placing these restrictions and checks and balances in the Charter, the U.N. tries to limit states' need or ability to immediately resort to the use of force. Although Chapter VI allows states to try to settle their disputes by themselves, Chapter VII restricts when they can address their disputes with force. The Security Council is given the responsibility to identify and act upon threats or breaches to the peace. Article 41 discusses action the Security Council may allow member states to initiate to include severing diplomatic relations and interrupting economic relations and communication. Article 42 increases the use of force allowed by permitting air, sea, and land armed forces to act. If military action is taken, the Security Council, with the assistance of the Military Staff Committee, is responsible for the war-time planning.⁶⁰ The final article, Article 51, is the only article that speaks to individual state member authority and action. This article maintains that each member of the U.N. has the inherent right of self-defense against an armed attack. However, it qualifies a state's ability to act by permitting the state to defend itself only "until the Security Council has taken measures necessary to maintain international peace and security."⁶¹ Furthermore, states are responsible for reporting their actions of self-defense to the Security Council and to allow the Security Council to take actions it decides are necessary to restore international peace and security. Although traditional interpretations of Article 51 may reflect the participation of state parties, Article 51 does not necessitate that the perpetuating actor be a state or include state involvement. Individual state reactions to the 11 September 2001 attacks by Al Qaeda as well as the United Nations Security Council's reaction reflects a contemporary interpretation of the ability of non-state actors to perpetuate armed attacks. Therefore, the right of self-defense also applies to defense against non-state actors.

⁶⁰ Ibid., Chapter 7, Article 46.

⁶¹ Ibid., Chapter 7, Article 51.

In addition to first suffering an armed attack, reporting the use of force to the Security Council and seceding the right of self-defense once the Security Council takes action in the conflict, customary and conventional law also mandate that reprisal actions must meet the principles of necessity and proportionality. Immediate self-defense must be necessary and the response must be proportional to the threat.⁶² This guidance is directly applicable when there is a conflict between two states such as when Iraqi armed forces invaded Kuwait. However, Article 51 has also been used to legitimize a state's response to an armed attack from terrorists. States can take action against a terrorist attack and still uphold the law if the attack is of a large enough scale to be considered an armed attack and the state then reports to and allows the Security Council to take further action. An immediate response allows a state to defend itself from further attack. However, prolonged action that goes above and beyond immediate self-defense, independent of the United Nations is not lawful under Article 51.

Levels of Violence within IHRL

Lastly, although international human rights law clearly supports the protection of people's rights, it does not comprehensively define acts of war or address internal violence that elicits internal state responses or violence that constitute threats to international peace. Leaving these concepts undefined is dangerous because violence increasingly stems from nonstate actors, thus blurring the traditional concept of war or interstate violence. However, it is also dangerous to specify too closely how concepts are defined. Kenneth Watkins explains the danger involved in determining the level of violence that constitutes an armed attack. He writes, "A very low threshold of what constitutes an armed attack has the potential to blur the lines between armed conflict and criminal law enforcement. At the other end of the spectrum, too high a threshold

⁶² Byers, *War Law: Understanding International Law and Armed Conflict*, 56.

may leave a state at risk, especially if there is a credible threat involving the use of weapons of mass destruction by a nonstate actor.”⁶³

The lack of specific definitions places the responsibility of determining whether violence constitutes a threat to the international peace on the United Nations. Although having one body responsible for this ultimate decision could help unify how threats are approached, there are also downfalls for states trying to respond to terrorist violence. These concerns will be further addressed in Chapter III. Despite the role the U.N. plays in naming what violence breaches international peace, since human rights law is applicable during any type of violence, a state that protects and respects this law when responding to terrorists will be more apt to respond within the realm of human rights law.

Conjoining International Humanitarian Law & Human Rights Law

Given that international humanitarian law protects people during armed conflict and international human rights law protects people during both times of peace and war, the two legal frameworks overlap with each other. Although international human rights law was initially developed to be distinct and separate from international humanitarian law, unique aspects of both branches of international law can be applied to terrorists and terrorist acts. Consequently, the two must be made to coincide with each other by the international community when developing a definition of terrorism and legislation to fight terrorism.

The overlap between the two legal frameworks is important when applying international law to terrorism and terrorists because neither framework is adequately written to single-handedly address all facets of terrorism. However, used together, the international community has better tools to use to counter this violent phenomenon. Despite the overlap in current law,

⁶³ Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," 5.

these two branches of international law were originally intended to be distinct from each other. One fundamental difference between them is which actors each framework primarily targets. International humanitarian law specifically concerns individuals, states, the United Nations, and the International Conference of the Red Cross whereas international human rights law involves individuals as well as states, legal bodies, and organizations for promotion and inquiry. Furthermore, international humanitarian law protects people labeled as protected persons or people who are not actors in a conflict. Conversely, human rights law is more “concerned with the relations between States and their own nationals in time of peace.”⁶⁴

The international community initially developed humanitarian law and human rights law to be two separate entities. Examples from both legal frameworks show that similar to today’s world events where state actors and nonstate actors can no longer operate freely of each other, international law must also become harmonized. I contend that the community of nations has an excellent opportunity to utilize both branches of law together as they develop a definition of terrorism and legislation to better control terrorism.

Historical Background

During the formative years of the United Nations, the organization purposely maintained a separation between the law of war and human rights law. The U.N. initially held the view “that the very fact that the law of war might be discussed within its walls would shake world confidence in its ability to maintain peace.”⁶⁵ Therefore, the 1948 Declaration of Human Rights does not address human rights during armed conflicts nor do the 1949 Geneva conventions mention general human rights.

⁶⁴ Dietrich Schindler, "The International Committee of the Red Cross and Human Rights," *International Review of the Red Cross* January-February 1979, no. 208 (1979): 5.

⁶⁵ *Ibid.*, 3.

However, unintentional overlaps were written into both humanitarian and human rights law. For example, international humanitarian law categorizes people who are protected during armed conflict and explicates how they are to be treated. Common Article 3 of the Geneva Conventions mandates states to “apply, as a minimum, certain humanitarian rules in an armed conflict not of an international character. It thus lays down the relations between the state and its own nationals and, consequently, encroaches upon the traditional sphere of human rights.”⁶⁶ Moreover, the most recent humanitarian law, Protocols I and II of the Geneva Conventions, contains provisions pulled directly from the U.N. Covenant on Civil and Political Rights such as guaranteeing fundamental rights to everyone and guaranteeing that those accused of criminal offences during armed conflict receive fair and just processes of prosecution and punishment.⁶⁷ Fundamental rights people should always be given include: the right to life, the prevention of torture and slavery, the right to liberty, judicial guarantees and the person’s juridical personality, and the freedom of thought, religion, and conscience.⁶⁸

Human rights law also encroaches upon humanitarian law. The United Nations Covenant on Civil and Political Rights states in article four that nations have the right to withdraw some of the rights granted under the Convention when necessary due to public emergency which threatens the nation as long as taking away rights is necessary and other states party to the Covenant are informed.⁶⁹ However, during armed conflict, often a public emergency that threatens a nation into taking this type of action against its own people, international humanitarian law already provides guidance as to civilians’ rights. This withdrawal of rights

⁶⁶ Schindler, "The International Committee of the Red Cross and Human Rights," 3.

⁶⁷ Ibid.; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Article 75.*; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of non-International Armed Conflicts (Protocol II), Article 6.*

⁶⁸ *International Covenant on Civil and Political Rights, Part 3, Articles 6-27.*

⁶⁹ Ibid.

does often happen during armed conflict. Consequently, it can be argued that international human rights law can be applied simultaneously as international humanitarian law.

Adaptation by the International Community

The world community began to acknowledge these links between humanitarian law and human rights law in the late 1960s. Numerous armed conflicts, such as conflicts in the Middle East and wars of national liberation throughout Africa, brought issues pertaining to both the laws of war and human rights to the attention of world leaders. The United Nations' International Conference on Human Rights in 1968 passed Resolution XXIII linking the two branches of law in two ways. First, the resolution required "respect for human rights in armed conflicts."⁷⁰ Second, the Conference advocated preexisting conventions to be applied and enforced in armed conflicts. This conference initiated U.N. action in the realm of international humanitarian law. The organization began to adopt resolutions dealing with armed conflict and reflected a more favorable light upon the Geneva Conventions than previous ICRC efforts had made with member states.

Efforts to apply humanitarian law and human rights law throughout the world in order to bring stability and peace to as many people as possible has made terrorism a pressing issue for the United Nations. Although there are many reasons to maintain a certain degree of separation between LOAC and human rights law, both are needed to adequately address terrorism.

This discussion of the history of international law and how it was created, how international law currently addresses terrorism, and what the international community is doing within international law to confront terrorism will provide the foundation from which I will examine the pros and cons of dealing with terrorism as an act of war in comparison to a criminal

⁷⁰ Schindler, "The International Committee of the Red Cross and Human Rights," 8.

act in the following chapter. After reviewing a real victim-state response to a terrorist attack in Chapter IV and performing a comparative case-study in Chapter V, I will suggest a definition for terrorism and propose modifications in international law that will help address current shortfalls in international law that is applied to terrorism in Chapter VI.

CHAPTER III

IS TERRORISM A CRIME OR AN ACT OF WAR: BENEFITS AND DISADVANTAGES WITHIN EACH LEGAL FRAMEWORK

Introduction

Once the Peace of Westphalia was established in 1648, European powers became prominent actors in international organizations desiring to maintain peace. The United States joined this developing international community in the late 1700s followed by Latin American nations at the beginning of the nineteenth century. The 200 years between 1648 and the outbreak of World War I “gradually solidified the contemporary perception of national sovereignty within the context of a community of nations. States in other parts of the world catered to this Western-driven paradigm, effectively acquiescing in the development of Eurocentric notions of International Law.”⁷¹ Throughout the nineteenth and twentieth centuries, a European-inspired approach to international law became the norm not only in relations between nations to try to prevent conflict but also within the law and legal structure regarding war. Recent examples of terrorism rebel against this modern international law approach, blurring the lines between religion and politics and applying different standards to the sanctity of innocent civilian life. Today, overlaps exist between domestic law and international law and further between international humanitarian law and human rights law when confronting terrorism. Due to the unique nature of terrorism and its unconformity with international law, these legal overlaps hinder state and international responses to terrorism.

Whereas the previous chapter discussed the differences within international law, this chapter discusses both the benefits and disadvantages of utilizing each legal framework to

⁷¹ William R. Slomanson, *Fundamental Perspectives on International Law*, third ed. (Belmont: Wadsworth/Thomson Learning, 2000), 11-12.

respond to terrorism. As a result, this chapter illustrates how a definition of terrorism and new legislation could be advantageous to the international community. This legislation would need to provide distinctions between terrorist attacks that legitimately elicited a military response and attacks that could be managed within domestic courts. A brief analysis of the criminal and military aspects of terrorism will precede a discussion of positive and negative aspects of classifying terrorist acts under each category. I then reason for and against categorizing terrorism as an act of war or as a crime. Built on this discussion, I analyze pros and cons of applying a domestic legal framework to terrorism as compared to the framework of international humanitarian law. Table II, on page ninety-four, provides a succinct summary of these arguments. The chapter concludes with my suggestion that the international community needs to reconcile the application of domestic and international humanitarian law with the cooperation of individual nations in order to better meet the needs of nations responding to terrorism.

Applications of Domestic versus International Law to Terrorism

Although there are aspects of terrorism that coincide with armed conflict, such as some of the weapons used and many guerilla tactics employed, terrorists purposefully target innocent people, an illegal target in conventional armed conflict. Furthermore, terrorists do not follow many other standards within international humanitarian law, such as identifying themselves as soldiers loyal to a state military or carrying arms openly and wearing fixed and distinctive insignias. Experience in Sri Lanka and the Middle East, two of the most prominent locations that have suffered terrorist attacks, shows that terrorists most frequently bear arms during their mission but then camouflage themselves by fading into the civilian population. These practices directly violate two laws of armed conflict: discrimination and perfidy. Consequently, terrorists are not considered lawful combatants or protected civilians. Terrorists' ability to conduct high

profile and deadly operations while remaining ambiguous actors, unspecified within international law, has sparked a debate as to whether terrorist acts are crimes or acts of war. This distinction is important because it determines which body of international law is most applicable to address the violence as well as the impact this distinction has on what laws individual nations apply when prosecuting terrorists or determining the legality of their response to an attack.

The variety of different ways a nation can respond to terrorist attacks can also complicate the boundary separating crime and acts of war and consequently whether domestic or international law addresses the actions. For example, the September 11 attacks on the World Trade Centers simultaneously triggered the United States to use both international and domestic law. President Bush's response was a two front war against the terrorist movement. Law enforcement agencies were given the responsibility to protect the nation from inside via domestic law while the military became the leader outside of the nation's borders as the U.S. infiltrated another nation to address terrorism at its source. Consequently, two different systems of law are being utilized in response to one attack. Although both legal frameworks provide useful guidance, domestic law and international law do not always coincide. The current legal system might mandate this type of approach. However, because the two legal systems are not harmonized, legal questions and unknown situations can and will surface.

Before proceeding further into this chapter, a discussion regarding the distinction between international humanitarian law, domestic law, criminal law, and international criminal law (addressing transnational crime) is warranted. International humanitarian law rests on the fundamental tenet that violence must escalate to the level of an international armed conflict in order for LOAC to apply. By default then, "violence committed in internal conflicts is

criminal....As a result, 'the need to categorize [violence] as either armed attacks or criminal attacks is an awkward-albeit for the moment seemingly inevitable-exercise.'"⁷²

Domestic law is a broad term that incorporates the laws and legal system within a country. Although it may be constrained by international obligations, it is the primary legal system people are expected to abide by when they are within the borders of a country or are citizens of a country. Criminal law, or penal law, is one aspect of domestic law that deals with crime and the legal punishment of criminal offenses. Confusion may arise when discussing criminal law because crime can be transnational and is frequently addressed by the international community. For example, the U.N. Office on Drugs and Crime has a large mission that consists of addressing terrorism, corruption, organized crime, and trafficking in human beings. These crimes can all affect multiple countries simultaneously or they can be specific to an individual nation. Similar to the multiple conventions adopted regarding terrorism (discussed in Chapter II), on 15 November 2000, the U.N. General Assembly adopted the U.N. Treaty against Transnational Organized Crime. This treaty binds "parties" to create domestic criminal offenses, new "frameworks for mutual legal assistance, extradition, law-enforcement cooperation, technical assistance, and training."⁷³ Despite international agreement that these crimes are wrong, legislation places enforcement responsibility for creating domestic law criminalizing specific actions and prosecuting individuals upon member nations. Therefore, I contend that despite discussion generated by the international community regarding criminal offenses and criminal law, the individual nation-states remain primarily responsible for punishing criminal acts.

⁷² Nathan Canestaro, "'Small Wars' and the Law: Options for Prosecuting the Insurgents in Iraq," *Columbia Journal of Transnational Law* 43, no. 1 (2004): 91.

⁷³ Office on Drugs and Crime, *Crime Programme* [on-line] (United Nations, [cited 11 October 2006]); available from http://www.unodc.org/unodc/en/crime_cicp.html.

Consequently, although categorical distinctions can be made among crimes committed by citizens against their own nation, crimes committed that transcend national borders, grave breaches of international law committed outside of the context of armed conflict, and war crimes, there are only three venues that exist to prosecute these crimes: domestic courts, military courts, and international tribunals. Domestic crimes and transnational crimes can be prosecuted in domestic courts and international courts if violations warrant it. Tribunals have been established to prosecute grievous crimes such as crimes against humanity and genocide.⁷⁴ In contrast, violations of the law of war can be prosecuted in military tribunals as well as in an international court.

The U.N. has created an international entity responsible for punishing crimes considered grievous by the international community by establishing the International Criminal Court (ICC) via the Rome Statute. Although this court might seem like the forum in which criminals participating in transnational crimes such as terrorism should be tried, the court has a more specific mandate. The ICC is an independent and permanent court that tries persons accused of only the gravest crimes of international concern (e.g. genocide, crimes against humanity, war crimes). Although using an international court might create a positive perception of legitimacy when trying terrorists as well as work to establish a record of international crimes that can be used to develop “norms and procedures for international criminal law,” many countries, to include the U.S., have not ratified the Rome Statute due to disagreements with universal ICC jurisdiction.⁷⁵ Furthermore, the ICC is a court of last resort. Therefore, it will not act if a case is

⁷⁴ *International Criminal Tribunals: Handbook for Government Cooperation* [on-line] (Amnesty International, 1 August 1996 [cited 24 September 2006]); available from <http://web.amnesty.org/library/index/engior400071996>.

⁷⁵ Canestaro, "'Small Wars' and the Law: Options for Prosecuting the Insurgents in Iraq," 136-7.

already being investigated or prosecuted by a national judicial system.⁷⁶ Therefore, domestic courts and military tribunals are the most commonly used courts for prosecuting criminals and violators of LOAC.

In order to ease discussion throughout the remainder of the chapter, I make arguments in terms of law-enforcement actions and military actions. Although many criminal issues are discussed in an international forum via bi-lateral and multi-lateral treaties, from a legal perspective, domestic law and international law are specifically referenced and used to prosecute offenders compared with the bi-lateral and multi-lateral treaties which more often ensure cooperation among specific nations trying to decrease specific types of crime or encourage the extradition of criminals. Consequently, references to law-enforcement actions do not necessarily confine a nation to acting single-handedly. Instead, law enforcement actions can encompass a national and/or multi-national approach to transnational crime. For the purposes of this discussion, law-enforcement actions refer to legal actions and the use of force against terrorism that incorporates domestic law or international human rights law and other international treaties outside of the context of armed conflict. In contrast, military actions refer to the use of military law and international humanitarian law that designate the use of military forces.

Correlating Terrorism with Criminal Acts or Acts of War: Benefits and Disadvantages

The next two sections, “Terrorism as a Crime” and “Terrorism as an Act of War,” are summarized in Table I below. Each section emphasizes the unique nature of terrorism and explores how terrorism/terrorist acts can be compared to criminal acts and acts of war. Although there are many direct correlations between criminal acts and terrorist attacks, such as the crime of murder, or between acts of war and terrorist attacks, such as the use of military weapons (e.g.

⁷⁶ *Rome Statute of the International Criminal Court* [on-line] (United Nations, 19 December 2003 [cited 24 September 2006]); available from <http://www.un.org/law/icc>.

long range rockets), I argue that there are differences that cannot be disregarded. Consequently, as currently written, neither domestic law nor international law is adequate to encompass the unique phenomenon of terrorism.

Table I: Characteristics of Terrorism: Classifications According to Current Terminology

	Aspects of Terrorism that Correspond with Criminal Acts	Aspects of Terrorism that Resemble Acts of War
Similarities	<ul style="list-style-type: none"> ▪ To a certain degree, terrorist actions can already be compared with criminal actions (e.g. murder, unlawful possession of firearms). ▪ Most nations already have laws in place to prosecute many of the criminal acts that comprise terrorist attacks. 	<ul style="list-style-type: none"> ▪ Weapons that terrorist can access and may be able to use are similar to those used during war (e.g. long range rockets, mines, bombs, weapons of mass destruction [WMDs]). ▪ The organizational ability, funding, and international reach of both terrorist networks and their attacks are reminiscent of power wielded by a state.
Contradictions	<ul style="list-style-type: none"> ▪ Although a terrorist attack may be a crime in and of itself, terrorism, as a phenomenon, has many aspects that are unique. The criminal mindset/motivations also differ from the organizational influence and ideology that often accompanies terrorism. ▪ Transnational crime necessitates international cooperation in order for suspects to be extradited and tried in court. However, countries such as Iran and Syria will most likely not extradite a terrorist to be tried in countries such as Israel or the U.S. 	<ul style="list-style-type: none"> ▪ There are varying degrees of terrorist attacks. Although 9/11 might be considered an “act of war” and closely resemble such violence, a bombing that does not cause any civilian casualties or mass destruction will not qualify as such.

Terrorism as a Crime

Both similarities and differences exist between terrorist acts and criminal acts. Although an initial analysis of a terrorist attack may show that terrorism can be construed as a combination

of smaller criminal offenses, this section will show that terrorism involves many other attributes which makes the phenomenon differ from its individual parts.

A terrorist attack can be seen as a combination of smaller criminal offenses. For example, someone who kidnaps and holds hostages within an Embassy could be charged with illegal possession of firearms or explosives as well as injuring, killing, or threatening the well-being of a person or people. Furthermore, terrorists are frequently funded by drug and arms smuggling or trading. These illegal methods of financing terrorist operations and the attacks often coincide with forged citizen or passport documents, also a practice that is already illegal in domestic law. Breaking terrorism down into these component parts reduces the resulting violence by representing it as actions already recognized by people and states and addressed by the law. Hypothetically then, most nations can apprehend and stop terrorism/terrorists via criminal proceedings. However, terrorism is broader than the components which comprise the attack. Two very important aspects of terrorism that must be acknowledged when comparing a terrorist with a criminal are terrorist groups and their ideologies. These two factors reflect aspects of terrorism that do not play an important role in the development of a criminal or in fabricating their criminal actions. Consequently, the nature of terrorist organizations and the ideologies they espouse represent an important difference between terrorism and crime.

The Role of Terrorist Organizations

Some terrorist attacks are carried out by individual people working alone. More frequently, however, charismatic leaders and organizations are responsible for terrorist attacks in addition to the individuals who directly participated in the attack. Although individual terrorists may be motivated by different root causes, the critical aspects of planning the attack, financing the training, and choosing people to execute the attack are predominantly calculated by others within a

larger organization.⁷⁷ Furthermore, these organizations are supported by both individuals and states that contribute to their finances, offer logistical assistance, and provide safe havens for them. Due to the essential involvement of terrorist organizations in the use and spread of terrorism, many nations have outlawed terrorist groups operating from within their borders as well as supporting terrorist groups abroad. Some nations go as far as making it an offense to be a member of an organization determined to be a terrorist organization.⁷⁸

In some respects then, terrorist organizations are similar to domestic gangs and can be approached using a law enforcement approach. However, they can be distinguished from the criminal context because their vision is more transnational and they utilize state support, via indirect funding and/or arms dealing, in order to survive as such extensive organizations. Consequently, they are also comparable to transnational criminal organizations. International efforts to thwart drug, arms, and human trafficking reflect the significance and power behind the organization backing the individual “runners.” To the contrary, transnational criminal organizations remain distinct from terrorist organizations due to the differences in ideology. Whereas criminal organizations are motivated by profit, terrorist organizations are more commonly motivated by political and/or religious objectives. This aspect of terrorism is further discussed below.

Last, state sympathies can interfere with other states using traditional law enforcement actions against the individual terrorists and terrorist organizations. International cooperation is imperative in order for victim-states to extradite terrorists or terrorist leaders to stand trial. However, this cooperation is not assured. For example, it is unlikely that Lebanon or Iran would arrest, much less extradite, a terrorist Israel wanted to prosecute. They are differentiated further from the criminal context by the ideologies perpetuated within terrorist organizations.

⁷⁷ Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002), 30.

⁷⁸ "Australia Anti-Terrorism Bill," ed. House of Representatives (Department of Parliamentary Services, 2004).; *CCCI Convicts 12 Insurgents, Three Sentenced to Life in Prison* [on-line] (Multi-National Force - IRAQ, 2 May 2006 [cited 15 May 2006]); available from <http://www.mnf-iraq.com/Releases/May/060502c.htm>.

Terrorist Ideology and Motivations

Terrorists have a different ideology than most criminals that are prosecuted and tried within a nation's domestic legal system. This point is two pronged. First, the political and/or religious nature of most terrorist attacks, in addition to the key element of generating fear and indiscriminately targeting the civilian population, creates distinct elements common to terrorist attacks that do not coincide with regular crimes. Most people commit crimes for one of three reasons: personal gain, passion, or due to some mental illness.⁷⁹ In contrast, most terrorists have or purport to have specific ideological motivations for committing their acts of violence. Studying these ideological motivations, or root causes, lends insight and understanding into what fosters terrorism not only as a motivation to the individual terrorist, but also as a tactic with international appeal. One of the foremost explanations can be summarized as “grievances.”

Grievances can be a direct result of environmental or social factors that contribute to motivating a person towards accepting terrorism as a legitimate act. Jessica Stern, author of *Terror In The Name of God*, categorizes these social factors into five groups: alienation, humiliation, demographics, history, and territory. In some cases, criminal acts can also be motivated by these grievances. Many authors also hypothesize that terrorists perpetuate terrorism out of religious beliefs such as their goal to spread their religion or keep those who do not believe in their religion away from their land, people, and politics. Although Farhad Khosrokhavar, author of *Suicide Bombers: Allah's New Martyrs*, ultimately blames suicide terrorism on the feelings of deprivation and humiliation experienced by many Muslims, he writes in-depth about how religion is encouraging individuals to cope with these emotions through terrorism. Martyrdom is rarely a motivation for the common criminal. Within the concept of religious motivation, Khosrokhavar identifies two types of martyrdom—defensive and offensive.

⁷⁹ Boaz Ganor and Alex Conte, *Legal and Policy Issues in Establishing an International Framework for Human Rights Compliance When Countering Terrorism* [on-line] (The Institute for Counter-Terrorism, 1 December 2005 [cited 24 September 2006]); available from http://www.ict.org.il/pdf/Ganor_Conte_Nov05.pdf.

The goal of defensive martyrdom is to be a witness for the cause by opposing heretics and oppressors with an attitude of defiance. In this case, an individual may face death because they refuse to follow what they consider to be a heretical government. However, these individuals do not actively fight the heretics or oppressors.⁸⁰ In contrast, offensive martyrdom “implies an active, and if need be violent, struggle against those the believer regards as oppressors and heretics.”⁸¹ Offensive martyrdom helps to explain terrorist acts, especially suicide terrorism.

Additionally, Robert Pape, author of *Dying to Win*, adds an important overarching component to the individual logic of terrorism, specifically suicide terrorism, by differentiating between altruistic and egoistic suicide. Egoistic suicide occurs because a person experiences isolation from society and individual trauma. Altruistic suicide is opposite in that the individual is very integrated into society and willing to sacrifice themselves for the betterment of others (e.g. a soldier falls on a grenade to save his fellow serviceman). Whereas egoistic suicide is looked upon unfavorably, people who commit altruistic suicide are often looked upon as heroes because they prefer death rather than allowing harm to befall their community.⁸² Many terrorists and Islamic communities believe and therefore glorify terrorism as altruistic suicide.

Grievances and martyrdom, in particular, help explain differences between some terrorists (for this argument, specifically religious terrorists) and other criminals in that terrorists’ motivations are not only affected by the here and now but are influenced by how one perceives the after-life and this life’s effect on the after-life. This spiritual focus greatly differs from the motivations which current law is written to address and punish.

⁸⁰ Farhad Khosrokhavar, *Suicide Bombers: Allah's New Martyrs*, trans. David Macey (London: Pluto Press, 2005), 5.

⁸¹ *Ibid.*, 6.

⁸² Robert A Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (New York: Random House, 2005), 173-75.

Second, when the ideology motivating the individual terrorist is rooted in religion or some other strong belief governing one's conduct, the terrorist might deem the law, as it is written and followed by states, as irrelevant. For example, Osama bin Laden, in his fatwa dated February 1998, claimed that according to Islam it was acceptable for terrorists to target American civilians. Although this is against the law of the United States and international law, the terrorists following fundamentalist Islam and bin Laden, as their leader, conduct their behavior according to the fatwa and other religious guidance or interpretations not internationally recognized law. To them, killing innocent civilians is a legitimate act. This idea of thinking that state/international law does not apply to the individual terrorist is commonly perpetuated from within terrorist organizations. Members pledge their allegiance to the organization and its ideology and often disregard the law. Consequently, "standard criminology does not apply [when trying to combat the terrorist phenomenon as a whole because] the notion of personal deterrence is largely irrelevant" warranting a different legal approach for terrorists compared to criminals.⁸³

In conclusion, terrorist attacks can exhibit many criminal characteristics. The fact that some of the specific actions involved in a terrorist attack are already classified as criminal and addressed within most nations' domestic law generates a positive correlation between terrorist acts and criminal acts. However, attributes such as the underlying motivations of the terrorists and the organizational capability and impact of terrorist groups can greatly differ from what is usually observed in criminal cases. An analysis of terrorism from the dimension of warfare will reveal that there are also many aspects of terrorism that are similar to acts of war.

⁸³ Ganor and Conte, *Legal and Policy Issues in Establishing an International Framework for Human Rights Compliance When Countering Terrorism*.

Terrorism as an Act of War

Similar to classifying terrorism as a crime, terrorism can be both comparable and distinct from warfare. Since military force can be lethal and very destructive, a crucial question when characterizing terrorism is whether or not terrorist acts constitute armed attacks that justify a military response. Terrorist attacks can be varied in both methods and outcomes. Therefore, this question is difficult to answer in a manner that is comprehensive to all terrorist attacks. An airplane hijacking resulting in zero casualties or deaths is not easily compared to the Madrid train bombings or the destruction of the World Trade Centers where thousands of people were injured or killed. Consequently, due to the varying degrees of terrorist attacks, some attacks may be similar to acts of war while others terrorist acts can not be compared to an act of war.

Discussion in both Chapters I and II reveals the lack of a concise definition of terrorism. However, there are perceivable differences in state action, namely diplomacy, sanctions, and the use of force. The use of violent action is the pinnacle of a state displaying its power. Therefore, a destructive terrorist attack may be likened to an act of war while a less violent terrorist attack may be better compared with other expressions of traditionally state yielded power. Nevertheless, in light of recent terrorist attacks suffered worldwide, there are many aspects of terrorism that exhibit war-like characteristics such as the scope of destruction terrorists are capable of creating, the types of weapons used or threatened, and the organizational and international capabilities of many terrorists.

Terrorism first gained notoriety and garnered international attention in the late 1960s. According the Bruce Hoffman, director of the Rand Corporation's terrorism research unit, the 1968 high-jacking of an Israeli passenger airliner, flown from Rome to Tel Aviv by the Popular Front for the Liberation of Palestine, marked the advent of the international terrorism that we

know today.⁸⁴ For many years casualties suffered from terrorist attacks remained relatively low. Innocent civilians were much more likely to be held hostage and then released once the terrorists' demands were met than to be indiscriminately targeted and killed. However, in the past twenty years, terrorists began orchestrating attacks that caused a much larger scope of destruction, such as the bombing of Pan Am Flight 103 over Lockerbie, Scotland, and the Marine Barracks bombing in Beirut, Lebanon. This development corresponds with the transformation of ideology and terrorist goals previously discussed. Consequently, the desire to inflict mass, indiscriminate casualties became more prominent. The September 11, 2001 attacks on the World Trade Center, the March 11, 2004 bombings of the commuter train system in Madrid Spain, and the July 7, 2005 bombings of London busses reflect a deadly trend of highly visible, destructive attacks. Another comparison between terrorism and warfare can be made due to the weapons terrorists can now access and use.

Technological advancements have increased terrorists' ability to use or threaten the use of more destructive weapons. Consequently, attacks in which they are utilized are more likely to resemble acts of war. Terrorists use a variety of weapons from small arms, such as pistols, to automatic weapons, explosive devices, and rocket propelled grenades. Fears that some terrorists will use chemical, biological, or nuclear weapons also increase the scale of attack and ability for terrorists to perpetuate an attack more commonly seen during an armed conflict.

Last, terrorists today have the ability to make organized, coordinated, and international attacks. This type of capability is more reminiscent of a state military capability and thus poses a threat similar to that of an act of war. Moreover, this capability can continue to survive despite the loss of individual leaders and can be used repetitively. Terrorist groups may plan and execute a large scale attack while also planning future attacks, recruiting more members, and

⁸⁴ Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 1998), 67.

obtaining additional resources. This larger and more intricate leadership and organizational structure increases the groups' lethality. Therefore, the scope of infrastructure that supports many terrorists and the potential destruction terrorism can create can be more favorably compared to that of warfare.

The previous two sections reflect how terrorism has components that have comparable and unique attributes with both a criminal classification and a warfare classification. Therefore, if the international community wishes to address terrorism in order to actively fight terrorism, it cannot merely implement existing law and force this phenomenon within current legal frameworks. To better understand the benefits and disadvantages within each framework for victim-states responding to terrorism, the next section delves deeper into how the corresponding legal frameworks can be positively used or can negatively impact the fight against terrorism with the hope of eventually determining which framework is most advantageous for victim-states to employ and potential modifications which may better address terrorism.

Classifying Terrorism within Criminal or Warfare Legal Frameworks: Benefits and Disadvantages

Terrorist attacks are given this specific title because they are unique, in some way, from either a crime or an act of war within an armed conflict. It follows that the legal system should adequately address these unique facets of terrorist violence. Further, victims of terrorist attacks, both individuals and states, need to respond appropriately to the attacks and are due justice for their sufferings. Currently, international law uses thirteen conventions to identify and condemn terrorist actions. However, domestic law and international humanitarian law are the primary instruments used to prosecute and punish terrorists. It is imperative to determine which legal framework(s) best address terrorism. For example, from a legal standpoint, terrorist groups or networks are not characterized as “a ‘party’ to a conflict within the meaning of international

humanitarian law.”⁸⁵ Consequently, terrorists do not easily fit into the framework of the law of war, bolstering support for a domestic or international law enforcement approach in addressing terrorists. However, if terrorists are perpetuating attacks within the context of an international armed conflict they can become subject to the laws of war. The following example shows the legal quagmire that terrorism can create.

When al Qaeda terrorists crashed hijacked airliners into U.S. buildings, their status and the status of their actions were ambiguous according to international law. However, when the U.S. invaded Afghanistan in 2001, U.S. action created an international armed conflict between two states. Therefore, those parties fighting against Afghanistan with U.S. coalition forces and those individuals fighting the coalition were all recognized peoples under IHL. In December 2001, Hamid Karzai became the interim leader of Afghanistan “ending” the official, international armed conflict. He was duly-elected in December 2004. This end to the international armed conflict is misleading because U.S. and coalition troops are still stationed and engaged in armed conflict with Taliban/Al Qaeda forces. If these terrorists are captured now they are no longer affiliated with the state of Afghanistan, but are nonstate actors waging private warfare. Consequently, they are no longer protected under IHL but will fall under international human rights law and the domestic law of Afghanistan or the country whose forces capture them.

The discontinuity caused when determining if and when what law applies to the terrorist is detrimental when trying to enforce the law and when determining the legitimacy of the terrorists’ actions. Further, despite some blanket protections provided by international human rights law, domestic law varies by nation. Consequently, there is no guaranteed, uniform punishment for terrorist actions. One nation’s domestic law may enable the terrorist to be released whereas another nation’s law may elicit long prison terms or the death penalty for the same offense. This inconsistency hinders international cooperation and the appearance of the international community’s

⁸⁵ *International Humanitarian Law and Terrorism: Questions and Answers.*

collective will to oppose terrorism. Therefore, modifications to international law, such as accounting for unlawful combatants within LOAC or guidance above and beyond the guarantee of fundamental human rights within international human rights law is necessary to begin standardizing individual states' response to and treatment of terrorists.

Both benefits and disadvantages exist regarding the classification of terrorist attacks as either criminal acts or acts of war for purposes of using international law to respond to the attacks. I used two criteria when evaluating the criminal and act of war approaches. First, I considered realistic repercussions that correspond with the application of each framework. This criterion provides insight into the feasibility of using each framework based on their current missions and infrastructure capabilities. Within this dimension, I observe and discuss consequences or dilemmas of applying a law enforcement approach or a military approach to the fight against terrorism. For example, I argue that one current benefit to categorizing terrorism as an act of war is that military forces, in general, are better trained and equipped to immediately take action against weapons of mass destruction. This argument is based on a practical response to the threat of WMDs. It is not necessarily concerned with whether or not it is desirable to use the military or ramifications of not responding with the law enforcement personnel but rather which framework is better qualified logistically to respond to a threat.

On the other hand, I also used political criteria to evaluate the two approaches. This criterion allows analysis of the potential political impact of using one framework versus the other. Political factors are an important consideration to contemplate when weighing benefits and disadvantages of each framework because when a nation is responding to a terrorist attack the leaders will often make decisions according to what actions are politically acceptable, both at home and abroad. The political criterion includes consideration for how politics might affect the employment of a domestic legal framework compared with using international law. For

example, I contend that it is beneficial to address terrorism as a crime and use the domestic legal framework because the use of minimal force is more likely to reduce the overall level of violence. In general, it is politically advantageous for national leadership to quell rather than incite violence. Therefore, a nation may decide a political victory is paramount to other factors involved when faced with terrorism. By using both practical and political criteria when evaluating benefits and disadvantages of categorizing terrorism in order to determine an effective and legal response to terrorism, a variety of arguments can be made for each approach.

Table II provides a summary of these arguments discussed in the following sections. After explaining both positive and negative aspects of these two classifications, I will argue that many different characteristics of an attack will dictate which framework best applies to governing the victim-state response and that limited modifications in international law pertaining to terrorism may augment the international community's ability to respond to terrorism.

Benefits and Disadvantages of a Criminal Classification

A criminal classification of terrorist acts could benefit a victim-state in a number of ways. Similarly, disadvantages also exist if domestic law or a law enforcement approach is used to address terrorism. Both benefits and disadvantages must be analyzed and then weighed against the positive and negative aspects of classifying terrorism as an act of war prior to concluding if one legal framework is better equipped to address terrorism. I propose three arguments that demonstrate the advantages of classifying terrorist acts as criminal acts and thus responding to them with domestic and international human rights law.

First, if terrorist acts are labeled as criminal acts, military or civil law enforcement personnel will need a high level of physical control over a situation and a well-developed judicial process in order to seize an individual and bring them to justice. Although the military has law

enforcement personnel and established courts and judges, they are not always readily accessible, especially in the field, nor is trying criminals the military's primary mission. This point will be expounded upon within the section of the disadvantages of using the LOAC framework to address terrorism. Unlike the military's employment of legal and investigative personnel for a variety of missions, the primary job of domestic law enforcement agencies is to investigate, arrest, detain, and try criminals. Consequently, they have more time and resources devoted to prosecuting terrorists.

Second, the U.N. and other regional organizations have become increasingly involved in heightening accountability in international humanitarian law. However, unlike committees organized under international human rights law to help provide accountability, such as the European Commission of Human Rights, these bodies do not exist under humanitarian law. Consequently, infrastructure is not yet established to monitor and report on breaches of humanitarian law.⁸⁶ For example, during Operation *Iraqi Freedom* instances of military wrongdoing, such as the killing of Iraqis in Haditha, have been alleged. Although investigations have been conducted, the initial gathering of evidence is often conducted by regular soldiers present on the battlefield. The handling and transfer of witnesses and evidence does not always occur in a manner expected in cases handled start-to-finish by trained crime scene investigators. If accountability continues to be a heightened concern, and the international community expects victim-states responding to terrorists to account for each of their actions, criminal proceedings might be more qualified to ensure accountability occurs.⁸⁷

⁸⁶ Breaches of human rights are reported, such as the Haditha killings. However, these are frequently brought to light by media sources, not by government accountability task forces.

⁸⁷ Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," 23.

Last, although both police and military force can be deadly, military force is created and used to accomplish a mission while only ensuring that the resulting casualties are proportionate to the ultimate goal. In contrast, police force, under human rights law, is tailored to minimize force at all costs. A lower level of force might prevent more violent retaliation. This line of thought must be carefully applied after the terrorists' motivations are taken into consideration. A higher level of violence may be a necessary tactic to show terrorists that a state and the international community can not and will not be pushed around. To the contrary, if the terrorists' motivations are driven by a desire to destroy the Western way of life, use of force may not be the only viable response. A lower level of force accompanied by social and economic assistance may create more room for diplomacy. Consequently, if at all possible, it is advantageous to apply human rights law regarding the use of force when responding to terrorist violence in hopes of lowering the overall level of violence.⁸⁸

These three benefits gained by utilizing a law enforcement approach by victim-states responding to terrorism impact very important aspects of the response. However, categorizing terrorism as a crime can also hinder a victim-state's response. I contend that there are four disadvantages to this approach that must be acknowledged if terrorism is to be treated as a crime.

First, law enforcement is primarily a reactive mechanism. Law enforcement agencies are most effective once "specific individuals [are] identified, a plot [has] formed, or an attack [has] already occurred."⁸⁹ Although they do conduct undercover work and perform sting operations that may lead to a preemptory arrest, most law enforcement work is accomplished once an illegal activity is discovered. For example, prior to September 2001, the Federal Bureau of

⁸⁸ Ibid., 30.

⁸⁹ National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, First ed. (New York: Norton, W.W. & Company, Inc, 2004), 82.

Investigation (FBI) was the lead U.S. agency with regards to terrorism. However, alone, they did not have the capability to address all aspects of terrorism. As FBI agents emphasized to the 9/11 Commission in testimony after the 2001 attacks: “The FBI and the Justice Department do not have cruise missiles. They declare war by indicting someone.”⁹⁰ Therefore, while some terrorists are being detained and investigated or courts are trying individuals, terrorist groups can continue larger operations.

Consequently, law enforcement’s offensive capability and ability to take decisive action is limited. Analyzing some of the consequences of the law enforcement approach to the 1993 World Trade Center bombing emphasize differences in the reactionary response of law enforcement agencies compared with offensive military action and two more disadvantages of the law enforcement approach. Many law enforcement measures had a detrimental affect on the overall fight against terrorism despite its overall effectiveness in investigating the World Trade Center attack, discovering the identity of its perpetrators, and making important arrests. The 9/11 Commission Report focuses on two effects that approaching this terrorist attack with law enforcement tactics had on the U.S. fight against terrorism. First, due to the excellent investigation and number of prosecutions for crimes related to the World Trade Center bombing, U.S. leadership held the impression that “the law enforcement system was well-equipped to cope with terrorism.”⁹¹ The bombing of the World Trade Center did increase the knowledge that terrorism was becoming a new security challenge. However, the procedures used to prosecute the terrorists were not questioned as to how they would protect innocent civilians from future attacks.

⁹⁰ Ibid.

⁹¹ Ibid., 72.

Second, according to the 9/11 Commission, the successful use of the legal system halted further investigation into the new threat of terrorism. “The law enforcement process is concerned with proving the guilt of persons apprehended and charged.”⁹² Regardless of information gained during the course of the attack investigation, investigators and prosecutors were only concerned with presenting evidence that directly related to those individuals charged with an offense. Although many investigations were continued in hopes of future prosecutions, these leads were not a high priority. “The process was meant, by its nature, to mark for the public the events as finished – case solved, justice done. It was not designed to ask if the events might be harbingers of worse to come. Nor did it allow for aggregating and analyzing facts to see if they could provide clues to terrorist tactics more generally – methods of entry and finance, and mode of operation inside the United States.”⁹³ Much has been learned by the U.S. from the World Trade Center bombings in 1993 and the most recent attack in 2001. Terrorism is now a much higher priority and consequently, law enforcement agencies have an increased role and responsibility to report and act upon potential terrorist plots in efforts to be offensive. The government has tried to improve interagency communication allowing law enforcement agencies to pass their information on to other units better equipped to follow and act on terrorist leads. However, the roots of the law enforcement system still remain investigative and responsive to events already transpired.

Furthermore, successful prosecutions of terrorists involved in the World Trade Center presented the idea that those responsible for terrorism were apprehended and brought to justice. Although the terrorists immediately involved in the attack were identified, this type of response only addressed the specific attack and not the larger phenomenon. Similar criminal prosecutions

⁹² Ibid., 73.

⁹³ Ibid.

in the future may work for small cells acting alone for unique causes. However, terrorism stemming from a fundamentalist Islamic commitment, in particular, is a worldwide phenomenon that cannot be contained by a few arrests. Even the capture of bin Laden could prove to be just one more stepping stone toward the overall suppression of terrorism. This idea highlights the difference between individuals who commit crimes and organizations that perpetuate crime. This distinction is important for nations trying to both prevent or deter terrorist attacks and punish perpetrators for attacks that have already occurred. Preventative action is difficult for law enforcement agencies as mentioned when discussing the reactive nature of law enforcement. Punishing individuals is also difficult due to the use of suicide tactics and the harboring of terrorists by some nations. However, in this case, the organization remains a target for victim-states. Criminal law more often is used to prosecute and punish individual offenders in contrast to international law which holds larger organizations such as the United Nations and individual states responsible and accountable for adhering to the law. Therefore, a criminal classification may provide a narrow scope of law enforcement where utilizing international law similar to that enforced during war may provide a more comprehensive scope of application for the law.

Last, as mentioned in this section's introduction, each nation follows their specific legal structure and written law. Addressing terrorism as a criminal act places more responsibility and jurisdiction within individual states. This approach has led to toleration of terrorism in some states and total intolerance for terrorism in others. In order to successfully fight terrorism, the international community must unanimously fight against it. Alan Dershowitz stated this point well in *Why Terrorism Works* when he wrote: "Since terrorists and their supporters generally regard *their* terrorism as justified, no objective continuum of terrorism will ever receive universal

acceptance. All terrorism must be condemned, if condemnation of any terrorism is to have an impact.”⁹⁴

The previous analysis has clearly shown that there are both benefits and disadvantages to responding to terrorism using a legal framework that would be applied to criminals. The following paragraphs conduct a similar analysis of the positive and negative aspects of treating terrorism as if it were an act of war.

Positive and Negative Aspects of an Act of War Classification

A number of benefits can be gained if the international community agrees that terrorist attacks constitute armed attacks that legitimately elicit a military response. These benefits often coincide with or closely align themselves with some of the negative aspects of classifying terrorist acts as criminal acts. As such, I will briefly reference the previous section’s analysis when these instances occur. I propose six differences between a military and criminal approach to terrorism that reflect the positive nature of an act of war classification.

First, military action can be both reactive, or defensive, and offensive whereas law enforcement is primarily reactive. This point coincides with the point above in which I argue the negative nature of law enforcement’s reaction approach. Unlike many law enforcement agencies, the military consistently uses intelligence and surveillance to monitor any activity that might not be in its nation’s best interest. They also have the strength of force and are legally able, if in self-defense or amidst an ongoing conflict, to take offensive action. The defensive and offensive nature of the military provides a victim-state with a tool to address many more aspects of the terrorism phenomenon.

The second positive aspect of classifying terrorism as an act of war is that the standards for accountability and determining when to use force are much more lenient within international

⁹⁴ Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, 9.

humanitarian law than in human rights law. Within international human rights law is The United Nations' Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. These principles call for a strict system of procedures in order to decrease unnecessary risk and harm to people. In an effort to safeguard people and ensure that their rights are maintained, a variety of stipulations were created. The five overarching principles include: maintaining accountability of firearms and ammunition, reporting any incident of death or injury, holding the government responsible for training and establishing reporting and reviewing procedures, protecting evidence in crime scenes and conducting autopsies, and conducting effective official investigations if individuals are killed due to the use of force.⁹⁵

These are difficult standards to meet when fighting terrorists, especially when a nation is conducting operations outside of its own borders. Not only would significant government resources be needed in order to conduct the necessary investigations, collect evidence, and ensure widespread compliance, but reviewing each instance when deadly force was used to subdue a suspected terrorist would also hinder the state's ability to react quickly to intelligence, ensure adequate distribution of manpower, and more efficiently eliminate national security threats.

Third, today's terrorists threaten the use of weapons of mass destruction. These weapons include chemical, biological, and nuclear weapons. Most states' law enforcement personnel are equipped to handle these types of weapons or fallout from these weapons in a limited manner, if at all. In addition, the more creative and technologically advanced terrorist weapons and tactics become, the less time authorities will have to react to the terrorist threat. Military personnel are

⁹⁵ Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," 19.

trained and given the authority to make momentary life and death decisions on limited information. State law enforcement personnel, on a broad scale, do not typically have as much training and, under human rights law, the authority to make decisions about the use of deadly force with minimal information about the threatening person. Law enforcement personnel are allowed to use deadly force in situations where there is an immediate and obvious threat to themselves or other innocent persons. However, as noted in the introduction to Chapter II, the increased use of suicide bombers complicates the distinction between an innocent person and a deadly terrorist. Nevertheless, with how international human rights law is currently written, using deadly force without evidence or an understanding of the terrorists' intentions is not condoned.

Fourth, some conventions within international human rights law may hinder a nation's ability or the international community's ability to fight terrorism. However, the limiting aspects of these conventions do not apply when states fall under the international humanitarian legal framework. Although existing human rights law may have been appropriately written to address situations facing the world at the time they were written, these laws may not easily be altered to adapt to today's terrorist threat. "For example, the use of riot control agents as a less-than-lethal means of law enforcement in the midst of an ongoing armed conflict must be reconciled with the prohibition on their use as 'a method of warfare.'"⁹⁶ Armed conflict that has arisen in response to terrorism, such as the ongoing conflict in Afghanistan, reflects two types of armed tensions. First, the initial fighting reflects intense armed conflict. Second, once the terrorists are initially defeated, insurgent operations or dangerous, armed masses of people protesting continued occupation pose a threat to victim-state troops. Within the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction,

⁹⁶ Ibid., 32.

Article 1, number 5 states: “Each State Party undertakes not to use riot control agents as a method of warfare.”⁹⁷ Article 2, number 9, part d then specifies that “purposes not prohibited under this convention means law enforcement including domestic riot control purposes.”⁹⁸ When there is a situation blurred between domestic and international conflict, as seen in Afghanistan or Iraq, it may be in the best interest of both the people and the government for armed troops to use tactics, such as the use of riot control agents. These agents might successfully diffuse a situation while simultaneously utilizing less than deadly methods of force. In order to use the best means available to lessen violence while effectively fighting terrorism, current law may therefore need to be amended or new law written specifically referencing appropriate actions in response to terrorism. For example, Article 2, number 9, part d, could be amended to allow the use of riot control agents by international forces to dispel people during wartime tensions.

Fifth, self-defense once a terrorist attack has occurred does not assist a country in preventing or proactively protecting itself from future terrorist attacks. As discussed in Chapter II, the U.N. Charter allows a state to use force if it is in self-defense. If a state must always suffer an armed attack prior to using force, they risk making terrorism easier and allowing terrorist organizations to grow without punishment and put their innocent civilians at risk. The advent of suicide terrorism makes this especially difficult because the terrorist has already decided to take his or her own life. As mentioned in the previous section, if the victim-state is punishing individual terrorists, they will not have an individual to prosecute each time a suicide terrorist attack is successful. This point is not an argument for the preemptive use of force. That

⁹⁷ *Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction* [on-line] (Organisation for the Prohibition of Chemical Weapons, 29 July 2005 [cited 24 September 2006]); available from http://www.opcw.org/docs/cwc_eng.pdf, 16.

⁹⁸ *Ibid.*, 18.

subject requires much more analysis than will be provided here. Rather, introducing the inadequacy of not taking any action prior to suffering an attack points out one potential drawback to limiting the classification of terrorism to a criminal act.

Last, human rights law does not account for the fog and friction that is inevitable during a violent conflict. During most law enforcement actions, the violent event has already transpired or, in some cases, officers become involved in a case that is on-going. In these circumstances, communication may be difficult, there may be conflicting orders, and/or events may occur that cannot be foreseen. However, these unknowns occur on a much smaller scale in these circumstances than when they occur in a war or large scale attack. In order to reconcile human rights norms to situations where states decide to use retaliatory force, Kenneth Watkins suggests states follow four steps. The first step is to determine which body of law the state utilizing force must abide by. The legality of the use of force resulting in death can then be determined. This is a logical first step. However, Watkins' next three suggestions do not correspond with feasible procedures. The second proposed step is to generate an investigation when there are targeting mistakes or weapons fail to hit their targets or operate properly. Third, he suggests authorities should be responsible for explaining the intentional killing of people. Last, he writes that "inquiries might be made when the state has used deadly force in a situation where it exercised sufficient control that detention and arrest of terrorists appeared feasible."⁹⁹

Although many of these actions are already taken to a certain degree, especially when innocent civilians are killed in what appears to be an avoidable situation; state leaders currently do not investigate or explain every use of force which results in casualties. Watkins' last three suggestions would provide much more oversight and control when states used force. However,

⁹⁹ Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," 33.

they overestimate technology and do not take into consideration fog and friction in armed conflict. Casualties are a part of the cost of war. Opportunities to counter a security threat are also dependent on technology, intelligence, weather, and other variables that are often momentary. Therefore, it is not always possible to conduct investigations or inquiries while also ensuring the mission is accomplished.

Further, technology will never be perfect nor should it be expected to be so. As technology has progressed warfare has changed, becoming much more precise and deadly and also allowing some unnecessary death to be avoided. However, some technical malfunctions and operator error with weapons systems is unavoidable. Similarly, intelligence is not a science. Information gained from intelligence sources will not always be correct and may be incomplete. However, decisions must still be made based on the knowledge authorities have at the time. Due to the inevitability of death and destruction during violent confrontations, the four principles of LOAC, proportionality, humanity, distinction, and necessity were already established in international humanitarian law. Kenneth Watkins provided a succinct summary of this argument in terms of the principle of proportionality when he wrote:

An important distinction between human rights and humanitarian law... is that the former seeks review of every use of lethal force by agents of the state, while the latter is based on the premise that force will be used and humans intentionally killed. In practical terms, a human rights supervisory framework works to limit the development and use of a shoot-to-kill policy, whereas international humanitarian law is directed toward controlling how such a policy is implemented. These differences are reflected in the respective applications of the principle of proportionality. In the domestic context, the force used must be strictly proportionate to the aim to be achieved. Under international humanitarian law, the use of force against valid targets such as combatants and civilians directly participating in hostilities is not directly governed by proportionality. Although the methods and means of using force are not unlimited, emphasis is placed on prohibiting “superfluous injury or unnecessary suffering.”¹⁰⁰

¹⁰⁰ Ibid., 32-33.

Furthermore, during armed conflict armed forces are legally able to attack rather than detain enemy combatants, with the precondition that they do not fall under protected person status due to surrender, injury, or other limiting factors noted in the Geneva Conventions. Corresponding with Watkins' proposed third and fourth steps, an inquiry into whether or not the state could have detained the terrorists rather than used force against them undermines the law that already determines whether a state's actions are right or wrong. Consequently, it is difficult to account for the fog and friction of warfare in human rights law. War is a fast moving machine. Guerilla warfare is even harder to stop and inquire about because its very nature is to be elusive. The international community could hinder itself with procedures and paperwork in efforts of inquiry and accountability while terrorists continue to attack innocent people. Finally, states at war are often not going to be open to inquiries due to national security concerns. The potential harm disclosure could bring to "ongoing operations and international relations, revelation of the capabilities of weapons systems, and the need to protect intelligence assets, may adversely affect public reporting on the findings of any investigation."¹⁰¹

The points discussed above paint a strong picture for the use of military force and the guidance of international humanitarian law against terrorists. However, negative positions also exist when addressing terrorism as an act of war. Five disadvantages of categorizing terrorism as warfare are discussed below. First, when a state of armed conflict exists, members of the military are legally able to take action that would be considered criminal during peacetime. For example, if a member is standing post guarding a military base during an armed conflict and an enemy combatant approaches the base or tries to force his way onto the base, the guard can kill the enemy without first determining guilt or innocence. However, during peacetime, if possible, the accused enemy combatant would be captured and stand trial to determine whether their

¹⁰¹ Ibid., 33.

actions were legal or illegal prior to punishment being administered. Before classifying terrorism, the different legal actions available for military members to take are an important consideration. If the law of war is developed to include terrorism, certain protections afforded in the LOAC may become counterproductive.

The danger of categorizing terrorism as an act of war became evident in the 11 September 2001 attacks against the World Trade Centers and the Pentagon. The World Trade Center was an illegal target according to both the LOAC and international human rights law. However, under international humanitarian law, the Pentagon could be considered a legal target depending on how the attack is characterized. During an armed conflict, the Pentagon is a legitimate, military target because it serves as a command and control center for the military. Similarly, the U.S.S. Cole, targeted in October 2000, could also be considered a legitimate and legal target. Therefore, if terrorism is enveloped into the law of war without careful verbiage, distinguishing between legal actions during an openly declared conflict and illegal attacks that are not part of a legally declared and continuing conflict, the law could ultimately legitimize some terrorist actions and protect them from prosecution.¹⁰²

The second disadvantage of characterizing terrorism as warfare uncovers a shortfall in international humanitarian law and is thus more of an argument for modification of IHL rather than a benefit of criminalizing terrorist actions and applying human rights law. The Geneva Conventions do not thoroughly address how the military should confront resistance movements. Therefore, applying international humanitarian law to conflict within occupied territory is difficult. Three of the main hotbeds for terrorism are currently Iraq, Afghanistan, and Israel/Palestine. Foreign troops are in each of these locations, for example, U.S. troops throughout Iraq or in Israel's case, Israeli forces in disputed territories, such as the West Bank.

¹⁰² Paust, *There Is No Need to Revise the Laws of War in Light of September 11th*, 3-4.

Consequently, laws governing these types of situations are important when addressing legal responses to terrorism. In an occupation situation, both criminal activity as well as violent, armed resistance can occur involving both police forces and military security forces. The use of both law enforcement personnel and the military invokes both human rights law and humanitarian law.

Terrorist uprisings seem to be especially frequent in such occupation environments. Protocol I of the Geneva Conventions loosens some of the criteria that were initially written into the Geneva Conventions regarding who is legally classified as a combatant allowing individuals who are fighting against colonial domination, alien occupation, or racist regimes in the exercise of their right of self-determination to gain combatant status.¹⁰³ However, the Protocol mandates that they still wear a fixed and distinctive sign. Although current experience says that terrorists do not follow Protocol I, hiding amongst the civilian population and choosing not to wear any significant insignia, international humanitarian law has addressed how they may gain combatant status. Consequently, military actions against those combatants who do not comply are not covered by international humanitarian law. Watkins writes that “a similar conclusion can be reached about resistance movements whose members are unprivileged belligerents [such as the terrorists mentioned above]. While their crimes are considered domestic in nature, unprivileged belligerents can pose the same threat as combatants. Their resistance thus falls within the category of armed conflict, as would operations by groups that use terrorist tactics in conducting their resistance.”¹⁰⁴ Perhaps, if terrorists do pose the type of threat suggested by Watkins, IHL should be modified to specifically tackle this change on the battlefield.

¹⁰³ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict*, Article 1, number 4.

¹⁰⁴ Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict," 27.

Third, proportionality, a fundamental principle of LOAC, may be a difficult measure to use when responding to terrorist attacks. Terrorism is a form of guerilla warfare. Organizations or states frequently utilize this tactic because it enables a smaller or less powerful nation or organization to attack a stronger nation. This form of warfare is also beneficial when one party is more technologically capable than the other. When weapons and tactics differ to a great extent, determining proportionality may become difficult because their effects and methodology may be different. Further, this measure might hinder the victim-state, placing overwhelming restrictions on their use of force and therefore making it impossible to gain military advantage by prohibiting the use of excessive force. For example, in Afghanistan, terrorists built a network of caves and tunnels. Although they often fought with smaller weapons, such as guns and grenades, it would have been very costly for American and allied forces to fight cave-to-cave. Therefore, superior technology in the form of bombs and other aerial firepower were employed. Depending on how the principle of proportionality is interpreted, this tactic could be deemed too excessive.

Fourth, as already mentioned, terrorist groups are not adequately addressed within LOAC. When the U.N. Charter and Geneva Conventions were written, actors bound by these international norms, referred to as “parties,” were states comprised of land with established borders and political leaders. Due to the introduction of terrorist groups and leaders that can now wield similar power to that of a state, international humanitarian law does not provide concise guidance regarding their role in armed conflict and how nations can legally respond to them.

Last, the military does not have the resources, or the resources could be better utilized, to investigate and prosecute terrorists as their primary mission. Although the military does have members responsible for tasks such as investigating crimes and trying criminals, conducting

investigations and prosecuting terrorists takes judge advocate generals (military lawyers) away from their primary mission of advising commanders, working with local officials to monitor foreign criminal trials of U.S. service members, providing legal advice and services to military members and their families, and prosecuting or defending military members in court-martials. It also takes investigative and military police away from important tasks such as establishing base security, detecting and providing early warnings about worldwide threats to the military, investigating and resolving criminal matters that disrupt military discipline, and combating risks to military technology and information systems. Consequently, the military may not be the best mechanism for a state to use if they are prosecuting terrorists within a court system.

As a result of the analysis above, I conclude that international humanitarian law, as it is currently written and interpreted, is not always the appropriate legal framework to apply to terrorism or violence perpetuated by terrorists. One final point to consider prior to proposing how the international community might proceed in legally classifying terrorism is neither a benefit nor a negative aspect of either categorization of terrorism. However, it is important for the overall effectiveness of whichever implementation force is used. Regardless of how terrorism is combated, whichever forces are used, the military or law enforcement officers must be adequately trained for their mission. Protocol I allows law enforcement personnel to join armed forces during a conflict. Also, terrorist situations, especially involving military actions that cross national borders, often involve both law enforcement and military action with both roles fulfilled by military forces. Using military forces that are not properly trained for both types of missions or are limited in their authority to fulfill both missions can have devastating consequences. At the same time, using civil police for military action without training and appropriate equipment is equally as dangerous. Some terrorist situations caused by victim-state

responses are similar to various U.N. peacekeeping missions where military troops have faced armed conflict but were acting under a law enforcement mission to maintain rather than establish peace and did not have the means or the authority to protect themselves or civilians when threatened. It is important for the international community to recognize the deadly consequences of these situations. Therefore, regardless of the law ultimately used by the victim-state or international community, clear roles for both law enforcement agencies and military forces must be established.

Conclusions

Terrorism, by its nature, is volatile, secretive, and attacks are rarely repeated the exact same way. Consequently, those individuals, agencies, governments, and organizations responsible for protecting innocent civilians must be flexible, creative, and adapt to the ongoing changes that technology and circumstances allow terrorists. Since terrorist attacks can be so varied, how a terrorist attack is categorized must be as equally varied, allowing for the most appropriate response. Determining what is a credible threat and/or a threat to international peace is a stumbling block in international humanitarian and human rights law. International law needs to provide clearer guidance to both the U.N. and individual states as they fight terrorism due to the different concerns each may have. Currently, the Charter of the United Nations bestows upon the U.N. the responsibility of determining threats to the international peace. However, decisions can be tainted or they may become deadlocked by politics. Some nations may sympathize with the terrorists' motivations, either religious or due to similar grievances, or they may desire to see the same countries targeted by the terrorist attacks. Furthermore, the U.N. may look at the terrorist violence within a bigger picture of world events causing them to give the terrorists leeway or not act upon the event at all. In contrast, individual states always have their

national security and interests first. As individual entities, states are more likely to look at any attack as a provocation or national security threat to be acted upon. Therefore, a definition of terrorism and clearer guidance as to appropriate responses written into international law can provide a consistent framework for the U.N. and individual states to turn to when an attack occurs.

Examples of such guidance are introduced below. However, a proposed definition of terrorism and further ideas regarding international guidance in light of the threat of terrorism will be further elaborated on in Chapter VI, the conclusion of the thesis. Sean Murphy provides an example of criteria to assist in clarifying what aspects of a terrorist attack may lead it to be classified as an armed attack in his article, "Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter." Four of these criteria, specifically written with regards to the terrorist attack on September 11, 2001, are that the magnitude of the incident was comparable to that of a military attack, the United States immediately perceived the incidents as an attack of military scale, this interpretation of the attack was largely accepted by nations worldwide, and precedent was set by previous state practice supporting the interpretation of a terrorist bombing as an armed attack.¹⁰⁵

These qualifying factors can be generalized for all terrorist attacks as follows: the scale of the attack must be similar to that of a military attack; the nation who was attacked must perceive that their security was threatened as an armed, military attack would as well as have this fear confirmed by nations throughout the world; and there must be previously established legal precedent concluding terrorist attacks can constitute armed attacks. Further, it must be recognized that state and nonstate actors can perpetuate such attacks.

¹⁰⁵ Sean D. Murphy, "Terrorism and the Concept Of "Armed Attack" In Article 51 of the U.N. Charter," *Harvard International Law Journal* 43, no. 1 (2002): 47-50.

If these four qualifications are applied to a terrorist attack, the victim-state could immediately determine whether the attack was of such a magnitude to be considered an act of war that could rightfully elicit a military response. The international community must further determine how sustained smaller attacks against a specific target must be before also invoking a military response. This consensus could be useful to a state, such as Israel, that might not suffer one horrendous attack but is continually plagued by smaller attacks. After this determination is made, the victim-state can respond using their domestic law and international human rights law or proceed with military action. If the victim-state does not use military force, the international community must still resolve to garner cooperation from individual nations in order to support the victim-state. However, if military action is taken, the drawbacks discussed above must be reconciled.

In conclusion, it would be advantageous if the international community first created a definition of terrorism and legislation that created distinctions between what terrorist attacks can elicit a military response and what should be dealt with in domestic courts. Second, they must then modify international humanitarian law to ensure it includes terrorism and allows states the ability to effectively counter it. These ideas will be further expounded upon and clarified at the conclusion of the case studies. The following chapter is a case study of the U.S. response to the 11 September 2001 terrorist attacks. This case study will discuss how a victim-state responded to a terrorist attack, the legal framework followed during the response, the international community's support for how the U.S. applied the law, and other legal issues that arose in this real-life scenario.

Table II: Benefits and Disadvantages of Current Classifications

	Terrorism = Crime	Terrorism = War
Benefits: how categorization benefits victim-states responding to terrorism	<ul style="list-style-type: none"> ▪ The required infrastructure is already built to try and prosecute terrorists (e.g. courts, legal personnel). ▪ The infrastructure necessary for increased accountability is further developed and is better experienced. ▪ The minimized use of force is more likely to reduce the overall level of violence. 	<ul style="list-style-type: none"> ▪ Military action can be defensive and offensive. ▪ Standards for accountability and determining when force can be used are more lenient when LOAC is the primary legal instrument used. ▪ In general, the military is better trained and equipped and has more on-the-spot authority to take action against WMDs. ▪ LOAC does not contain all of the restrictions of IHRL which can be beneficial when tactics used or conflicts (domestic versus international law) become blurred. ▪ Military action can provide justice despite suicide tactics. More leniencies exist for preemptory attacks after one initial attack (versus waiting to react until after each individual attack). ▪ The fog and friction inherent in violent conflict are accounted for within LOAC.
Disadvantages: how categorization hinders victim-states responding to terrorism.	<ul style="list-style-type: none"> ▪ Law enforcement is primarily a reactionary mechanism. ▪ Prosecuting cases successfully can give the faulty impression that the threat or danger of terrorism has been addressed and eliminated. ▪ Trials and investigations for criminal purposes are not all-inclusive or addressed for large-scale problems. They are primarily concerned with creating a case to prosecute individuals for specific offenses. ▪ The legal structure varies by nation and therefore does not provide a unanimous response to terrorism by the international community. 	<ul style="list-style-type: none"> ▪ Protections afforded to combatants within LOAC may be counterproductive to a victim-state when fighting terrorists (determining who is a combatant, targeting). ▪ The Geneva Conventions do not thoroughly address how to confront resistance movements; therefore alternatives in an occupied territory are difficult (combatant status). ▪ It is difficult to measure the principle of proportionality when determining response or the principle may unjustly bound the victim-state responding to a terrorist attack. ▪ Terrorist groups are not considered a “party” as used throughout international law to provide guidance during armed conflict. ▪ The military does not have the resources (or their resources could be better utilized) to have their primary mission be investigating and prosecuting terrorists.

CHAPTER IV

TERROR IN THE 21ST CENTURY

On the morning of 11 September 2001, two passenger jets were purposely flown into the Twin Towers of the World Trade Center. This event began the most catastrophic attack on U.S. soil since the 1941 attack on Pearl Harbor which led the country into World War II. In addition to the September 11, 2001 attacks' immediate casualties and destruction, they sparked the beginning of prolonged and intensive domestic reforms and military action in Afghanistan. In order to focus on the interplay between terrorism and international law and study how a victim-state responded to a terrorist attack within the context of domestic and international law written at the time of the attack, the following case study will analyze the September 11, 2001 terrorist attacks on the United States' east coast (commonly referred to as 9/11) to determine whether the United States responded within the scope of international law. For this purpose, the countries involved in both the attack and the reprisal action, the amount of carnage caused by the terrorist and reprisal attacks, the use of criminal and/or military action by the victim-state, and a variety of international responses to both the terrorist attack and the victim-state response will be analyzed. In addition to analysis of the events and reactions that transpired on and immediately following September 11, 2001, this case study provides insight into how a victim-state applied both law enforcement and military legal frameworks and highlights the inadequacies of utilizing both legal systems; it also shows how international law was interpreted and used by a victim-state and how the international community accepted this interpretation or otherwise applied international law to terrorism.

As a result of this analysis I suggest that international law contains ambiguities which are then bypassed by political decisions in place of sound legal decisions. Consequently, clarifying

what terrorism is and in what context international humanitarian law or domestic and human rights law applies and modifying international law to apply to unique aspects of terrorism will augment the international community's ability to better respond to both terrorist attacks and assist victim-states in their response.

New Weapon, New War

The September 11, 2001 attacks occurred between 8:14 and 10:10 in the morning.¹⁰⁶ Nineteen Arab men hijacked four U.S. domestic commercial airliners almost simultaneously except for one plane that was delayed during take-off. The hijackers then crashed one airplane into each of the two towers of the World Trade Center, one plane into the Pentagon, and the fourth plane into a field in Shanksville, Pennsylvania after passengers on board resisted the hijackers. It is suspected that this fourth plane was headed for either the White House or the nation's Capitol. These coordinated, suicide terrorist attacks killed at least 2,762 people including the 19 terrorists.¹⁰⁷ The 2,762 innocent people killed were citizens from more than 40 different countries. Almost five years after the attacks, lives are still being lost due to residual effects, such as cancer and respiratory diseases, from air first responders breathed at ground zero. The total cost in human life may never be accurately known.

In addition to the human carnage, the 110-floor Twin Towers of the World Trade Center, five other buildings at the World Trade Center site, and four subway stations were either destroyed or severely damaged. Numerous other buildings on Manhattan Island were also damaged to some degree. Finally, in Washington D.C., a portion of the Pentagon was destroyed.

¹⁰⁶ *September 11: Chronology of Terror* [on-line] (Cable News Network, 12 September 2001 [cited 11 October 2006]); available from <http://archives.cnn.com/2001/US/09/11/chronology.attack/>; National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*.

¹⁰⁷ Phil Hirschhorn, *New York Reduces 9/11 Death Toll by 40* [on-line] (Cable News Network, 29 October 2003 [cited 11 October 2006]); available from <http://www.cnn.com/2003/US/Northeast/10/29/wtc.deaths/>.

Although many other countries suffered losses during the 9/11 terrorist attacks, the United States was the primary country attacked. However, the loss of life suffered by other countries probably impacted the international response to both the attack and U.S. response that will be analyzed later in this chapter. The terrorists who perpetrated the 9/11 attacks were clearly nonstate actors. Of the nineteen hijackers, fifteen of them were from Saudi Arabia, two were from the United Arab Emirates, one was from Egypt, and one was from Lebanon. The mastermind behind the attack was Khalid Sheikh Mohammed (KSM), a Kuwaiti. He was later captured by Pakistani security officials working with the Central Intelligence Agency (CIA) during the American response to the attack.¹⁰⁸ KSM revealed that he chose his targets in New York and Washington because he thought that targeting the country's economy was the best way to influence U.S. policy.¹⁰⁹ Traditional hijacking, where a plane was used to hold hostages while negotiating the release of prisoners, was developed further to where the planes became weapons because traditional hijacking did not meet al Qaeda's desire to inflict mass casualties.¹¹⁰ All of the people responsible for the 9/11 attack were connected to each other through a common affiliation with al Qaeda.

Al Qaeda: A Brief History

Al Qaeda is an international terrorist organization led by Osama bin Laden, a Saudi national whose citizenship was revoked in 1994. The following background on bin Laden and al Qaeda describes the important role a terrorist organization can have in spreading terrorism and allowing individuals to carry out terrorist attacks. It will also help explain the U.S. response to the 9/11 attacks.

¹⁰⁸ Elaine Shannon and Michael Weisskopf, "Khalid Sheikh Mohammed Names Names," *Time* (2003 [cited 11 October 2006]), <http://www.time.com/time/nation/article/0,8599,436061,00.html>.

¹⁰⁹ National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, 153.

¹¹⁰ *Ibid.*

Bin Laden first became active in militant aspects of Islam during the Soviet invasion of Afghanistan in 1980.¹¹¹ Throughout the 1980s he became a respected commander in war-torn Afghanistan and began to establish contacts, training camps, and other resources for the mujahideen, those who wage the jihad; Islam's holy warriors.¹¹² After the placement of U.S.-led coalition forces on Saudi territory in the early 1990s during and following the first Gulf War, bin Laden became outspoken against their presence. Although initially remaining loyal to the Saudi government, he went into exile in Sudan with his family in 1991 after the Saudi government, out of fear of his popularity and criticism of the government's actions, pressured him to halt his criticism of the government and threatened his extended family and their business.¹¹³ On 19 May 1996, bin Laden left his primary base of operations in Sudan and traveled to Afghanistan.¹¹⁴ Although initially maintaining contacts with a variety of political and religious leaders in Afghanistan, bin Laden reinforced his ties with the Taliban in September 1996.¹¹⁵

The Taliban seized the capital of Afghanistan, Kabul, in 1996 after years of fighting for control among different factions of the mujahideen. By 2001 they controlled approximately 95% of the country and desired to build a pure Islamic state. Their main opposition was the Northern Alliance, who helped provide intelligence to U.S. forces after the 9/11 attacks. Due to their repressive regime, which restricted many fundamental human rights among many other things, the U.N. did not recognize the Taliban as the official leader of Afghanistan. Only three states,

¹¹¹ Yossef Bodansky, *Bin Laden: The Man Who Declared War on America* (New York: Prima Publishing, 2001), 10.

¹¹² *Ibid.*, 408.

¹¹³ *Ibid.*, 30-32.

¹¹⁴ *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, 63.

¹¹⁵ *Ibid.*, 65.

Saudi Arabia, Pakistan, and the United Arab Emirates diplomatically recognized the Taliban while they were in power.¹¹⁶

The illegitimacy of the Taliban's control of Afghanistan, as perceived by most the international community, became an important factor in determining international support for the use of force within Afghanistan after 9/11. In contrast to an action which would clearly impinge on a sovereign nation, politically, the sovereignty of Afghanistan was not a key factor for the international community. According to Mortimer Sellers, in his review of Gerry Simpson's *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order*, "The success of the international community has depended upon recognizing the legal significance of hegemonic power, and upon states acting together to condemn the most egregious violations of universal standards of legitimate governance."¹¹⁷ Therefore, it can be concluded that on paper, international law accords each state equal sovereignty, but in practice, those states which have the military and economic power required to uphold the law can legitimize their actions in the name of international peace and security. Sellers also expounds upon Simpson's discussion of this larger theory and summarizes it by writing, "When great powers punish outlaws, the rules of state equality give way, so that the ensuing war's legitimacy depends less upon the general rules of sovereignty than on the nature of the adversaries involved."¹¹⁸

The Taliban allowed bin Laden freedom in pursuing his terrorist operations to include freedom of movement within Afghanistan as well as entering and exiting the country, importing vehicles and weapons, using government license plates, operation and access to training camps,

¹¹⁶ Encyclopedia Britannica. *Afghanistan* (Encyclopedia Britannica Online, 2006 [cited 13 December 2006]); available from <http://search.eb.com/eb/article-226141>.

¹¹⁷ Mortimer Sellers, review of *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* by Gerry Simpson, *The American Journal of International Law* 99, no. 4: 950.

¹¹⁸ *Ibid.*, 953.

and using the state owned airline to courier money into the country.¹¹⁹ “U.S. intelligence estimates put the total number of fighters who underwent instruction in bin Laden-supported camps in Afghanistan from 1996 through 9/11 at 10,000 to 20,000.”¹²⁰

In February 1998, Osama bin Laden, Ayman al Zawahiri, an Egyptian, and three other men had a fatwa (interpretation of Islamic law by a respected Islamic authority) published in a London newspaper. It “called for the murder of any American, anywhere on earth, as the ‘individual duty for every Muslim who can do it in any country in which it is possible to do it.’”¹²¹ Soon after, in April 1998, bin Laden and Abdullah Azzam, a Palestinian cleric, established al Qaeda. This organization was a foundation which served as a general headquarters for future jihad based off of the success of their operations in Afghanistan against the Soviet Union.¹²²

In 1996 KSM first met with bin Laden to discuss a variety of ideas he had for terrorist attacks. His idea to use planes as weapons became the foundation for the 9/11 attacks.¹²³ At this time he had not yet pledged his allegiance to bin Laden. However, in late 1998 or early 1999 bin Laden gave a green light for the 9/11 attacks at which time KSM became a member of al Qaeda and the chief manager of the 9/11 operation.¹²⁴

Initial International Reaction and Support

Immediately following the 9/11 attacks, international horror and condemnation was readily apparent. In addition to governments worldwide denouncing the attacks, many countries, such as the United Kingdom, France, Germany, Uganda, Belarus, and India, introduced “anti-

¹¹⁹ *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, 66.

¹²⁰ *Ibid.*, 67.

¹²¹ *Ibid.*, 47.

¹²² *Ibid.*, 56.

¹²³ *Ibid.*, 148-9.

¹²⁴ *Ibid.*, 150, 45.

terrorism” legislation and increased law enforcement actions against individuals suspected of having al Qaeda ties.¹²⁵ Furthermore, many countries arrested terrorist suspects in an effort to break up the multitude of terrorist cells that had been established throughout the world. On 12 September 2001, the United Nations Security Council unanimously adopted Resolution 1368 condemning the terrorist attacks on the United States and calling on all States to bring the perpetrators to justice. In this resolution, the Security Council called any act of international terrorism a threat to international peace and security and recognized “the inherent right of individual or collective self-defense in accordance with the Charter.”¹²⁶

Furthermore, within 24 hours of the attacks, the North Atlantic Treaty Organization (NATO) invoked Article 5 of the Washington Treaty for the first time since the inception of the organization. The Washington Treaty, signed in Washington D.C. on 4 April 1949, is the basic treaty of NATO. Article 5 is its collective defense statement in which the States party to the treaty agree that an attack against one or more of the states is to be considered an attack against them all allowing them to exercise the right of individual or collective self-defense.¹²⁷

¹²⁵ *Fact Sheet: Fight Against International Terrorism – Prevention and Stability* [on-line] (German Embassy Washington, D.C., 15 November 2005 (cited 19 December 2006)); available from http://www.germany.info/relaunch/info/archives/background/anti_terror_factsheet.pdf; *World Anti-Terrorism Laws* [on-line] (Jurist: The Legal Education Network, University of Pittsburgh School of Law (cited 19 December 2006)); available from <http://jurist.law.pitt.edu/terrorism/terrorism3a.htm>.; Judge S. B. Bossa and Titus Mulindwa, *The Anti-Terrorism Act, 2002 (Uganda): Human Rights Concerns and Implications* [on-line] (Counter Terrorism and Human Rights – Network News, 15 September 2004 (cited 19 December 2006)); available from http://www.icj.org/news.php3?id_article=3517&lang=en.; Human Rights First, “Chapter 5: The United States and International Human Rights Protection,” in *A Year of Loss 09/01-09/02* (cited 19 December 2006); available from http://www.humanrightsfirst.org/us_law/loss/loss_ch5a.htm.

¹²⁶ *Resolution 1368* [on-line] (United Nations, 12 September 2001 [cited 24 September 2006]); available from <http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>.

¹²⁷ *The North Atlantic Treaty* [on-line] (North Atlantic Treaty Organisation, [cited 24 September 2006]); available from <http://www.nato.int/docu/basic/txt/treaty.htm>.; *NATO and the Fight against Terrorism* [on-line] (North Atlantic Treaty Organisation, 19 September 2006 [cited 28 February 2006]); available from <http://www.nato.int/issues/terrorism/index.html>.

Responding to Terrorism

The United States' immediate response to the 9/11 attacks occurred while the attacks were taking place but only consisted of preventive measures. Federal Aviation Administration facilities ordered all aircraft to land at the nearest airport, and military jets were scrambled to counter further threats from the air. However, due to miscommunication, the military jets were alerted to a phantom aircraft and were not flying in a location to intercept any of the hijacked airliners.¹²⁸

After the attacks ended, the United States took a variety of legally acceptable actions including: an investigation of the people and phenomenon behind the attacks in addition to the readiness level of the United States in regards to terrorism, arresting individuals on immigration violations that U.S. officials gained knowledge of during the post 9/11 investigation, diplomatic action that required specific concessions from states supporting al Qaeda and measures to build coalition support, and taking military action in Afghanistan. Although the current conflict in Iraq is frequently referred to as an extension of the "War on Terror" by the media and current Presidential Administration, President George Bush did not order the invasion of Iraq until March 2003. In fact, when some of America's senior leadership proposed targeting Iraq and Afghanistan simultaneously, President Bush decided against this action. In addition to military action in Iraq not being an immediate reaction to the 9/11 attacks, the United States was already militarily active in Iraq, maintaining no-fly zones and closely observing U.N. interaction with Saddam Hussein regarding Iraq's weapons programs.

On the eve of the 2003 invasion of Iraq, President Bush addressed the nation from the Oval Office. Announcing impending military action to the people, he vowed to disarm Iraq of

¹²⁸ *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, 29.

weapons of mass destruction, free its people, and defend the world from grave danger.¹²⁹ Throughout the entire address he did not mention terrorism or the 9/11 attacks. In two other press releases at the beginning of the war, President Bush also discussed his decision to take military action in Iraq. On 17 March 2003, the White House released a global message. In this release, the administration discussed Iraq's refusal to comply with the U.N. and the need for Iraq's disarmament or the use of military force. Terrorism is mentioned in the release. The administration accused Iraq of aiding terrorism, Iraq's concealment and use of weapons of mass destruction, its history of reckless aggression, and three U.N. Resolutions, 678, 687, and 1441, which demanded Iraq to disarm and authorized force to compel Iraq to disarm.¹³⁰ The second press release was a radio address by President Bush on 22 March 2003. He declared that the United States' mission was to disarm Iraq of WMDs, end Saddam Hussein's support for terrorism, and free the Iraqi people.¹³¹ Although these two releases do mention terrorism, they do not reference the 11 September 2001 attacks, and President Bush's primary emphasis is on weapons of mass destruction. Successful entry into and fighting in war requires military justification and public support. The still recent emotion and loss of 9/11 helped to provide public support for Operation *Iraqi Freedom*. However, there is a distinction between why the government invaded Iraq and how they advocated the war to the public to gain support. Therefore, since the motivations for invading Iraq were not solely in response to the 9/11 attacks, the Iraqi conflict will not be discussed in this case study.

¹²⁹ *President Bush Addresses the Nation* [on-line] (Office of the Press Secretary, 19 March 2003 [cited 9 November 2006]); available from <http://www.whitehouse.gov/news/releases/2003/03/20030319-17.html>.

¹³⁰ *Iraq Denial and Deception: Global Message* [on-line] (Office of the Press Secretary, 17 March 2003 [cited 9 November 2006]); available from <http://www.whitehouse.gov/infocus/Iraq/news/20030317-10.html>.

¹³¹ *President Discusses Beginning of Operation Iraqi Freedom* [on-line] (Office of the Press Secretary, 22 March 2003 [cited 9 November 2006]); available from <http://www.whitehouse.gov/news/releases/2003/03/20030322.html>.

Throughout the weekend following the attacks, America's leadership reviewed diplomatic and military contingency plans.¹³² Although President Bush and his Cabinet officials realized the worldwide nature of terrorism and the possibility of future U.S. action in other countries such as Iraq or Iran, the initial response to the 9/11 attacks focused on al Qaeda, the Taliban, and Afghanistan.¹³³ On 21 September 2001 and 2 October 2001, during meetings with General Tommy Franks, the Central Command Commander, President Bush approved military action against Afghanistan.¹³⁴ The four phase operation was titled *Operation Enduring Freedom*.

The first phase took place in the initial few weeks following 11 September 2001. Augmented by international sympathy for the United States, the American government and its allies were able to quickly move forces into the region and set up bases of operation throughout Afghanistan's neighboring countries. By April 2002, more than sixty-eight nations were helping the U.S., and twenty-seven of them had representatives at Central Command Headquarters.¹³⁵ Twenty different nations provided more than 16,000 troops, 6,600 of them employed directly in Afghanistan. In spring 2002, coalition nations also provided forty-seven ships and eighty-nine aircraft. While not all countries provided military forces, many countries provided resources, basing and staging, or allowed overflight of their airspace.¹³⁶

During the second phase, CIA and Special Forces attacks and air strikes from land-based and carrier-based fighter and bomber planes and Tomahawk cruise missiles were launched from

¹³² *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, 332.

¹³³ *Ibid.*, 336.

¹³⁴ *Ibid.*, 337.

¹³⁵ *Operation Enduring Freedom - Afghanistan* [on-line] (GlobalSecurity.org, [cited 24 September 2006]); available from <http://www.globalsecurity.org/military/ops/enduring-freedom.htm>; Commanding General General Tommy Franks, U.S. Central Command, *Operation Enduring Freedom* [on-line] (U.S. Department of State, 11 April 2002 [cited 24 September 2006]); available from <http://fpc.state.gov/fpc/9283.htm>.

¹³⁶ General Tommy Franks, *Operation Enduring Freedom*.

both U.S. and British ships and submarines to eliminate key al Qaeda and Taliban targets.¹³⁷

These attacks began on 7 October 2001. The phase one basing and establishment of infrastructure was simultaneously being worked and was completed by the end of October.

Phase three included the use of total force. Ground troops were deployed into Afghanistan with the following goals expressed by President Bush and Secretary of Defense Donald Rumsfeld: destroy terrorist training camps and infrastructure within Afghanistan, capture al Qaeda leaders, cease terrorist activities in Afghanistan and deny terrorists future sanctuary, acquire intelligence about al Qaeda and Taliban resources, oust the Taliban regime, and facilitate the delivery of humanitarian supplies to the Afghan people. According to the 16 October 2001 campaign objectives of Operation *Veritas*, the British military operation in Afghanistan, Britain's goals were similar to U.S. goals but also established the long term goals of preventing further attacks, ending terrorism, deterring the state sponsorship of terrorism, and reintegrating Afghanistan into the international community.¹³⁸

By early December 2001 all major Afghan cities were under coalition control, and a new leader was appointed chairman of an interim administration, ending the Taliban's rule in Afghanistan.¹³⁹ Throughout phase three, coalition forces continued to target al Qaeda hide-outs throughout Afghanistan. According to the 9/11 Commission Report, within two months of the start of combat operations, one quarter of the Taliban and al Qaeda leadership was either captured or killed.¹⁴⁰ Last, phase four consisted of, and remains today, security and stability operations. As of 9 November 2006, phase four is recurrently impeded by continued violence in

¹³⁷ *Operation Enduring Freedom – Afghanistan*.

¹³⁸ *Ibid.*

¹³⁹ *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, 337-8.

¹⁴⁰ *Ibid.*, 338.

Afghanistan as remnants of the Taliban rally for resurgence.¹⁴¹ More than 18,500 American troops remain in Afghanistan in addition to 1,700 coalition forces.¹⁴²

The Department of Defense confirmed that between October 7, 2001 and November 4, 2006 there were 344 military deaths attributed to Operation *Enduring Freedom*.¹⁴³ The British Government confirmed forty-one deaths related to operations in Afghanistan since November 2001. Nineteen of these fatalities are currently attributed to hostile action.¹⁴⁴ Finding an accurate count of civilian casualties and enemy casualties is virtually impossible. Reports estimate a range from 500 to 3,000 with Mr. Carl Conetta of the Project on Defense Alternatives estimating that more than 3,000 civilian deaths are attributed to both aerial bombardment and the nation's refugee and famine crises. He estimates that between 1,000 and 1,300 of these 3,000 died as a direct result of the United States' bombing campaign.¹⁴⁵

Also according to the Project on Defense Alternatives, at the beginning of 2002, between 3,000 and 4,000 Taliban coalition troops had been killed. The term coalition refers to Taliban and al Qaeda present in Afghanistan prior to Operation *Enduring Freedom* and fighters brought to Afghanistan via the al Qaeda network once Afghanistan was invaded.¹⁴⁶ Despite a slow down in major military operations in Afghanistan, pockets of violence continue to flare. Consequently, it can be assumed that in the past four years since these numbers were collected more civilians and enemy combatants have been killed. Carl Conetta, author of "Strange Victory" from which

¹⁴¹ *NATO Kills 28 Taliban Suspects* [on-line] (Cable News Network, 9 November 2006 [cited 10 November 2006]); available from <http://www.cnn.com/2006/WORLD/asiapcf/11/09/afghan.nato.ap/index.html>.

¹⁴² *Information* [on-line] (Combined Force Command - Afghanistan, 9 March 2006 [cited 10 November 2006]); available from <http://www.cfc-a.centcom.mil/Information/Coalition%20forces%20in%20Afghanistan.htm>.

¹⁴³ *Operation Enduring Freedom Military Deaths* [on-line] (Department of Defense, 4 November 2006 [cited 10 November 2006]); available from <http://siadapp.dior.whs.mil/personnel/CASUALTY/OEFDEATHS.pdf>.

¹⁴⁴ *Defence Fact Sheet for Operations in Afghanistan: British Fatalities* [on-line] (United Kingdom, 19 October 2006 [cited 10 November 2006]); available from <http://www.mod.uk/DefenceInternet/FactSheets/OperationsFactsheets/OperationsInAfghanistanBritishFatalities.htm>

¹⁴⁵ Carl Conetta, *Strange Victory: A Critical Appraisal of Operation Enduring Freedom and the Afghanistan War* [on-line] (Commonwealth Institute, 30 January 2002 [cited 20 October 2006]); available from <http://www.comw.org/pda/0201strangevic.pdf>.7.

¹⁴⁶ *Ibid.*, 4.

these numbers were taken, writes that official U.S. government estimates of the numbers of foreign military or civilian personnel killed in the war are not being given to the public.

However, he gathered information from a variety of news reports and Pentagon statements in order to provide as accurate of an estimate as possible.¹⁴⁷

The International Response to U.S. Action

The international community's response to America's reprisal actions in Afghanistan was overwhelmingly supportive. Not only were there U.S.-led coalition forces in the country but also the United Nations Assistance Mission to Afghanistan and the International Security Assistance Force. All remain there today. As is noted above, multiple countries not only vocally supported the United States but also sent troops or resources to aid directly in the U.S. response to 9/11. Although the majority of the response to Operation *Enduring Freedom* has been positive, two aspects of the international response have been negative.

First, many Muslims worldwide did not and do not agree with the positioning of U.S. troops in traditionally Islamic nations. It has been difficult for nations with large Muslim populations to support the U.S. while also maintaining domestic control. Demonstrations in Pakistan, Indonesia, the Gaza Strip, Iraq, Oman, and throughout other Persian Gulf States reflect the separation between government policies and many individuals' perceptions and feelings toward the United States.¹⁴⁸ The second negative response highlights two separate aspects of responding legally to terrorism. First, the terrorist attack must warrant a response in order for a nation to legitimately and legally render a response. Second, the response must then be executed within international law. The following negative response is primarily concerned with the execution of the United States' response.

¹⁴⁷ Ibid., 63-64.

¹⁴⁸ Public Broadcasting System, "Holy War?," in *News Hour*, ed. Jim Lehrer (2001).

Human rights organizations negatively reported on many U.S. actions during Operation *Enduring Freedom*. Although these organizations do not speak on behalf of the governments in the international community, they do try to elicit support and bring attention to the human rights status of individuals that make up the international community. Therefore, it is important to understand their criticisms of U.S. actions in its response to the 9/11 attacks and acknowledge the media attention this generates for a worldwide audience. Both Human Rights Watch and Amnesty International have focused on two issues for which they condemn U.S. application of international law: civilian casualties during bombing campaigns and the mistreatment of detainees.

Although Human Rights Watch initially found that the United States generally took necessary precautions prior to targeting locations in Afghanistan as well as using precision-guided munitions to minimize civilian casualties, they also noted incidents in which many civilians were killed due to mistargeting, technical error or human error.¹⁴⁹ As discussed in Chapter II, the United States is obligated under international law to follow the principles of proportionality, discrimination, humanity, chivalry, and necessity. Although these principles strive to eliminate civilian casualties, the fog and friction of war and technical and human error cannot always be avoided and almost always inhibit the desired outcome of zero innocent civilian casualties. Human Rights Watch recognized in their report that “the Taliban and al Qaeda bore major responsibility for civilian harm during the air war.”¹⁵⁰ Their actions, such as using civilians as human shields, reflect the difference between accidental civilian casualties and flagrant violations of international humanitarian law which directly caused the killing of civilians.

¹⁴⁹ *World Report 2003: Afghanistan* [on-line] (Human Rights Watch, [cited 12 October 2006]); available from <http://hrw.org/wr2k3/asia1.html>.

¹⁵⁰ *Ibid.*

The second issue involves the confinement and treatment of detainees by the United States. Human Rights Watch accused the U.S. of arbitrarily detaining civilians and using excessive force while arresting non-combatants.¹⁵¹ Although Amnesty International wrote that conditions improved in the second half of 2005, they also stressed the importance of ensuring that U.N. human rights experts, the ICRC, and family members have access to the remaining detainees.¹⁵² These reports have influenced much of the international community to have the opinion that the United States is not adequately following international humanitarian law pertaining to detainees in Afghanistan and especially at Guantanamo Bay, Cuba. This publicity has hindered international opinion towards the U.S. response to 9/11.

Moreover, in February 2006, members of a Working Group on Arbitrary Detention of the U.N. Commission on Human Rights specifically called for the immediate closure of the Guantanamo Bay detention center and emphasized the need for detainees to either be tried in court or released.¹⁵³ On 6 July 2006 the committee once again affirmed their position that the center be closed and appealed to the international community to aid in their efforts. A United Nations' public release reflects the growing opinion of the international community against the United States' use of the Guantanamo Naval Base citing the Secretary-General of the United Nations, the High Commissioner for Human Rights, the European Parliament, and the European Union Presidency's calls for its closure.¹⁵⁴ Further controversy regarding detainees held at the

¹⁵¹ *World Report 2005* [on-line] (Human Rights Watch, [cited 12 October 2006]); available from <http://hrw.org/wr2k5/wr2005.pdf>.245.

¹⁵² *Report 2006 Asia-Pacific: Afghanistan* [on-line] (Amnesty International, [cited 12 October 2006]); available from <http://web.amnesty.org/report2006/afg-summary-eng#6>.

¹⁵³ Greg Sampson, *US Dismisses UN Call to Close Guantanamo Bay Prison Camp* [on-line] (Jurist: The Legal Education Network, University of Pittsburgh School of Law, 16 February 2006 [cited 12 October 2006]); available from <http://jurist.law.pitt.edu/paperchase/2006/02/us-dismisses-un-call-to-close.php>.

¹⁵⁴ *UN Rights Experts Ask International Community to Aid with Expedient Closure of Guantanamo Detention Centre* [on-line] (The United Nations Office at Geneva, 6 July 2006 [cited 12 October 2006]); available from

Guantanamo Bay detention center will be discussed within the military analysis of this case study.

The two issues noted above are important issues for the United States to consider and remedy while operations continue in Afghanistan. Human Rights Watch positively reported that human rights have immensely improved throughout Afghanistan. The organization wrote in their 2002 report that, “for the first time in over twenty years, Afghans ha[ve] realistic hopes for stable peace, legitimate governance, increased development assistance, and new respect for human rights norms.”¹⁵⁵ Furthermore, diplomatic relations were restored between Afghanistan and most nations, the United Nations has reopened agencies in Afghanistan, and developmental organizations are allowed access into Afghanistan for the first time since the Taliban took control of the nation.¹⁵⁶ Despite this progress for both the country and its people, the United States is still extremely involved in the country both in fighting continued Taliban violence and in state-building operations. It is imperative for the United States to adhere to international humanitarian law in order to continue fighting terrorism with the international community’s support.

Law Enforcement Action versus Military Action

America’s response to the 9/11 terrorist attacks included both law enforcement and military action. Further analysis of law enforcement action will show that the United States has specified its domestic law to better root-out and punish terrorism and has increased its arrests and convictions of suspected terrorists within the confines of international law. Moreover, U.S. military action continues in Afghanistan with minimal disagreement from the international community. However, I argue that although most U.S. actions were acceptable to the

[http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/4BB88D24B7A045FEC12571A30056E42A?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/4BB88D24B7A045FEC12571A30056E42A?OpenDocument).

¹⁵⁵ *World Report 2003: Afghanistan.*

¹⁵⁶ *Ibid.*

international community, the U.S. did not always entirely adhere to international law. This lack of adherence is two pronged. On one hand, provisions may exist in international law, such as allowing the U.N. to take control of a conflict after the initial security threat has passed, that are not followed. On the other hand, international law may not provide clear guidance for states to follow. For example, it could be beneficial to detail the treatment of captured nonstate actors actively participating in violent warfare similarly to how international law accounts for the treatment of prisoners of war. Consequently, clarification and/or modifications to international law in regards to terrorism may be required to enable victim-states to effectively respond to terrorist attacks within the scope of international law with the legally justified approval of the international community.

Criminal Law Enforcement Analysis

The criminal or law enforcement action utilized by the United States included arresting aliens within the United States if they were determined to have terrorist links and taking action to cut off terrorists from financial support. Both of these actions were augmented by the passing of the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) governing future U.S. actions against terrorism. The PATRIOT Act is a legislative action but has important ramifications for law enforcement's ability to take criminal action against terrorists. Although many aspects of the PATRIOT Act reflect the United States' ability to use domestic legislation to further protect itself from terrorism, this section reflects the limitations that still exist in the U.S. when responding to terrorism. The Act increases intelligence gathering and regulatory powers in hopes of preventing terrorist access to the U.S. but continues to have its most powerful impact against terrorists themselves via law that punishes and sentences terrorists after crimes have already been

committed. Ensuring that individuals who perpetuate terrorist actions are punished is important. Historically, punishment has not always occurred which has encouraged the use of terrorist tactics. However, as terrorism becomes more deadly, nation-states are working harder to prevent attacks. International cooperation remains vital for the U.S. to gain access to many threatening terrorists in order to prevent future terrorist attacks and render punishment when applicable.

The USA PATRIOT Act was signed into law on 26 October 2001, with applicable portions of the Act renewed by Congress in 2005. The PATRIOT Act increased U.S. security against terrorism in six ways. First, the Act allows more authority for the tracking and interception of communications for law enforcement and foreign intelligence gathering purposes. Second, it gives the Secretary of the Treasury regulatory “powers to combat corruption of U.S. financial institutions for foreign money laundering purposes.”¹⁵⁷ Third, it tightens restrictions on America’s borders in hopes of preventing new terrorists from entering the U.S. and allowing for the detention and removal of those already inside the country. Fourth, the Act created new crimes where gaps existed in previous law. For example, terrorist attacks on mass transportation facilities, biological weapon offenses, harboring terrorists, providing terrorists material support, and fraudulent charitable solicitation are now crimes that can be prosecuted.¹⁵⁸ Fifth, it increases maximum penalties for acts of terrorism and crimes that terrorists commit. For example, the penalty for life-threatening arson or arson of a dwelling within a federal enclave was increased from twenty years to any term of years or life.¹⁵⁹ Last, the Act increases federal law enforcement agencies’ capacity to combat terrorism. Examples include: increasing funding authorization for an FBI technical support center, providing terrorism prevention and antiterrorism training grants

¹⁵⁷ Charles Doyle, *The USA PATRIOT Act: A Legal Analysis* [on-line] (The Library of Congress, 15 April 2002 [cited 12 October 2006]); available from <http://www.fas.org/irp/crs/RL31377.pdf>.

¹⁵⁸ *Ibid.*, 57.

¹⁵⁹ *Ibid.*, 61.

to first responders, and giving money to develop and support regional computer forensic laboratories.¹⁶⁰

An important distinction to be made about the PATRIOT Act is its scope of application. The PATRIOT Act governs actions within the U.S. with two exceptions. The Act expands previously used definitions of financial institutions and computers that fall underneath the jurisdiction of U.S. laws to include financial institutions and computers located outside of the United States that are being used to facilitate terrorism. It allows increased criminal penalties for people arrested within the U.S. using these banks or computers outside of the U.S.¹⁶¹ The Act's primary purpose was to revise U.S. law in regards to gathering intelligence, the structure of federal agencies, and the way the government prosecutes suspected terrorists and other criminals in an effort to bolster law enforcement efforts to curb the threat of terrorism. Apprehension of "detainees" outside of the U.S. and other U.S. actions in foreign countries still requires international cooperation and the application of treaties or agreements with individual countries.

The PATRIOT Act was passed through both the House of Representatives (357-66) and Senate (98-1) with an overwhelming majority in 2001.¹⁶² However, support for its stricter measures had lessened when it was renewed in 2005. The House renewed it with a 257-171 vote, and the Senate renewed it by an even smaller margin of 52-47.¹⁶³ Although some domestic

¹⁶⁰ Ibid., 77.

¹⁶¹ Patrick Leahy, *The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, H.R. 3162 Section-by-Section Analysis* [on-line] ([cited 12 October 2006]); available from <http://leahy.senate.gov/press/200110/102401a.html>.; *The USA Patriot Act* [on-line] (Public Broadcasting Service, 27 March 2006 [cited 12 October 2006]); available from <http://www.pbs.org/newshour/bb/terrorism/homeland/patriotact.html>.

¹⁶² *Highlights of the USA PATRIOT Act* [on-line] (Department of Justice, [cited 12 October 2006]); available from <http://www.lifeandliberty.gov/highlights.htm>.

¹⁶³ *Final Vote Results for Roll Call 414* [on-line] (United States House of Representatives, 21 July 2005 [cited 12 October 2006]); available from <http://clerk.house.gov/evs/2005/roll414.xml>.; *U.S. Senate Roll Call Votes 109th Congress - 1st Session* [on-line] (United States Senate, 16 December 2005 [cited 12 October 2006]); available from http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00358.

dispute has existed concerning infringement on the rights of the American people, there has not been international controversy regarding the PATRIOT Act since it does not violate human rights standards established within international law.

One of the most visible effects of addressing terrorism via law enforcement is the cases that have been prosecuted against terrorists. Information-sharing authorized by the PATRIOT Act was used in three of the four cases mentioned below, making the prosecution's cases stronger for trial. Although the cases could have been tried in criminal court prior to the passing of the PATRIOT Act, the Act did provide new measures from which some of the specific charges and longer sentences were taken. Cases against suspected terrorists can be broken up into two categories: those tried in civilian criminal courts and those tried in military court-martials (therefore a military action governed by international humanitarian law and the Uniformed Code of Military Justice). In an effort to maintain the distinction between law enforcement action and military action, military court-martials and controversy regarding military tribunals will be discussed with other military actions beginning on page 119. Four cases tried in civilian criminal courts have garnered national attention: those of Zacarias Moussaoui, a French national; Richard Reid, a British citizen; and John Walker Lindh and Jose Padilla, both U.S. citizens. Although there are legal details unique to each of these cases, I intend only to review the final legal action or results of conviction in the following paragraphs.

Moussaoui's trial ended on 4 May 2006 with a sentence of life in prison without the possibility of parole. He was convicted for his role in the 9/11 attacks although he was already in custody when the attacks occurred. After being arrested on immigration charges in August 2001, he was formally indicted in December 2001 for various counts of conspiracy regarding

terrorism and murder.¹⁶⁴ According to a statement by the French Justice Minister, Pascal Clement, France acknowledged the verdict in Moussaoui's case and that it had been determined in an independent court in a sovereign nation.¹⁶⁵ There has not been negative international opinion regarding the U.S. charges or verdict against Moussaoui. Moussaoui is the only individual listed in this analysis that played some kind of role in the 9/11 attacks as well as the only 9/11 terrorist to have been tried and prosecuted.

In December 2001, Richard Reid attempted to blow up a plane with explosives placed in his shoe. After pleading guilty in 2002, he was sentenced to life in prison, a sentence he is serving in Boston, Massachusetts. The U.K. has accepted this criminal trial and its verdict. John Walker Lindh and Jose Padilla are both U.S. citizens. Lindh was arrested while fighting in Afghanistan and stood trial in the U.S. in 2002. He was sentenced to twenty years in prison. Padilla was arrested in 2002 but was not indicted until November 2005. He is charged with conspiring to murder, maim, and kidnap Americans overseas. His case is expected to go before a judge in January 2007.¹⁶⁶ Zacarias Moussaoui, Richard Reid, and Jose Padilla were all arrested within the U.S., negating the need for the U.S. to operate within another country in order to detain them. John Walker Lindh was arrested after a prison uprising in Afghanistan. He was medically treated and detained by military forces and was returned to the U.S. to face charges, a legal action for the U.S. since he is an American citizen. Under these circumstances, legal provisions existed to prosecute these suspected terrorists. Furthermore, the international community accepted the United States' trial process and its outcomes.

¹⁶⁴ Alexandra Silver, *Prosecuting Terrorists after September 11* [on-line] (Council of Foreign Relations, 27 March 2006 [cited 13 October 2006]); available from <http://www.cfr.org/publication/10246/>.

¹⁶⁵ *In Quotes: Verdict Reaction* [on-line] (British Broadcasting Corporation, 3 May 2006 [cited 12 October 2006]); available from <http://news.bbc.co.uk/2/hi/americas/4970976.stm>.

¹⁶⁶ Mark Sherman, *Dirty Bomb Suspect Jose Padilla Indicted* [on-line] (ABC News, 22 November 2005 [cited 12 October 2006]); available from <http://abcnews.go.com/Politics/wireStory?id=1337222>.; Associated Press, *Lawyers: Images Show Harsh Treatment of Padilla* [on-line] (Cable News Network, 4 December 2006 [cited 4 December 2006]); available from <http://www.cnn.com/2006/LAW/12/04/padilla.ap/index.html>.

These cases are unique because they relate directly to the United States' "War on Terror." In each case, the U.S. had the jurisdiction to detain these individuals. However, only Jose Padilla's case reflects a departure from standard domestic law. Although Richard Reid attempted to persuade the court that he should be treated as an enemy combatant, the prosecution's case allowed the court to legally try him as a criminal suspect. Jose Padilla, on the other hand, is being detained as an enemy combatant to be prosecuted in a federal court.

This case differs from the others in that he is not accused of breaking the law, but of being a threat to the law by "providing and conspiring to provide material support to terrorists, and conspiring to murder individuals who are overseas."¹⁶⁷ Moreover, this case reflects the confusion and potential abuse of power victim-states might face due to vague laws and the blurred application of both criminal law and international humanitarian law. U.S. courts have been ill at ease in defending their authority against constitutional challenges levied by Padilla. "The District Court agreed that the government possesses the authority to detain Padilla...but the Court of Appeals reversed the decision. In the Supreme Court decision of June 28, 2004, the material question of whether the Government has the authority to detain Padilla was not resolved because the Supreme Court held that the *habeas* petition was filed in the wrong jurisdiction."¹⁶⁸ The Supreme Court ruled that since Padilla was being held in a military brig in South Carolina, his custodian was the brig's commander, Commander Marr, not Defense Secretary Rumsfeld. Consequently, Padilla had to re-file his petition in South Carolina rather than in New York.¹⁶⁹

On 9 September 2005, three federal appellate court judges maintained that the government could

¹⁶⁷ Christiane Wilke, "War V. Justice: Terrorism Cases, Enemy Combatants, and Political Justice in U.S. Courts," *Politics and Society* 33, no. 4 (2005).; Alberto R. Gonzales, *Prepared Remarks of Attorney General Alberto R. Gonzales at the Press Conference Regarding the Indictment of Jose Padilla* [on-line] (22 November 2005 [cited 12 October 2005]); available from http://www.usdoj.gov/ag/speeches/2005/ag_speech_051122.html.

¹⁶⁸ Wilke, "War V. Justice: Terrorism Cases, Enemy Combatants, and Political Justice in U.S. Courts," 643.

¹⁶⁹ Robert A. Levy, *What the Supreme Court Really Said About Jose Padilla* [on-line] (CATO Institute, 9 August 2004 [cited 12 October 2006]); available from http://www.cato.org/pub_display.php?pub_id=2777.

continue to hold Padilla without charging him.¹⁷⁰ On 17 November 2005, Padilla was formally indicted by a federal grand jury. At the beginning of January he was transferred from military custody to Miami, Florida where he will stand trial.

This latest development provides an example of possible legal loopholes that exist allowing for lengthier detainment of suspects before trial as well as exemplifies potential problems that might arise due to a lack of clear guidance regarding the classification of terrorists and terrorist acts as discussed in Chapter III. Due to the varying degrees of terrorist threats and attacks and the different motivations for committing crime versus terrorism, situations similar to Padilla's case could continue to occur if terrorism is not better defined and addressed in international and domestic law. For example, due to political, public, and judicial pressure, Padilla was formally charged and removed from military custody. However, Padilla remains classified as an enemy combatant. The phrase "enemy combatant" was used in "a 1942 Supreme Court case concerning German saboteurs caught in the United States."¹⁷¹ However, the term is vague, not defined in international law and remains unclear in U.S. domestic law. Consequently, "enemy combatant" does not coincide with the term legal combatant as discussed in Chapter II. His classification as a terrorist can be simultaneous with that of an enemy combatant. In this case, both classifications can result in Padilla being an unlawful combatant if found guilty. Therefore, Padilla's continued classification as an enemy combatant has two ramifications. First, he is not a privileged prisoner of war but should still receive fundamental rights while in custody. Second, he can be prosecuted under domestic law, versus by a military commission, the route currently being taken. However, since the law regarding this classification remains murky, as

¹⁷⁰ Gene Healy, *Jose Padilla: Constitutional Unperson?* [on-line] (CATO Institute, 25 September 2005 [cited 12 October 2006]); available from http://www.cato.org/pub_display.php?pub_id=5043.

¹⁷¹ Aziz Huq, *We're All Enemy Combatants Now* [on-line] (The Institute of America's Future, 2 August 2006 [cited 12 October 2006]); available from http://www.tompaine.com/articles/2006/08/02/were_all_enemy_combatants_now.php.

long as a person is deemed an enemy combatant, they could potentially be returned to the custody of the U.S. President despite domestic criminal proceedings. Padilla's formal trial under the criminal indictment is set to begin in the fall of 2006.¹⁷² Further discussion regarding the use of military tribunals follows under the military analysis section.

The cases mentioned above reflect a small portion of the work federal investigators and prosecutors have done since 9/11. The Justice Department reports a variety of examples of how law enforcement agencies have increased their investigations into and punishments of terrorist offenses. For example, "five terrorist cells in Buffalo, Detroit, Seattle, Portland (Oregon), and Northern Virginia have been broken up; 401 individuals have been criminally charged in the United States in terrorism-related investigations; already 212 individuals have been convicted or have pleaded guilty in the United States," there are "approximately 1,000 new and redirected FBI agents dedicated to counterterrorism and counterintelligence; 200 new Assistant U.S. Attorneys; 100 Joint Terrorism Task Forces; [and] more than [a] 300% increase in Joint Terrorism Task Force staffing."¹⁷³ According to Transactional Records Access Clearinghouse in 2003, using information gathered from the Justice Department, when considering international terrorism cases separately from all terrorism cases, terrorism cases that were brought before U.S. attorneys and either prosecuted or declined increased from 544 to 1,778 cases. Convictions once these cases went to trial also increased from 96 convictions before 9/11 to 341 after the attacks.¹⁷⁴ These numbers are one of the best ways to determine the effectiveness of using law enforcement to counter terrorism in the U.S. The increase in cases going to trial show, if nothing else, that

¹⁷² Colleen Hardy, *Jose Padilla* [on-line] (George Mason University School of Law, [cited 12 October 2006]); available from <http://cipp.gmu.edu/research/Padilla-0602Article.php>.

¹⁷³ *Waging the War on Terror* [on-line] (Department of Justice, [cited 12 October 2006]); available from http://www.lifeandliberty.gov/subs/a_terr.htm.

¹⁷⁴ *Criminal Terrorism Enforcement since the 9/11/01 Attacks* [on-line] (Syracuse University, 8 December 2003 [cited 8 June 2006]); available from <http://trac.syr.edu/tracreports/terrorism/report031208.html#figure1>.

terrorism is now a more important issue to law enforcement agencies. It is otherwise difficult to say with certainty how successful this method is because one cannot know how many terrorist attacks have been prevented due to law enforcement action.

Military Analysis

U.S. military action began with military force in Afghanistan and simultaneous diplomatic work to try to stop support for the Taliban, al Qaeda, and other terrorist operations. The United States justified military action in Afghanistan primarily by asserting their actions were in self-defense, a valid use of force permitted by Article 51 of the U.N. Charter. The international community, in general, supported the U.S. response, condemning specific execution actions such as prisoner or detainee abuse, but finding the operation acceptable within international law. Despite calls to close Guantanamo Bay's detention center, it remains open and international troops continue to support U.S. military action in Afghanistan. However, the legal quagmire created by the continued detainment of terrorism suspects at a military base warrants further discussion.

On 7 February 2002, the White House press secretary announced President Bush's decision that: the Geneva Conventions applied to the armed conflict between the Taliban and the U.S., but captured Taliban are not entitled to POW status; the Geneva Conventions did not apply to the armed conflict between al Qaeda and the U.S.; captured al Qaeda personnel were also not entitled to POW status; and despite the denial of POW status, all detainees must be treated humanely in accordance with principles of the Geneva Conventions and the ICRC.¹⁷⁵ Placing detainees from Operation *Enduring Freedom* at Guantanamo Bay further complicated their legal status due to their non-U.S. citizenship and categorization as unlawful enemy combatants and

¹⁷⁵ George H. Aldrich, "The Taliban, Al Qaeda, and the Determination of Illegal Combatants," *The American Journal of International Law* 96, no. 4 (2002).

because the U.S. has jurisdiction over them but does not have “full sovereignty in Guantanamo Bay. This has previously been interpreted to preclude the jurisdiction of U.S. federal courts.”¹⁷⁶

The Bush administration initially wanted to try these detainees by military tribunals which differ from a military court martial or civilian trial in that the prosecution does not need as strong of a case or as much evidence to successfully prosecute an individual. Furthermore, detainees would not be allowed to appeal the tribunal’s decisions to any U.S., foreign, or international court.¹⁷⁷ However, on 29 June 2006, the U.S. Supreme Court concluded that these military tribunals were illegal, ruling that the Bush administration does not have the authority to try terrorism suspects by these tribunals and that they violated the Geneva Conventions. In addition, they ruled that federal courts do have jurisdiction to hear appeals involving enemy combatants in military custody overseas. Nevertheless, the Supreme Court did not order Guantanamo Bay’s detention center to be closed and ruled that the President can request the authority necessary to hold military tribunals that coincided with customary international law from Congress. Congress and the Bush administration are currently working toward legal clarity and compromise regarding Article III of the Geneva Conventions and the use of military tribunals. Only time will tell how U.S. domestic law and international law is interpreted when the detainees do reach their trials. These ambiguities, in interpretation and application of international law, further reflect that the letter of the law and the practice of the law differ and must be noted in order to highlight the need for clarification and potential change within international law.

Despite the legal issues discussed above, Operation *Enduring Freedom* was accepted by the international community for three primary reasons. First, the United Nations announced that

¹⁷⁶ Wilke, "War V. Justice: Terrorism Cases, Enemy Combatants, and Political Justice in U.S. Courts," 645.

¹⁷⁷ Ibid.

the terrorist situation in Afghanistan constituted a threat to international peace. Second, the scale of attack and loss of life in such a short period of time provided ample evidence that the U.S. had an enemy from which it needed to defend itself. Last, the Taliban continually disregarded its obligation to comply with the U.N. Charter. More importantly, perhaps, is the idea that “Operation *Enduring Freedom* may be counted as a case of implementation of the collective will.”¹⁷⁸ The U.S. received almost unanimous support from the international community even though the actions taken overstepped the boundaries of Article 51. The Security Council did not take measures to ensure stability and peace after the initial gestures of self-defense made by the U.S. Despite the U.N. statement that a threat to international peace existed, according to the U.N. Charter, this does not give a state authorization to take action to counter this threat. However, “many Western countries openly stated that they regarded Operation *Enduring Freedom* as being ‘legitimate and in accordance with the terms of the Charter and Security Council Resolution 1368.’”¹⁷⁹ The Security Council even gave its support to actions in Afghanistan in Resolution 1378, adopted on 14 November 2001, over a month after coalition forces had begun operations in Afghanistan. Resolution 1378 states that the Security Council supports international efforts to root out terrorism as well as condemns the Taliban for allowing al Qaeda and other terrorist organizations to use Afghanistan as their base of operations.¹⁸⁰

This approval of force, despite literal translation of the U.N. Charter, which counters the actions’ legitimacy, also occurred in other circumstances such as the establishment of no-fly zones in Iraq by the U.S. and U.K. and the force used in Kosovo in the early 1990s. Although neither one of these actions was formally acknowledged as legal use of force, the international

¹⁷⁸ Carsten Stahn, "Enforcement of the Collective Will after Iraq," *The American Journal of International Law* 97, no. 4 (2003): 809.

¹⁷⁹ *Ibid.*, 813.

¹⁸⁰ *Resolution 1378* [on-line] (United Nations, 14 November 2001 [cited 12 October 2006]); available from <http://daccessdds.un.org/doc/UNDOC/GEN/N01/638/57/PDF/N0163857.pdf?OpenElement>.

community, to include individual nations and the U.N., allowed both operations to occur. This history and the repetition of similar acceptance of the use of force during Operation *Enduring Freedom* creates support for “the idea that lawfulness in the international legal system is not merely a matter of textual interpretation but results from cumulative and interactive processes of discourse and collective decision making.”¹⁸¹

Since the United States increased its law enforcement actions against terrorists, and the military deployed forces to Afghanistan, the U.S. has not suffered a terrorist attack within its borders. However, al Qaeda and the Taliban remain actively involved in terrorist activities. Both law enforcement and military responses have been acceptable to the international community. The United States’ use of the PATRIOT Act and their prosecution of terrorists did not garner negative international opinion; neither was it considered breaking international law. However, the international community’s acceptance of the military operation in light of the guidelines established by international law is questionable. Consequently, a number of things can be learned from this case study.

Conclusions

This case study analysis shows that according to the international law, in the case of a major terrorist attack in which a state is harboring the perpetrators or the organizations that perpetrate such attacks, the law does explain what constitutes a legal response to the terrorist attack. This explanation is largely that a nation has a right to immediate self-defense but the U.N. is then directly responsible for taking over the situation and establishing peace and security. However, this case study clearly shows that legality is only one aspect of the international community’s concern when determining whether a country appropriately responds to a terrorist

¹⁸¹ Stahn, "Enforcement of the Collective Will after Iraq," 813-14.

attack. According to international law, the United States has had some shortcomings but, overall, has used both domestic law and international law to bring the individuals they incarcerated and those out of reach of their domestic jurisdiction to justice. The international community has highlighted their concern with these shortcomings but, for the most part, has supported the prosecution of terrorists as well as U.S. military and state building action in Afghanistan.

Three insights from the 9/11 case can be applied toward the argument that a clear and understood definition of terrorism and a determination of whether terrorism is a criminal act or an act of war greatly assists in establishing the legality of a victim-state response to a terrorist attack. First, international consensus that the event was a terrorist attack occurred immediately. This near unanimous agreement paved the way for diplomatic and military action after the initial shock of the attacks subsided reflecting positive feedback for the international community to develop guidelines to reach similar clarity for future events.

Second, international consensus that the U.S. could respond with the use of force within another country occurred very quickly. Consent was even supported with the offer of additional forces and other resources from multiple countries. Therefore, recognition of the 9/11 attacks as an act of war allowed the U.S. to invoke Article 51, NATO to declare the attack an attack against the alliance, and the U.N. to pass a resolution supporting action against the perpetrators. International consensus also existed for the domestic trials. Consequently, an important distinction can be made regarding the classification of the terrorist attack and the corresponding international opinion. If an attack occurs that obviously involves a complex international terrorist operation, a victim-state is more likely to respond with military action with international consensus and be supported by the international legal framework. However, if a terrorist is

captured alone, or is acting within a more locally orchestrated plot, international law and opinion favor the terrorist being treated as a criminal.

Third, legal issues pertaining to Operation *Enduring Freedom* have arisen since military action began and have focused on treatment of people in the war zone or at detainee camps and the use of aerial bombing and targeting methods. The latter two issues can be addressed and understood within the context of current international law via the previously discussed principles of LOAC. However, the status and categorization of people in the war zone and the continued military action by a victim-state when U.N. action is not sufficient are issues in which some clarification in international law is required. Since the U.N. does not have a self-sustaining military force and relies on its members to provide troops and resources for an operation, despite the U.N. Charter's declaration that the U.N. will take action to establish international peace and security, it may not always have the means or collective will to do so.

The 11 September 2001 terrorist attacks bring to light a phenomenon that may be unique but also might exemplify the norm when victim-states respond to terrorist attacks that cross their state borders. The international community supported U.S. action against Afghanistan. Although self-defense was necessary or initially accepted as such, five years after the terrorist attacks, the U.S. is still taking military action in Afghanistan. This continued action seems to contradict international law. However, the U.S. is a superpower and politically and militarily has the ability to take this action. On the contrary, Israel is a much smaller nation that also has suffered at the hands of many terrorists. They, too, have responded by using military action that crosses their state borders into nations such as Syria and Lebanon. In many cases, the international community has condemned the attacks as illegal according to international law. Yet, Israel continues such responses. Therefore, it appears that international support, or the

international community's inability to act on their disagreement with the response, compared to international consensus on the legality of a victim-state response is more important.

Nonetheless, due to the continued use of international law as a benchmark to judge the legality of a terrorist attack and a victim-state's response, in either situation, international law remains a factor that helps the international community determine their opinion. As such, clarity regarding what terrorism is and in what context international humanitarian law or domestic and human rights law applies will augment the international community's ability to better respond to both a terrorist attack and assist the victim-state in their response.

CHAPTER V

A COMPARISON OF APPROACHES: THE MUNICH ATTACK AND MADRID BOMBINGS

Although the 9/11 terrorist attacks were historical due to the method of attack, loss of life, and the use of force in response to the attacks, it was neither the first nor the last terrorist attack to garner international attention. In order to further analyze how international law has been interpreted and used when responding to terrorism and help uncover important criteria that, if implemented, could enable victim-states to respond to terrorism within the boundaries of international law, the 9/11 attacks will be compared with two other terrorist attacks which elicited different victim-state responses. These two attacks, the Munich attack against Israeli Olympic athletes in 1972 and the Madrid train bombings in 2004, will provide a brief study in alternative responses to terrorism compared with the United States' use of overt military force. Throughout this comparative case study I will discuss similarities and differences among the three terrorist attacks and associated victim-state and international responses. I then elaborate on the merits and disadvantages of the differing victim-state responses from which I argue that each terrorist attack provides the international community with the opportunity to better address terrorism and unanimously condemn terrorism.

I will analyze both the Munich and Madrid cases as I did the 9/11 attack, reviewing the terrorist attack, the international community's response to the attack, the victim-state's reprisal response, and the international community's response to the victim-state's response. Following these two sections, I compare similarities and differences among all three case studies and discuss Sean Murphy's proposed criteria to help determine whether force could have been justified. Unique insight can be gained by each case study. The Munich attack and associated

victim-state response portrays not only a unilateral example of the use of force compared to the United States' coalition of military forces, but also the influence world events and a lack of international cooperation can have on a victim-state determining how to respond to terrorism. The Madrid attacks can further increase understanding as to factors that lead victim-states to respond to terrorism using approaches other than violent force. In this case, Spain uses law enforcement in place of a violent reprisal response. Furthermore, the Munich attack represents an attack much smaller in scope than 9/11 while the Madrid bombings were of a scope in between the Munich and 9/11 attacks.

Although all of the case studies show that political condemnation of the terrorist attack is frequently given to some extent, disapproval of terrorist tactics using verbal statements is not enough. The world also needs political action that reflects the diplomatic talk and stays one step ahead of the terrorists so law already exists to guide states when forced to respond to an attack. In order for the threat of terrorism to decrease, political action condemning terrorism must coincide with social disapproval of terrorist tactics. The differences among the case studies also reflect the need for international law to be written with the acknowledgement that national interests and security are paramount when a state responds to terrorism in order for the law to be effective and followed. Finally, the explicit recognition of political factors unique to each nation, such as the nation's military and economic strength and consequently their international influence, impact the applicability of international law to a state's response to terrorism. In addition to theoretical advantages and disadvantages of responding using or not using force as discussed in Chapter III, the comparison of these three case studies allow identification of the real-life factors that motivated a victim-state to respond to terrorism in a specific way. As a

result, they help identify criteria and legal questions victim-states have used or faced when responding to an attack that can shape international law and guide future victim-state responses.

Munich: Shattering the Peace

The Munich case study raises two key issues. First, it establishes that a lack of consensus by the international community, in regards to both responding to the initial attack and responding to the victim-state's response, impacts how the victim-state responds to a terrorist attack and permits likely illegal responses without rebuke. Second, Israel's use of targeted killings provides a unique study of a victim-state response that continues to be used thirty years later but remains contentious both within the law of armed conflict and international human rights law. Both Israel's retaliation to the Munich attack and the international community's response to both the attack and Israel's response highlight that signatories of international law do use tactics that are questionably illegal and that the international community is insufficient as an organization addressing conflict if they can not reach consensus.

The Attack

The terrorist attack at the 1972 Summer Olympic Games, held in Munich, Germany, is one of the earliest and most recognized terrorist attacks in modern terrorism history. Using an international forum covered by news networks worldwide, Palestinian terrorists gave the Palestinian struggle international attention. On 5 September 1972, eight members of the terrorist group Black September snuck into the Olympic Village compound. Although the terrorists were from different refugee camps located in many Middle Eastern countries, they were united by their membership in the Palestinian fedayeen. After killing 2 Israeli men, the terrorists took 9 other Israelis hostage and demanded the release of 234 prisoners being held in Israeli jails. They also demanded the release of two German prisoners, members of the left-wing Red Army

Faction (Baader-Meinhof), in hopes of winning sympathy from leftist Europeans.¹⁸² Although the terrorists initially threatened to kill one hostage each hour after 9:00 A.M., they added an additional demand of being provided a jet to fly them and their captives to Egypt and extended their deadline until 5:00 P.M.¹⁸³ Jamal Al-Gashey, the only remaining hostage-taker still alive as of 2000, has since said, “The demand to free our imprisoned brothers had only symbolic value....The only aim of the action was to scare the world public during their ‘happy Olympic Games’ and make them aware of the fate of the Palestinians.”¹⁸⁴ The deadline extensions served this goal well, capturing more worldwide attention as the day continued.

Although Israel immediately responded to the crisis with resolve to not negotiate with the terrorists, they did request to send an Israeli Special Forces unit to Germany. German authorities rejected this offer and instead attempted their own rescue operation. The operation occurred at Fürstenfeldbruck Airbase. Feigning agreement to the terrorists’ demand of transportation to Cairo, the German government had the terrorists and their captives transferred to the airbase via helicopter. What followed was a poorly planned and failed attempt to kill the terrorists that ultimately resulted in the death of the remaining nine Israeli hostages, one German police officer, and five of the eight terrorists. The three remaining terrorists were captured but released without trial after a German Lufthansa commercial airline jet was hijacked on 29 October 1972 for the purpose of demanding their release.

International Response to the Attack

Olympic events initially continued the morning of the hostage crisis but were suspended later that day for 34 hours. Additionally, a memorial service was held in the Olympic Stadium

¹⁸² Alexander Wolff, *When the Terror Began* [on-line] (Time Europe, August 25, 2002 [cited 12 October 2006]); available from <http://www.time.com/time/europe/magazine/2002/0902/munich/index.html>.; Klein, *Striking Back: The 1972 Munich Olympics Massacre and Israel's Deadly Response*, 49.

¹⁸³ Wolff, *When the Terror Began*.

¹⁸⁴ *Ibid.*; Klein, *Striking Back: The 1972 Munich Olympics Massacre and Israel's Deadly Response*, 224.

on 6 September 1972. However, during his speech at the service, International Olympic Committee President, Avery Brundage, did not refer to the murdered Israelis. Further, even though the Olympic Flag and the flags of most of the other nations present were flown at half-staff, Arab nations demanded their flags remain at full-staff.¹⁸⁵ The Olympic Games then continued despite the remainder of the Israeli team, the Egyptian team, the Philippine team, the Algerian team, and members of the Dutch and Norwegian teams leaving the Games.

Israel's Prime Minister, Mrs. Golda Meir, asked that the world's nations condemn the attacks. The international community consented, except for many Arab countries. King Hussein of Jordan "was the only leader of an Arab country to publicly denounce the Olympic attack."¹⁸⁶ Showing support for the terrorists and their actions, Libya received the bodies of the five terrorists killed by German sharpshooters and buried them with full military honors. Ultimately, verbal condemnation was the only international, political response to this tragedy.

Israel's Retaliation

A caveat must be provided prior to discussing Israel's response to the Munich attack as well as the international community's response to Israel's actions. The operations used by Israel to fight back against the terrorists, Operation *Wrath of God* and Operation *Spring of Youth*, were highly classified. Comprehensive and accurate information regarding each attack was therefore unknown at the time the operations were being carried out. As a result, the international community could easily ignore some of the targeted killings or react less strongly because actions could not be traced to a state government. However, as information has been declassified or leaked throughout the past twenty years, Israel's use of targeted killings has come into dispute. After my discussion of Israel's response and the international community's

¹⁸⁵ Roone Arledge, *Roone* (New York: HarperCollins Publisher, 2003), 138.

¹⁸⁶ Faik Bulut, *The Munich Massacre and the Mossad (I)* [on-line] (The New Anatolian, 9 February 2006 [cited 13 December 2006]); available from <http://www.thenewanatolian.com/tna-352.html>.

corresponding reaction, I will briefly analyze current debate regarding this counter-terrorism method.

Israel's first response to the Munich attack was an aerial bombing raid on Palestinian training camps in Syria and Lebanon. On 8 September 1972, two dozen Israeli fighter jets launched the most devastating Israeli attacks since 1970. Eleven Palestinian bases were bombed, "killing two hundred terrorists and eleven Lebanese civilians."¹⁸⁷ The Israeli Defense Force Chief of Staff David Elazar was quoted that day as saying that the air strikes were not an Israeli response to Munich but "were part of the war we are forced to wage against the terrorists so long as they continue to kill Israelis."¹⁸⁸ Within days of this air strike, Israel also sent ground forces into southern Lebanon in addition to more bombing missions. Despite the death and destruction wrought by the Israeli military, Israel's politicians decided that their response to the Munich attack necessitated "a more significant form of retribution."¹⁸⁹

Pondering questions such as whether or not the Black September group had infrastructure worth attacking, who the group's leadership was, and who could be held responsible for the attacks, the Israeli leadership decided that unprecedented actions that actively fought those trying to destroy Israel were necessary. Furthermore, even though the air strikes were an immediate response to the terrorist attacks and quelled some public pressure for Israel to retaliate for the attacks, Israel's leadership recognized that they were not of a scope or nature to help Israel specifically fight terrorists and their tactics.

To further magnify the graveness of the situation, on 10 September 1972, Black September sent an operative who had previously tried to give information to the Mossad, Israel's Institute for Intelligence and Special Operations, on a mission to kill a Mossad case officer.

¹⁸⁷ Klein, *Striking Back: The 1972 Munich Olympics Massacre and Israel's Deadly Response*, 94.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*, 95.

Although the officer survived the attack, terrorists' ability to strike Israelis outside of Israel was once again displayed in the streets of Europe.¹⁹⁰ To make matters worse, a letter bomb was delivered to Dr. Ami Shchori, an agricultural attaché scheduled to return to Israel, via the Israeli embassy in London. The letter bomb killed the attaché and was followed by sixty-four more letter bombs the subsequent week. All but one were found and neutralized.¹⁹¹ Although the Munich attack garnered international attention to terrorism and Israel, this quick succession of smaller, less visible attacks against Israel and its citizens contributed to the nation's response.

These calculated terrorist attacks fueled Israel's determination to retaliate. In addition to a string of Israeli-made letter bombs that maimed or injured suspected terror activists, Israel focused on another mission, now known as Operation *Wrath of God*, which used the Mossad to carry out clandestine attacks against chosen individuals. Within weeks, Mossad agents killed Wael Zwaiter, allegedly involved in planning the Munich attack and a suspected leader of Black September within Italy. He was shot numerous times on 16 October 1972 in Rome.¹⁹²

Two months later, on 8 December 1972 in Paris, France, Mossad agents killed Dr. Mahmoud Hamshiri by detonating a remote controlled table bomb. Dr. Hamshiri was the spokesman for the Palestine Liberation Organization (PLO) in France and suspected of helping to plan the Munich attack and other attacks throughout Europe.¹⁹³ The Mossad's campaign continued with the death of a suspected gun-runner in Paris and the bombing of a suspected Black September courier in Cyprus.

Operation *Spring of Youth*, a joint operation between the Mossad and the Israeli Defense Force, occurred in April 1973. After learning that three targets, Mohammad Yusuf al-Najjar

¹⁹⁰ Ibid., 112-14.

¹⁹¹ Ibid., 115.

¹⁹² Nancy Duin, *Tit for Tat* [on-line] (Channel 4: London, [cited 25 September 2006]); available from <http://www.channel4.com/history/microsites/H/history/t-z/titfortat5.html>.

¹⁹³ Ibid.

(Abu Yusuf), Kamal Adwan, and Kamal Nassir, were living close together in Beirut, Lebanon, Israel chose to conduct a larger operation. All three targeted PLO leaders were killed, and the Popular Front for the Liberation of Palestine's headquarters in Beirut and a Fatah explosives plant were also targeted, receiving damage.¹⁹⁴ Israel continued its policy of targeted killings between April and June 1973. Mossad agents targeted four more terrorists, taking action in Athens, Rome, and Paris. However, Israel's unique fight against terrorism failed when agents killed an innocent Moroccan waiter they misidentified as Ali Hassan Salameh, a Black September leader. Although the Mossad had been able to distance the Israeli government from the targeted killings in previous operations, Norwegian authorities arrested six Israeli agents for the killing of Ahmed Bouchiki, in Lillehammer, Norway, exposing Israel's covert actions.¹⁹⁵

Despite this costly mistake, Mossad agents continued to track Salameh, and in January 1979, six and a half years after the Munich attack, a car bomb planted in Beirut killed him.¹⁹⁶ Although Aaron Klein, author of *Striking Back: The 1972 Munich Olympics Massacre and Israel's Deadly Response*, states that in the fall of 1986 key Israeli leaders were briefed that all of the terrorists responsible for Munich were dead, he correlates the 1992 assassination of the PLO's head of intelligence, Atef Bseiso, in Paris with Munich.¹⁹⁷ Klein further questions the death of all of Israel's targets in 1986 due to two interviews given five years later by Jamal Al-Gashey. Publicly, however, Israel stopped its policy of assassinations in retaliation for the Munich attack in 1986 but continued its policy of targeted killing.¹⁹⁸

¹⁹⁴ Klein, *Striking Back: The 1972 Munich Olympics Massacre and Israel's Deadly Response*, 165, 167; Duin, *Tit for Tat*.

¹⁹⁵ Duin, *Tit for Tat*.

¹⁹⁶ Ibid.

¹⁹⁷ Klein, *Striking Back: The 1972 Munich Olympics Massacre and Israel's Deadly Response*, 8.

¹⁹⁸ Klein, *Striking Back: The 1972 Munich Olympics Massacre and Israel's Deadly Response*, 224.

Israel did not specifically invoke international law or try to defend its response using international law to the international community. Although this approach was taken with positive results by the United States after the 9/11 attacks twenty-nine years later, Israel responded covertly and without specific justification for several reasons. First, a lack of consistent international cooperation regarding terrorism and the Israeli state fostered a lack of trust by Israel. The nation did not feel that other countries would provide adequate assistance that would allow them to use law enforcement actions to detain and prosecute terrorists. Second, previous attempts at self-defense using more traditional diplomatic, military, and law enforcement techniques did not appear to be deterring terrorists from carrying out operations against Israel. Last, perhaps Israel felt that as a small nation isolated among hostile Arab nations, in order to promote its own security, it was forced to react single-handedly.

International Response to Israeli Action

Due to the covert nature of Israel's response and because targets were killed throughout the span of a decade, the international response to Israel's response was varied. The first phase of Israel's response to the Munich attack was the air strikes against Palestinian camps in Syria and Lebanon. These attacks did not elicit much coverage in the popular media outside of the region. However, when noted, two themes can be seen. First, despite debate at the political level regarding the reason for the attacks, the media tied the Israeli attacks to the Munich attack and labeled them as retaliatory attacks. Second, the journalists covered the attacks more to convey facts regarding the attacks or to provide opinions concerning terrorism or the greater Middle East conflict than to judge the legality of the attacks.

Conversely, the Israeli air strikes did become a matter of debate within the U.N. Security Council. Both Syria and Lebanon filed complaints with the Security Council after the 8

September 1972 attacks requesting that the Security Council condemn Israel for the attacks, take necessary measures to prevent a renewal of aggression, and compel Israel to immediately stop all military operations against the two nations. Debate ensued within the Security Council, and two perspectives emerged. On one hand, some countries recognized a link between Israel's military action and the Munich attack and argued for not only disapproval of Israeli action but also of those responsible for harboring and supporting terrorists. On the other hand, other nations denied the link to the terrorist attack and condemned Israel's actions as violating international law and cease-fire agreements. Additional U.N. observer posts were established in Lebanon later that year, but no measures were enacted regarding the 8 September 1972 air strikes due to the lack of a majority vote within the U.N.¹⁹⁹

The second phase of Israel's response was its policy of targeted killings. After the initial targeted killings in the fall and winter of 1972, "Western governments appeared to be ignorant of [Israel's] operation."²⁰⁰ However, because the attacks killed the target, avoided civilian casualties and allowed plausible deniability to the Israeli government, it is more likely that Israel's allies merely turned a blind eye to their participation in the killings.

Operation *Spring of Youth* varied from the Mossad's previous operations in that it resulted in civilian deaths to include seven Lebanese police officers, the wife of one of the PLO targets, and a neighbor. The Arab world protested these events claiming they could not be linked back to Munich, underlying an interesting political and social phenomenon of quiet resignation to Israeli tactics in response to the attacks they suffered but rising indignation when it appeared that Israel was targeting terrorists beyond the scope of the Munich attack and killing civilians.

¹⁹⁹ *Yearbook of the United Nations* [on-line] (United Nations, 31 December 1972 [cited 12 October 2006]); available from <http://domino.un.org/UNISPAL.NSF/361eea1cc08301c485256cf600606959/de9be8e9630430da8525631c0067f2e4!OpenDocument>.

²⁰⁰ Duin, *Tit for Tat*.

The largest international response to Israeli action occurred after the 20 July 1973 murder of Bouchiki, misidentified as Salameh. The murder of an innocent man incurred international condemnation and forced the committee overseeing Operation *Wrath of God* to step down. In particular, it created diplomatic tensions between Israel and Norway. It also brought negative diplomatic pressure from Canada after the Mossad agents were found to have traveled under forged Canadian passports.²⁰¹ Nonetheless, the five Israeli agents arrested and convicted in Bouchiki's murder, were released in twenty-two months and deported to Israel. Although Israel denied official involvement in what is now known as the "Lillehammer Affair," it did provide monetary compensation to the Bouchiki family in 1996.²⁰²

Targeted Killings

The improved accuracy of technology, both in surveillance and weaponry, has enabled countries to monitor and eliminate individuals from a distance. This method of warfare has increasingly been the source of debate when used to combat terrorism. What follows is a brief discussion regarding the legalities concerning this method of warfare, why Israel, and now the U.S., has utilized the method of targeted killings, and whether this method works as an effective deterrent against terrorism. I do not intend to argue for or against targeted killings, only to provide further information regarding tactics used in response to the Munich attack.

The legality of targeted killings is up for debate. While many nations and human rights organizations condemn the practice, many academicians, some human rights organizations, and two nations in particular, Israel and the United States, have tried to justify it. After continued debate regarding each side's merits and disadvantages, the legal argument which is ultimately

²⁰¹ Daniel Byman, "Do Targeted Killings Work?," *Foreign Affairs* 85, no. 2 (2006): 97.

²⁰² *Lillehammer Affair* [on-line] (QuickSeek, [cited 12 October 2006]); available from <http://lillehammeraffair.quickseek.com/#>.; Klein, *Striking Back: The 1972 Munich Olympics Massacre and Israel's Deadly Response*, 198.

considered to be more legitimate will likely correspond with how the international community decides to define and categorize the “terrorist:” either as a criminal or as an enemy combatant.

The first argument is that targeted killings are extrajudicial executions and are therefore illegal. International law can support this argument in three ways. First, if a terrorist is considered a criminal, and consequently a civilian, when determining this categorization within armed conflict, common Article Three of the Geneva Conventions prohibits violence to life and person.²⁰³ Furthermore, the International Covenant on Civil and Political Rights also states that “every human being has the inherent right to life,” and the death “penalty can only be carried out pursuant to a final judgment rendered by a competent court.”²⁰⁴

Second, in addition to the principle of perfidy discussed in Chapter II, the Hague Convention of 1907, commonly referred to under customary international law, prohibits the treacherous killing or wounding of one’s enemies.²⁰⁵ Disregarding this guidance and violating the principle of perfidy could make targeted killing illegal. However, the methods used to kill the enemy play an important role in this determination. Many operations that target an enemy during an armed conflict could be legitimate. For example, the United States’ use of an unmanned aerial Predator to target senior al-Qaeda operative Ali Qaed Senyan al-Harthi in Yemen corresponds closer to an act of war. In comparison, some covert operations may use questionable methods that are perfidious and violate international law.

Last, the principle of proportionality is also easily disregarded when using the method of targeted killing. Proportionality ensures that the actions a state takes are comparative, in threat

²⁰³ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.*

²⁰⁴ *International Covenant on Civil and Political Rights*, Article 6.; Mayur, Patel, *Israel’s Targeted Killings of Hamas Leaders* [on-line] (American Society of International Law, [cited 25 September 2006]); available from <http://www.asil.org/insights/insigh133.htm>.

²⁰⁵ Patel, *Israel’s Targeted Killings of Hamas Leaders*.

and consequence, to the attack it incurred, especially with regard to human life. If a terrorist plans an attack that kills five innocent civilians, but in response, the victim-state bombs an apartment building in order to target one terrorist and causes twenty civilian casualties, this legal principle will be violated.²⁰⁶ Although these three elements of international law can be used to determine the illegality of targeted killings, three other arguments shed light on how this method can also be justified.

First, Article 51 of the U.N. Charter allows a nation to act in self-defense. This article can be used by a victim-state which considers itself at war with terrorists. This argument emphasizes, once again, the importance of the international community characterizing terrorists as combatants or as criminals. The second element to be considered is whether the terrorists pose an imminent threat. If a terrorist is considered to be a “ticking bomb” and thus a person who will inevitably cause death and destruction, a victim-state may perceive the terrorist as an imminent threat to its security. However, if a terrorist is perceived as a threat that can be stopped via methods alternative to deadly force, they are not considered an immediate threat, and targeted killings can not be justified using Article 51.²⁰⁷

The last facet of Article 51 that must be considered is whether the terrorists pose an ongoing threat that has not yet been acted upon by the Security Council. This is a stronger argument for Israel because there has been a lack of unanimous action by the United Nations against terrorists targeting Israel. However, the U.S. may also choose to use this argument. An additional caveat is that the intention of the U.N. Charter’s self-defense clause was that both

²⁰⁶ Ibid.

²⁰⁷ Chris Toensing and Ian Urbina, *Israel, the US And "Targeted Killings"* [on-line] (Middle East Report Online, 17 February 2003 [cited 25 September 2006]); available from <http://www.merip.org/mero/mero021703.html>.

actors were states.²⁰⁸ However, groups such as Hamas or al Qaeda are not states. Resulting legal complications caused by what may be a potential inadequacy in international law regarding the status of state versus nonstate actors has already been discussed.

In addition to these legal arguments for and against targeted killings, a number of arguments are used to legitimize targeted killing. Primarily, the Israeli government argues that although they prefer to use peaceful methods such as arresting and trying known terrorists, many Arab governments which surround the small nation are hostile to Israel and provide protection to these terrorists by refusing to extradite them for trial. A lack of consistent international cooperation and trust hinder some nations from rightfully punishing offenders using law enforcement actions. Another reason targeted killings are often supported is because they can force terrorist leaders to go into hiding, moving frequently from place to place and utilizing less effective means of communication in order to avoid surveillance. This focus on staying alive disrupts the leader's ability to effectively lead the terrorist organization.

In spite of this method's legitimacy or lack thereof, a variety of advantages and disadvantages exist regarding targeted killing and its effectiveness. Israel's continued use and the United States' occasional employment of this method hint that it is effective against terrorism to a certain degree. Three disadvantages of targeted killing include: creating martyrs, diplomatic costs, and political costs. One chief argument against targeted killing is that although one terrorist may be killed, his/her death creates many more terrorists. By killing a terrorist leader who may be popular and well-known to the public, a nation that utilizes this method risks increasing popular support for the terrorists' cause or sympathy for the terrorist organization.²⁰⁹ Another disadvantage is the potential diplomatic costs. Especially for Israel, peace negotiations

²⁰⁸ Patel, *Israel's Targeted Killings of Hamas Leaders*.

²⁰⁹ Byman, "Do Targeted Killings Work?," 100.

regarding the underlying Palestinian conflict may be disrupted if Israel is seen as continuing to violently act against its enemies. Israeli leaders have justified their actions in the past despite this risk arguing “that since there was little reason to believe that the talks would make progress even absent the campaign, it made no sense to pass up opportunities to weaken Israel’s enemies.”²¹⁰

Third, a country that utilizes targeted killing must always weigh the political risks. The legality of targeted killing is questionable. Consequently, political leaders worldwide can be quick to condemn the use of this method. In addition, the assassinations can be used by the enemy to stir negative opinions about the nation employing this method. For example, “Israel's actions have become a widely used cover for domestic killings among Palestinians.”²¹¹ When Israel’s enemy’s leaders are killed, it is easy for Israel to be blamed even if it is not their doing. Additionally, targeted killing requires extensive intelligence and covert operations. A failed mission may bring to light intricacies of the operation which could strain diplomatic relations. For example, when the Mossad misidentified their target in Lillehammer, Norway Israeli operatives were arrested, and the investigation revealed that they were utilizing Canadian passports. The use of Canada’s official documents in the operation was an affront to Canada and created political and diplomatic tension between the two nations. Utilizing a policy of targeted killings always carries some risk for a nation willing to use this method.

Despite the potential negative risks that correspond with this tactic, multiple advantages also exist. First, targeted killing can “satisfy domestic demands for a forceful response to terrorism.”²¹² In addition to being a response sufficient for the people, these targeted killings may also counter one of terrorism’s most powerful effects: reducing public morale. Second,

²¹⁰ Ibid., 102.

²¹¹ Gal Luft, "The Logic of Israel's Targeted Killing," *Middle East Quarterly* X, no. 1 (2003).

²¹² Byman, "Do Targeted Killings Work?," 102.

although killing a senior terrorist leader may result in the disadvantage that they become a martyr, it nonetheless reduces the number of skilled terrorists. According to Daniel Byman, “Bomb makers, terrorism trainers, forgers, recruiters, and terrorist leaders are scarce; they need many months, if not years, to gain enough expertise to be effective....new recruits will not pose the same kind of threat.”²¹³ Furthermore, less experienced terrorists are more likely to create a trail of evidence that will allow intelligence agencies to discover and stop attacks before they are implemented.

Third, as mentioned in this section’s introductory paragraph, targeted killings force terrorists to focus more time on protecting themselves rather than perpetuating terrorism. Finally, a leader who is forced to hide may have a difficult time motivating followers. Although hiding, or perhaps not even releasing a new leader’s name, may be essential to their survival, the charisma and bravery often essential to motivating and winning followers can not easily be exuded if the leader can not be made public.²¹⁴

These advantages and disadvantages must be weighed in addition to two other factors that impact the usefulness of targeted killings. First, targeted killing is not as successful of a tactic if used against decentralized groups. If a terrorist group is smaller and more dependent on its leader or specific experts within the organization, eliminating these targets will have a more detrimental effect on the group. For example, Israel’s killing of Zuhir Mokhsan, head of A-Tzaika, a pro-Syrian Palestinian terrorist group, led to the complete disbanding of the organization.²¹⁵ However, as can be seen in the case of Al Qaeda, bin Laden has given many field operatives the ability to use their own indiscretion and leadership. Although unknown, I suspect that the capture of bin Laden would not cause the organization’s immediate collapse.

²¹³ Ibid., 103-4.

²¹⁴ Ibid., 104.

²¹⁵ Klein, *Striking Back: The 1972 Munich Olympics Massacre and Israel's Deadly Response*, 209.

Second, targeted killings are more effective if negative public opinion regarding the killing is short-term. For example, although there is a negative response from Palestinians concerning Israeli's use of targeted killings, "polls show that Palestinians have long favored negotiations with Israel and care most about issues such as economic growth and political reform."²¹⁶ Consequently, negative public opinion about assassination is relatively short-lived when compared with other Israeli policies such as restricting access to the West Bank.

This debate regarding targeted killings reflects the need for states to respect and follow international law despite an individual state's desire to respond to terrorism in their own way. Simultaneously, this debate also shows that preexisting law may not provide adequate tools and guidance for states facing terrorist threats. This subject, in addition to other quandaries posed in the following section reveal the importance of analyzing how victim-states currently utilize international law when they respond to terrorism. Comparing Munich with the 9/11 and Madrid terrorist attacks will further expose the need for clarification in international law that will help guide each state when responding to terrorism.

Madrid: Key Timing, Deadly Attacks

All successful terrorist attacks invoke a response. However, more often than not, these attacks elicit verbal condemnation and law enforcement investigations but no use of military force. The Madrid case study is important because some aspects of Spain's response reflect this common response to terrorism. This section will highlight factors that caused Spain to react without violence and the negligible international reaction concerning Spain's response. Further, the Madrid case reveals that international human rights law is also not always followed, but law enforcement violations remain in the background compared with violations caused by military forces. Despite similarities and differences that exist among the three case studies, the Spanish

²¹⁶ Byman, "Do Targeted Killings Work?," 102.

response to the Madrid bombings highlights issues that affect the numerous countries who do not respond to terrorism with overt force.

The Attacks

During rush hour on 11 March 2004, terrorists detonated a series of bombs on Spain's commuter train system. One hundred ninety-one people were killed and at least 1,800 were wounded. Forty-one of those killed were from thirteen countries outside of Spain.²¹⁷ Even though the attack had similar characteristics to that of an al-Qaeda operation, Spanish law enforcement authorities have determined that although there was not a connection to the terrorist organization, and it is more likely that this terrorist cell did not have a direct connection but may have been trying to act on its behalf.²¹⁸

International Response to the Attacks

Both individual nations and the international community via the United Nations immediately condemned the terrorist attacks. In addition to nations heightening their own terror levels, the U.N. Security Council unanimously passed Resolution 1530 condemning the attacks and encouraging all nations to cooperate and fight terrorism. Media reports from the Middle East reflected the divide frequently seen in recent years regarding terrorism. Many journalists wrote about the disapproval of the attacks while others claimed the bombings were a victory for the terrorists. Spain's response fueled this last argument.

Spain Reacts to Terror

Spain responded to the attacks in two different ways. First, its immediate response was to investigate the attacks, determine responsibility, and punish its perpetrators. The Spanish

²¹⁷ *Timeline: Madrid Investigation* [on-line] (BBC News, 28 April 2004 [cited 11 October 2006]); available from <http://news.bbc.co.uk/1/hi/world/europe/3597885.stm>.

²¹⁸ *Madrid Bombing Prove Finds no Al-Qaida Link* [on-line] (Associated Press, 9 March 2006 [cited 13 December 2006]); available from <http://www.msnbc.msn.com/id/11753547/>.

government initially suspected that either the ETA (Basque Homeland and Freedom), a Spanish organization that had previously utilized terror tactics, or Islamic militants were responsible for the attacks. The train attacks did not have the signature elements that other ETA attacks had, and as the investigation continued, the arrest of a number of Moroccans were quickly made, strengthening the case for an Islamic group to be the perpetrators. On 3 April 2004, Spanish law enforcement personnel surrounded a flat in the city of Leganés. Core members of a group within the flat committed suicide by detonating explosives, killing seven Arab terrorists and one policeman and wounding 11 other law enforcement officers. Five to eight suspects are thought to have escaped from this flat and remain hunted criminals. As of 11 April 2006, 29 suspects had been charged for their involvement in the planning and execution of the attacks. Due to the complex nature of the case, the trials for these suspects may not begin until 2007. Under Spanish law, no suspect will spend more than 40 years in prison.

Second, there was a much broader Spanish response to the attack on the domestic social and political level due to the General Elections held three days after the bombings. At the time of the bombings, Spain's Prime Minister was Jose Maria Aznar, a highly visible supporter of the U.S.-led war of terror and U.S. action in Iraq.²¹⁹ It is largely believed that the Popular party would have won the elections and remained in power had the 11 March 2004 bombings not occurred. The party "did better in absentee ballots [in 2004] than in the 2000 landslide that gave it an absolute majority."²²⁰ However, the Socialist opposition party campaigned with the promise of withdrawing Spain from the Middle East if elected. Prime Minister Jose Luis Rodriguez Zapatero won in a surprise victory and announced it would pull Spanish forces from Iraq by 30

²¹⁹ Nile Gardiner and John Hulsman, *The Madrid Bombings: Staying the Course in the War on Terror* [on-line] (The Heritage Foundation, 12 March 2004 [cited 25 September 2006]); available from <http://www.heritage.org/Research/Europe/wm445.cfm>.

²²⁰ Christopher Caldwell, *Zapatero's Spain* [on-line] (10 May 2004 [cited 9 October 2006]); available from <http://www.weeklystandard.com/Content/Public/Articles/000/000/004/037xxgah.asp?pg=1>.

June 2004 unless the U.N. was given control of the armed forces.²²¹ He changed this position on 18 April 2004, one day after he was sworn in, and began the immediate withdrawal of 1,300 troops, “the sixth-largest foreign force in Iraq.”²²² Prime Minister Zapatero later said “he would never send Spanish troops back to Iraq, even if foreign troops there were put under the authority of the United Nations or NATO.”²²³ Despite this strong position and criticism of America’s involvement in Iraq, he continued to portray Spain as a strong ally of the United States and refused to speak poorly of the Bush administration. Furthermore, Spain kept more than 3 thousand troops deployed to Afghanistan and the Balkans.²²⁴

International Response to Spanish Action

Spain’s first response of investigating the bombings, making arrests, and raiding the terrorists’ flat did not receive international political attention because the action was taken within Spanish borders and coincided with Spanish criminal law. This aspect of the response as well as the legality of arresting suspects followed international law. However, some human rights organizations did not approve of Spanish legal actions and treatment of prisoners taken against the arrested terrorists. Human Rights Watch criticized Spain for falling short of its commitment to international humanitarian law by allowing incommunicado detention, secret legal proceedings, limitations on the right to a lawyer during initial periods of detention, and lengthy periods of pre-trial detention.²²⁵ In response to Basque separatist violence, Spanish counterterrorism measures limit the rights of terrorists upon arrest. Although the creation of domestic law is an internal matter to each state, domestic law should also be compliant with the

²²¹ *Threat Video in Spain Flat Rubble* [on-line] (BBC News, 9 April 2004 [cited 25 September 2006]); available from <http://news.bbc.co.uk/1/hi/world/europe/3613775.stm>.

²²² Elaine Sciolino, "Spanish Premier Says Troops Will Not Return to Iraq," *New York Times*, 7 May 2004.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ *Spain: Counterterrorism Measures Infringe Basic Rights* [on-line] (Human Rights Watch, 27 January 2005 [cited 25 September 2006]); available from <http://hrw.org/english/docs/2005/01/27/spain10066.htm>.

nation's obligations under international law. Similar to debate within the United States regarding how to treat terrorist detainees, Spain must reconcile recommendations that would appease human rights organizations with the political necessity to ensure safety for the nation.

Spain's broader response of pulling its troops out of Iraq did elicit some international attention and opinions. A video uncovered at the terrorists' flat in Leganés demanded the withdrawal of Spanish troops from Iraq and Afghanistan. Consequently, the media and some State leaders associated the newly elected government's quick withdrawal of Spanish troops as submission to terrorist demands. Initially, the U.S. condemned the decision regarding it as defeat at the hands of the terrorists. Nonetheless, the U.S. has maintained close cooperation with Spain in the war against terrorism.²²⁶

There was not an outspoken response from European nations. Although some European policy-makers expressed their support for Spain, there was not an immediate or European-wide change in social attitudes or political actions towards the war. Tony Blair, on behalf of the British Government, expressed his understanding of the decision as it had been a campaign pledge.²²⁷ Within Iraq, "Shiite radical cleric Muqtada al-Sadr...praised Spain's decision."²²⁸ Al Sadr's militia had been actively fighting coalition troops and told his fighters not to attack Spanish troops after the announcement of their withdrawal. Ultimately, some politicians and terrorist experts criticized the Spanish withdrawal for giving in to terrorist demands. However, the international community remained largely silent allowing Spain's political leaders to react to the bombings as the Spanish people desired.

²²⁶ *Spain PM Orders Iraq Troops Home* [on-line] (BBC News, 18 December 2004 [cited 25 September 2006]); available from <http://news.bbc.co.uk/1/hi/world/europe/3637523.stm>.

²²⁷ *Spain Plans Quick Pull out of Iraq* [on-line] (China Daily, 19 April 2004 [cited 13 October 2006]); available from http://www.chinadaily.com.cn/english/doc/2004-04/19/content_324409.htm.

²²⁸ Kristina Nwazota, *U.S. Troops Face Deadliest Month in Iraq and Longer Tours of Duty* [on-line] (Public Broadcasting Station, 19 April 2004 [cited 25 September 2006]); available from http://www.pbs.org/newshour/extra/features/jan-june04/iraq_4-19.html.

Comparative Analysis: Case Studies' Similarities & Differences

The similarities and differences between the three terrorist attacks and responses are noted following the same distinctions used to analyze the individual case studies. I first discuss specific aspects of the attacks and conclude with broader advantages and disadvantages of the different victim-state responses. I then discuss the Munich and Madrid attacks in light of the criteria proposed after the 9/11 attacks to show whether or not the use of military force was or could have been appropriate. Differences found between the scope of the attacks, the initial international responses to the attacks, social responses from within each victim-state, and world events at the time of the attack, and similarities among all of the attacks created by the use of mass media to portray all three attacks lead to a number of conclusions. The misperception that the scope of the attack directly correlates with a victim-state's response and that legal precedent provides a foundation for victim-states to rely on when responding to terrorism are just two ideas that will be further investigated at the end of the chapter. The comparisons and analysis of how the criteria is applied to the last two case studies establish the foundation from which I continue to support my argument that future political action needs to be taken to ensure international law is adequate for use against future terrorist attacks.

The Terrorist Attacks and Initial International Responses

Despite all being terrorist attacks, the Munich, Madrid, and 9/11 terrorist incidents differed greatly from each other with respect to the violent methods used during the attacks, the response of the victim-state during the terrorist attack, the scope of each attack, and the initial international response to each of the terrorist attacks. One fundamental difference was the method used in each attack. The Munich attack was not a suicide operation even though some terrorists were killed in a firefight with authorities. Conversely, the 9/11 attacks successfully

used suicide to not only kill passengers on multiple airliners but also many people on the ground. Although the Madrid bombings were also not suicide attacks, as authorities closed in on a residence housing some of the perpetrators, seven of them blew themselves up. These differences between the attacks are important to the victim-states' responses because after the Munich attack and Madrid bombings, state authorities had people in custody to prosecute and punish. In contrast, the members directly responsible for murder of civilians on 9/11 were killed in the attacks and would never stand trial.

This distinction between states that can punish those people who attacked it and states that can not provides insight into factors that help determine a victim-state's response. For example, after the Munich attack, national criminal law preexisted in both Germany and Israel to adequately punish the three captured terrorists. However, national criminal law was not used to the maximum extent because Germany released the terrorists, effectively relieving the German government of its duty to try them and denying Israel the opportunity to extradite and prosecute them. Due to Israel's political status, Arab nations would not have cooperated with Israel to extradite those involved after their release from Germany.

Similar to the situation Israel faced in 1972, despite international condemnation of the 9/11 terrorist attacks, nations harboring terrorist organizations and leaders responsible for the attacks were uncooperative and did not extradite those terrorists responsible to the U.S. to stand trial for their role in the attacks. Also, throughout the attack on the U.S., all of the 9/11 hijackers were killed. Consequently, despite initial differences created by the nature of the attack, Israel ultimately faced similar issues as the U.S. in regards to punishing the terrorists responsible for the attack. However, in both cases, terrorist leaders, planners, and financiers remained alive. Spanish authorities have been more successful in arresting some of the terrorists responsible for

the train bombings because the terrorists did not use suicide bombings to carry out the attack, and nations have cooperated with Spain's extradition requests. Serbia, the United Kingdom, Italy, and Belgium have all handed over terrorist suspects to Spain.²²⁹

A second, more subtle difference between the Munich attack and the 9/11 and Madrid attacks was the response of the victim-state during the attack itself. Since the attack in Munich was an on-going hostage crisis, Israel had the opportunity to acquiesce to the terrorists' demands as well as try to rescue their citizens. Israeli policy, however, is to never give-in to terrorists, and the German government did not want Israel to mount their own rescue operation. Nevertheless, state action against the terrorists prior to the operation ending resulted in five terrorists killed and the immediate detainment of three others.

To the contrary, the 9/11 attacks did not afford the United States the ability to counter-attack during the terrorist operation. Although it is possible that if authorities would have recognized that the first plane that hit the World Trade Towers was a hijacked airliner and known that more planes were hijacked, Air Force jets could have been scrambled to intercept them, it is unlikely that the hijacked planes could have been prevented from crashing. The suicide nature of the attack did not give the U.S. the opportunity to kill or capture its perpetrators. Similarly, even though the Madrid bombings were not suicide bombings, the attack was well coordinated, striking multiple locations almost simultaneously and using remote detonation or timing devices. There may have been opportunities to foil the attack prior to 11 March 2004. However, once the attack began, Spanish authorities did not have much opportunity to take preventative action.

²²⁹ *Madrid Bombs Suspect to Be Extradited* [on-line] (Guardian Unlimited, 4 May 2006 [cited 25 September 2006]); available from <http://www.guardian.co.uk/spain/article/0,,1767617,00.html>; *Madrid: The Prime Suspect* [television] (Canadian Broadcasting Corporation, 1 December 2004 [cited 25 September 2006]); available from <http://www.cbc.ca/fifth/warwithoutborders/suspect.html>; Associated Press, *Serbia Hands over Key Suspect in Madrid Bombings* [on-line] (USA Today, 25 September 2005 [cited 25 September 2006]); available from http://www.usatoday.com/news/world/2005-09-25-madridsuspect_x.htm; Al Goodman, *Italy Hands over Madrid Suspect* [on-line] (Cable News Network, 7 December 2004 [cited 25 September 2006]); available from <http://edition.cnn.com/2004/WORLD/europe/12/07/spain.italy.madrid/>.

Third, the scope of each of the three attacks differed. The Munich attacks killed fifteen people and caused minimal property damage. On the other hand, the 9/11 attacks killed 2,762 people and resulted in monumental property damage. Similarly, the Madrid train bombings killed 192 people, injured thousands more, and resulted in extensive property damage. The significance of the scale of attack will be further discussed below.

Finally, the initial international response to each of the terrorist attacks differed. After the Munich attack, despite many nations worldwide condemning the attack, some nations, primarily Israel's immediate neighbors, did not denounce the attack. Further, during the Olympic memorial service, the Olympic Committee President evaded the violence of the attack, not mentioning the death of the Israeli coaches and athletes. The international response to the 9/11 attacks was remarkably different. Although socially, there were individuals in Arab nations who praised the 9/11 attacks, the world political community almost unanimously condemned the attacks. Similarly, nations worldwide expressed their sympathies to Spain and criticized the train bombings. The difference in international response between 1972 and the twenty-first century reveal two interesting ideas about the evolution of terrorism and its effect on the world's psyche. First, while the Munich attacks were seen as a direct threat to the nation of Israel, the 9/11 and Madrid attacks created fear worldwide. Terrorists had plotted and successfully attacked well-established, powerful countries as well as displayed terrorist organizations' ability to act on a grand scale. Instead of terrorists targeting one small nation, the terrorists who attacked the U.S. and Spain were seen as fighting for a much larger ideology and against many Western nations.

In spite of these differences, one significant similarity did exist among all three attacks: each attack garnered extensive media attention. This media attention achieved three things. First, it made the terrorists' plight known to the world. The Palestinian struggle for a homeland

reached a level of political and social recognition it previously had not enjoyed prior to the Munich attacks. The Islamic terrorist organizations demonstrated incredible planning, coordination, and their ability to hit the U.S. on its homeland during the 9/11 attacks. Finally, the Madrid bombings showed the world that splinter groups far away from the fighting in Iraq and Afghanistan were being motivated to take action, increasing the potential threat to nations all over the world. Second, media coverage brought the carnage and loss of human life into the homes of millions of individuals. This ability to broadcast images and information worldwide allowed individuals to grieve and cope together as a nation and citizens of other nations to see the horror that another nation was enduring. In many cases, this shared experience encouraged sympathy for the victim-state as well as heightened awareness of the threat of terrorism. Last, the media attention forced the international community to acknowledge that a violent attack had occurred. This provided nations, individually and collectively, the opportunity to offer condolences to the nation who had lost its citizens and/or take action against the terrorists.

Victim-State Responses

Differences and similarities also exist when comparing Israel's response to the Munich attack, the United States' response to 9/11, and Spain's response to the Madrid bombings. These similarities and differences are best compared when broken up between the victim-states' social and political responses.

As a fledgling state that was not a stranger to adversity, Israel's political leaders perceived the social reaction to Munich as demanding a fierce response and a strong message to the terrorist networks. Socially, Israelis did not cower in the face of terrorism but wanted to fight the phenomenon which endangered their small nation. Similarly, the United States' public overwhelmingly supported President Bush and the use of military action against terrorism. A

poll taken on 4 November 2001 by the Program on International Policy Attitudes showed that ninety-one percent of the U.S. public supported military force against terrorists responsible for the 9/11 attacks. Further, a poll taken on 4 October 2001 by the Gallup Poll reflected an eighty-nine percent approval for the use of military action and fifty percent approval rate of military action regardless of U.N. authorization.²³⁰ Contrary to the social response by Israel and the United States, Spain's citizens responded to the Madrid bombings by upsetting the Popular Party's bid for reelection and voting in the Socialist Party which had promised withdrawal from Iraq. Although the Spanish reaction was just as strong as that of the citizens of Israel and the United States, the reaction turned Spanish political concerns inward toward the immediate security of its own people versus the Israeli and U.S. response of engaging in a long-term fight against terrorism.

Due in part to differing social responses after the terrorist attacks, each victim-states' political reaction also varied. Although Israel and the United States' responses are similar in that they both utilized overt force outside of their own country in order to engage terrorists where they lived, one stark difference can be noted. Whereas Israel's political leaders responded single-handedly with an aerial bombardment of terrorist camps in Syria and Lebanon and covert operations against individual terrorists spanning a decade, the U.S. led a multinational invasion force in Afghanistan. In complete contrast, Spain withdrew its troops from Iraq and did not take any military action against terrorists or their networks. Though, they did maintain previous troop activity in Afghanistan.

On a broader scale, these differences can be partially explained due to world events and state relations during the time of the attacks. In 1972, terrorism was a tactic that was limited in

²³⁰ *Terrorism, Military Response (Question 4 of 6)* [on-line database] (Polling the Nations, [cited 11 October 2006]); available from <http://poll.orpub.com.ezproxy.lib.vt.edu:8080/>; The Roper Center for Public Opinion Research, "Terrorism, Military Response (Question 1, 6 of 15)," (Polling the Nations, 2001).

nature and in use. The Munich attack was clearly carried out against the country of Israel. Israel had been a state for only twenty-four years and was surrounded by hostile nations.

Consequently, when the Munich attack occurred, Israel was, in many ways, fighting for its continued existence and recognition in the region. A unilateral response was therefore the response favored by Israel's leadership compared to what probably would have only amounted to verbal support by some nations of the international community had Israel turned to the world for help.

World events were very different on the morning of 11 September 2001. Not only had terrorism become a more commonly used tactic, but many more lives had been claimed by terrorists making this form of attack a much more publicly acknowledged threat. Furthermore, Al Qaeda, the group responsible for the attack, was hosted by the Taliban, a government not recognized by the world community. Consequently, the ability of President Bush to form a coalition and make a case for a cooperative campaign was conceivable.

Last, when the Madrid bombings occurred, U.S.-led action against terrorism had been ongoing in both Iraq, after the Hussein regime fell, and Afghanistan for over one year. Although the Spanish forces were fighting alongside a variety of other nation's forces in Iraq, the war had become highly politicized, and some of its neighbors, to include France and Germany, had refused to offer troops to the coalition. Therefore, there was political and social pressure both to keep troops in Iraq as well as to withdraw them. Due to its neighbors remaining out of Iraq and impending general elections at the time of the attack, Spanish political leaders were able to appease domestic pressure as well as remain politically supported by other European nations when they withdrew Spanish troops after the Madrid bombings.

International Responses

Compared with early aspects of these terrorist attacks, the international response to Israel, the U.S., and Spain's response to terrorism are remarkably similar despite the almost thirty-two year separation among the attacks. Due to Spain's criminal approach to the Madrid bombings and withdrawal of military forces amidst popular domestic support, besides verbal reproach for conceding to the terrorists, there is not much of an international response from which to compare the other two case studies. Nevertheless, there is a broad practice of the international community giving victim-states time to mourn and the lee-way to decide which course of action is best for the nation.

The international response to Israel's response to Munich and the United States' response to 9/11 reveal interesting similarities and differences. Common to both victim-state responses, the world community, largely, turned a blind-eye to Israeli and U.S. action as long as innocent civilians were not killed. Retaliation for Munich, as well as the United States' Operation *Enduring Freedom*, was acceptable to the international community for different reasons, such as the scope of destruction on 9/11 and a pattern of repeated, malicious attacks in Israel's case, even if the letter of the law disagreed. When operations became larger in scope, such as Israel's infiltration into Beirut or the U.S. invasion of Iraq, or when operations went wrong, such as Israel's misidentified target in Lillehammer or U.S. detainment of suspected terrorists without charges at Guantanamo Bay, the world's political leaders were quick to condemn the actions.

The Munich case study, in particular, provides interesting insight into how the international community reacted to both terrorism and Israel's response to terrorism when Arab terrorism was in its infantile stages. First and foremost, the international community viewed terrorism as the victim-state's problem, not a threat of international concern. This thought

process had two ramifications when terrorist acts occurred. First, many European nations responded to terrorism out of fear or indifference. If they responded out of fear, they were more likely to capitulate to terrorist demands or otherwise arrange for the safety of their individual nation.²³¹ Consequently, there was not an overall international condemnation of terrorism.

Second, the international community did not take much action regarding a nation's response to terrorist attacks. In some cases, the U.N. condemned Israel's military response to terrorism. Even if the U.N. did denounce an attack, U.N. statements condemning both a terrorist attack and a state's reprisal attacks resulted only in an exchange of words, not decisive action. In Israel's case after the Munich attacks, its use of targeted killings did not receive much international attention until there were innocent civilian casualties. Targeted killings, as a specific tactic, did not garner much response until the early 1990s when terrorists began to strike back. Only when targeted assassinations began to elicit further retribution did the debate regarding the effectiveness and cost-benefit analysis of targeted killings increase.²³²

The comparison of the terrorist attacks in Munich, the United States, and Madrid and the associated Israeli, American, and Spanish responses reveals that despite many differences between methods of attack, scope of attack, and victim-state responses, the international community is relatively resigned to allowing a victim-state to choose how to retaliate. However, the five criteria, scale of attack, perceived threatened security, confirmation of fear, legal precedent, and capability of both state and nonstate actors to perpetuate attacks, discussed with respect to the 9/11 case study point to there being factors in each terrorist attack that more persuasively warrant military action or criminal law enforcement action.

²³¹ Klein, *Striking Back: The 1972 Munich Olympics Massacre and Israel's Deadly Response*, 175-77.

²³² *Ibid.*, 248.

The Criteria: Could Military Force be Justified?

As mentioned at the beginning of this section, these three case studies represent a broad range of casualties and damage caused by terrorist attacks. The Munich attack was very influential due to media coverage and the timing of the attack during the Olympic Games but was small in scope. In comparison, the Madrid bombings were larger in scale, resulting in heavy human casualties. The 9/11 attack was the largest attack, costing many people their lives as well as extensive damage to the Pentagon and lower Manhattan. The 9/11 case study argues that the scale of attack was akin to an act of war and thus justified a military response. Analysis of the other criteria also revealed how the United States could rationalize an armed response. However, analysis of this criterion with regards to the Munich attack and Madrid bombings not only helps determine whether military force is warranted but also indicates that the larger political environment at the time of the attack greatly influences the victim-states' responses.

The Munich attack does not represent a scale of attack, when studying this criterion alone, which would warrant a military response. As such, the international community was divided in its response to Syrian and Lebanese appeals after Israeli air strikes. The second criterion, Israel's perception about how much the Munich attack threatened its security, contributed the most to Israel's decision to attack terrorist camps in Syria and Lebanon and use their campaign of targeted killings. Although the attack itself did not threaten Israel's immediate security, occurring well beyond Israel's borders and limited in the number of people killed, it increased Israel's concerns about protecting its citizens at home and abroad and about different capabilities and methods terrorists could draw on. Furthermore, although many of the individual terrorists who attacked the Israeli athletes, the World Trade Center, and the Madrid train system were not citizens of the countries that they attacked, it is clear in both the Munich and 9/11

attacks that the organizations behind the attacks, Black September and Al-Qaeda, were international in nature.

Similar to the 9/11 attacks against the U.S. that was preceded by various other attacks, the Munich attack was preceded by years of terrorist attacks against Israel. In 1968, approximately seventy-nine percent of the fatalities caused by international terrorist incidents were suffered by Israelis or on Israel's territory.²³³ Israel continued to see high casualties caused by terrorism in 1969, suffering approximately seventy-five percent of the world's terrorist fatalities, forty-six percent in 1970, nine percent in 1971, and thirty-eight percent in 1972, prior to the Munich attack.²³⁴ During the mid-1960s tensions increased along the Syrian-Israeli border as Syria actively sponsored the PLO and Al-Fatah. Furthermore, tensions between Egypt, Jordan, Syria, and Israel were consistently high causing military clashes between Syria and Israel in the spring of 1966 and 1967. In June 1967 Israel attacked Egypt, initiating the Six-Day War.²³⁵ This war

²³³ MIPT Terrorism Knowledge Base, "Rand Terrorism Chronology 1968-1997 and Rand@-MIPT Terrorism Incident Database (1998-Present)" (Memorial Institute for the Prevention of Terrorism). Numbers were computed from a database of incidents gathered from the RAND Incident Database. As this database is intended only to aid those seeking to better comprehend terrorism and will not provide definitive information to be used as a tool for any sort of analysis, predictive or otherwise, these numbers are only approximates reflecting general trends for the years 1968-September 1972. Numbers killed in terrorist incidents do not include soldiers or law enforcement officials responding to the terrorist incident or terrorists killed while carrying out the attacks. "For the purposes of this database, terrorism is defined by the nature of the act, not by the identity of the perpetrators or the nature of the cause. Terrorism is violence, or the threat of violence, calculated to create an atmosphere of fear and alarm. These acts are designed to coerce others into actions they would not otherwise undertake, or refrain from actions they desired to take. All terrorist acts are crimes. Many would also be violation of the rules of war if a state of war existed. This violence or threat of violence is generally directed against civilian targets. The motives of all terrorists are political, and terrorist actions are generally carried out in a way that will achieve maximum publicity. Unlike other criminal acts, terrorists often claim credit for their acts. Finally, terrorist acts are intended to produce effects beyond the immediate physical damage of the cause, having long-term psychological repercussions on a particular target audience. The fear created by terrorists may be intended to cause people to exaggerate the strengths of the terrorist and the importance of the cause, to provoke governmental overreaction, to discourage dissent, or simply to intimidate and thereby enforce compliance with their demands."

²³⁴ The dramatic decrease in 1971 is explained by 73% of the fatalities being caused by two terrorist attacks: the bombing of a Portuguese ship and a Chinese passenger aircraft.

²³⁵ Ian J. Bickerton and Carla L. Klausner, *A Concise History of the Arab-Israeli Conflict*, third ed. (Upper Saddle River: Prentice-Hall, Inc., 1998), 138.

greatly increased Israel's control of land but also significantly increased Palestinian national aspirations.²³⁶

Although U.N. Resolution 242, passed by the Security Council in November 1967, reduced some of the Arab-Israeli tension, Syria stood behind its principle of no peace, no recognition, and no negotiations with Israel.²³⁷ The PLO began to use airplane hijackings to further their cause in July 1968, and the Palestine National Council negated Israel's right to exist the same month.²³⁸ The years immediately prior to the Munich attack were consumed with an unofficial war of attrition between Egypt and Israel. As a result of these tumultuous political relations and repeated attacks, Israel did perceive noteworthy threats to its future security.

The international community did not unanimously confirm Israel's security fears. Although the Security Council debated whether or not Israel's reprisal actions were justified, the U.N. did not take measures to reprimand or stop Israeli aggression against Syria and Lebanon. Many individual nations did express their explicit disagreement with the air strikes. However, a few nations, the U.S. in particular, did not agree with condemning Israel for the reprisal strikes without simultaneously denouncing the terrorist acts.

Legal precedent, the third criteria that can be useful in determining whether military force in response to a terrorist attack is legal and justified, is difficult to apply to the aftermath of the Munich attack because modern terrorism became prominent in 1968, only 4½ years earlier. However, terrorist incidents prior to the Munich attack do lend some insight into how victim-states were responding to attacks. According to the MIPT Terrorism Knowledge Database, there were 629 terrorist incidents between 1 January 1968 and 4 September 1972 which caused 276 casualties. These terrorist incidents, defined in footnote 234, encompass a variety of attacks;

²³⁶ Ibid., 146-53.

²³⁷ Ibid., 162.

²³⁸ Ibid., 164.

some as small as throwing a Molotov cocktail at the doorstep of a political building and others very large such as the bombing of an airline passenger jet.

Israel did respond to terrorist attacks using military force prior to the Munich attack. Specifically, Israel attacked the Jordanian village of Karameh after Al Fatah planted a mine that killed two Israeli adults when a school bus drove on top of it in March 1968. Israel also shelled Lebanese frontier villages in 1972 after the PFLP General Command fired rockets at a bus killing two civilians. The Israeli attack on Jordan was condemned by the U.N. Security Council in Resolution 248, passed on 24 March 1968.²³⁹ Likewise, the 1972 attack on Lebanon was also condemned by the U.N. Security Council.²⁴⁰

In addition to Israel's use of force against Palestinian terrorists, Jordan also engaged Palestinian guerillas with military force. In 1948, Jordan was the only Arab country to allow Palestinians to become citizens.²⁴¹ However, as the Palestinian movement increased, terrorists most often launched attacks into Israel from within Jordan despite Jordanian efforts to prevent this from happening. The PLO became a serious threat to Jordan's political stability, challenging King Hussein's leadership, bringing reprisal actions from Israel after Palestinian terrorist attacks, and functioning like a state within a state.²⁴² Consequently, using armed force, King Hussein expelled PLO terrorists from Jordan in the early 1970s. Jordanian action did not receive the condemnation from the U.N. that Israel previously faced. This different response might have occurred for two reasons. First, the use of military force could have been viewed as more of an internal Jordanian matter, a civil conflict between two armed groups. Second, the Palestinian

²³⁹ *The Situation in the Middle East* [on-line] (United Nations, [cited 25 September 2006]); available from <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/248/29/IMG/NR024829.pdf?OpenElement>.

²⁴⁰ MIPT Terrorism Knowledge Base, "Rand Terrorism Chronology 1968-1997 and Rand@-MIPT Terrorism Incident Database (1998-Present)."

²⁴¹ Bickerton and Klausner, *A Concise History of the Arab-Israeli Conflict*, 108.

²⁴² *Ibid.*, 148, 168.

fighters were undermining the peace and authority of an internationally recognized nation-state and its leadership.

Most other nations responding to terrorist attacks during this timeframe used criminal law enforcement to punish perpetrators. Except for four larger terrorist attacks, and attacks suffered by Israel, the majority of the 629 terrorist incidents between 1968 and September 1972 comprised of smaller attacks with one or zero casualties. The four larger terrorist attacks included three airline bombings, a Swissair plane in route to Tel Aviv claimed by the PFLP-GC until they disclaimed it due to public revulsion (an attack focused at Israel but also claiming many citizens of other nations), a Chinese aircraft bombed by an unknown group, and a Yugoslav airliner suspected of being bombed by Croatian separatists, as well as the bombing of a Portuguese ship associated with the Mozambique war for independence. These 4 attacks claimed 121 lives. Accordingly, disregarding these 4 major attacks and those suffered by Israel, in the 4½ years preceding the Munich attacks, 62 people lost their lives in the remaining 559 attacks. It follows that criminal law enforcement was appropriately applied to these smaller incidents where casualties were minor.

Finally, during these formative years when nations across the globe began to be confronted with terrorism more frequently, a precedent was set to negotiate with terrorists. Many terrorist attacks resulted in the arrest of terrorists. However, these arrests were followed by another attack demanding that the prisoners be released. The precedent being set was not a deterrent to terrorists but rather a stepping stone to further success. The first terrorist airline hijacking occurred on 22 July 1968. “The hostages were released in exchange for sixteen Arab prisoners being held in Israeli jails. The hijackers too were released.”²⁴³ With this success, Palestinian terrorists struck again on an Israeli plane at the Athens airport. These hijackers were

²⁴³ Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, 37.

freed after another plane was hijacked. Likewise, only two months later after another attack on an Israeli plane, one hijacker was released almost immediately with the other three freed after yet another hijacking. Six months passed before another plane was hijacked. The lead hijacker was released only to participate in another attack. Two Arab boys attacked an El Al office one week later, escaping after taking refuge in the Iraqi embassy. Three months later, in 1969, another El Al office was attacked. Even though two people were convicted of murder, they were freed after another hijacking. Later that year, hijackers were arrested before carrying out another hijacking but were released after a successful hijacking.²⁴⁴

“At the end of 1969, as Palestinian terrorism was increasing, the U.N. General Assembly adopted a resolution, long sought by Arab members, recognizing the “inalienable rights” of the Palestinian people.”²⁴⁵ This string of events reflects how successfully using terrorist tactics beget more terrorist attacks and how prevention may be more effective than punishment after an attack. In hindsight, legal precedent may not have favored Israel’s response to the Munich attacks, but it also did not provide a successful solution for the fight against terrorism.

The final criterion is the ability of nonstate actors to perpetuate attacks similar to state actors. Although the members of Black September who carried out the Munich attack were nonstate actors, the role of states in terrorism was much more prominent and exposed in the 1970s. Libya openly accepted the bodies of the terrorists who had been killed and ceremoniously buried them. Furthermore, many Arab nations’ refusal to denounce the attack makes evident the acceptance of this form of violence against a shared enemy. As a result, the fifth criteria that was important in determining the appropriate level of response to the 9/11 attacks and confirmed that nonstate actors could use force more frequently associated with state

²⁴⁴ Ibid., 37-38.

²⁴⁵ Ibid., 38.

actors, is not as important. However, Israel's use of force within two states does still highlight the problem of attacking terrorists who reside within sovereign nations, whether or not the sovereign nations support them or have the authority to dispel them.

Analysis of these five criteria reveal that the second criterion, Israel's perceived threat to its security, was overwhelmingly important to Israel when its leaders decided to use overt force against terrorists and nations protecting terrorists. According to this criteria, if used to measure whether military force is warranted, there is not as much of a case for Israel to use air strikes and extrajudicial killings in response to the Munich attack compared with the United States' use of force following the 9/11 attacks. Due to the lack of strong international condemnation, however, this case study shows that in spite of these criteria, the political environment regarding the Middle East conflict in 1972 greatly influenced not only Israel's choice to respond with force and the use of targeted killings but also the passivity of the international community in regard to this response.

These five criteria will also be used to evaluate whether or not the Madrid bombings could have warranted a military response even though that is not the course of action Spanish authorities chose to take. The scale of the Madrid train bombings fell between the Munich attack and the 9/11 attacks. Historically, according to the MIPT Terrorism Knowledge Database, there were 28 terrorist attacks that killed 101 or more people between 1968 and 2006. Not counting attacks where the perpetrators were unknown, attacks used in the chosen case studies, domestic terror attacks, such as the Oklahoma City bombing, or attacks that occurred in Iraq after the U.S. invasion in 2003, eleven terrorist attacks provide insight into prior responses to attacks of a similar magnitude to the Madrid train bombings as well as possible legal precedent that was established. Of these eleven attacks, six victim-states used domestic law to arrest and prosecute

terrorists responsible for the attacks, three victim-states used both law enforcement and military force, and two victim-states used only military force in response to the attacks.

Interestingly, these attacks occurred in nine different countries but also targeted many other countries. For example, four of the six attacks which elicited a criminal response were airline bombings.²⁴⁶ Three of these four attacks were later attributed to states: Libya and North Korea. Due to the international nature of overseas commercial airline flights, there were citizens of multiple countries aboard each of these targeted flights. One of the remaining two attacks in which the victim-state used law enforcement action was the bombing of a Bali discothèque. Three-quarters of the fatalities were foreigners. I suspect that a state will not be as likely to use military forces to respond to an attack in which the property belongs to them but most of the casualties are suffered by other nations. For example, the bombing in Bali was aimed more at Western nations than the country of Indonesia. It would make sense for Indonesian leaders to prosecute the perpetrators but not necessarily risk national resources and troops to retaliate against the terrorists.

Three nations utilized military force to respond to terrorist attacks: Russia, the United States, and France. The first terrorist attack suffered by Russia that killed more than one hundred people preempted air strikes and the beginning of the Second Chechen war. Similar to responding to terrorist attacks that occur right now in countries such as the U.S. and U.K., who are already engaged in actively fighting terrorism both inside and outside of their respective nations, Russia's military responses to the October 2002 Moscow theater and September 2004 Beslan school attacks coincided with ongoing military operations in Chechnya. The remaining

²⁴⁶ *Incidents by Date* [on-line database] (Memorial Institute for the Prevention of Terrorism, [cited 25 September 2006]); available from <http://www.tkb.org/Category.jsp?catID=321>.

incidents, where military force was utilized by the U.S. and France, consisted of minimal air strikes and shelling.

The international political community was tolerant of the use of force in these instances. However, the United States did receive criticism for its choice to target a pharmaceutical plant in Sudan after the embassy bombings in Africa. Air strikes targeting Al Qaeda training camps in Afghanistan were better accepted. In addition, Russia has been criticized for human rights abuses in Chechnya. Disapproval, however, has been levied on both Russian and Chechen forces and applies to the entire time span of the ongoing conflict, not Russia's decision to re-enter the province following multiple terrorist attacks.

Therefore, the scale of the Madrid train bombings and legal precedent permitting military force in retaliation for the attacks has been established by five incidents in which military action was taken. However, there are also six incidents which utilized only law enforcement action. The countries which did use military force are larger more powerful nations. Due to their economic and military strength, it follows that they would have a greater ability to respond using force in other areas of the world compared to a country such as Kenya or the Philippines.

Due to ongoing operations in Afghanistan by coalition forces, it is likely that the second and third criteria, a perception of threatened security and confirmation of this fear by other nations, would not have played a large role in determining whether a military response to the Madrid attacks was justified because Spain already had troops committed to actively fighting terrorism outside of its borders. In this particular case, the perception of fear can better be understood as fear stemming from within the country rather than outside of its borders. Spanish public opinion regarding the war in Iraq and the recognition that the perpetrators could be "homegrown" terrorists steered Spain's Prime Minister to address domestic pressures instead of

continuing to keep troops in Iraq, a hotly contested war by the Spanish people. The ability of Spanish police to quickly narrow in on suspects of the Madrid bombing confirmed that such a horrific attack could be perpetrated by nonstate actors, but also that Spain could find, arrest, and prosecute wanted terrorists using its own legal system. As a result, using the five criteria, a mid-level attack such as the Madrid train bombing could warrant either the rightful use of military force or the use of law enforcement action. Determining factors, from an international perspective, will come predominantly from the second criteria, the threat perceived by the victim-state, the history of terrorism against that nation, and world political events at the time of the attack.

Although the five criteria used, in part, to determine whether or not military force was appropriate in response to the 9/11 attacks helped establish solid criteria from which to analyze the United States' response, the comparison of all three case studies shows two important issues that must also be addressed if international law is to be appropriately amended. First, each victim-state weighs each criterion differently when choosing how to respond to an attack. Second, other factors, such as an individual nation's experience with terrorism and the current world political atmosphere, inevitably carry tremendous weight on the victim-state's decision. Therefore, in order to best address terrorism using international law, the law must include necessary guidelines that help nations, both small and large and weak and strong. Political action, both from the U.N. and individual nations, must also correspond with the law.

Conclusions

One common denominator exists among each of these case studies: the loss of innocent life. The way each nation responded to being attacked varied, exhibiting both merits and shortcomings. For example, Israel responded to the Munich attack by not giving-in to terrorist

demands and striking back at camps fostering terrorism and leaders inciting terrorism. To a certain extent, this response was considered effective. The idea of defeating terrorism by not complying with terrorists and thus rewarding terrorist tactics is a respected and often used response today. However, Israel's response did have its disadvantages in that the country acted unilaterally and did not have the support of many nations. Also, their use of targeted killings necessitates the question of the legality of killing terrorist suspects without trial. These shortcomings reflect some of the important issues the international community faces when applying international law to terrorism.

The U.S. response enjoyed the legal and political advantage of being directly supported by an international coalition. This united front was also effective in portraying international disapproval of terrorism. Nonetheless, military action of such a magnitude prior to the legal determination of detainee status by U.S. and international leaders hinders the overall effectiveness of the U.S. response. Once again, international law falls short.

Last, Spain has prided itself in using and following the law to apprehend and punish terrorists responsible for the Madrid bombings. Except for some concerns levied by Human Rights Watch, Spain's response has followed existing legal requirements. However, despite Spanish troops' continued presence in Afghanistan, Spain's decision to withdraw from Iraq might have hampered the overall fight against terrorism due to the perception that the terrorists achieved their objective. This perception would not only foster the idea that terrorist tactics are worthwhile but could also hurt the united front the world needs to portray regarding terrorism.

How each individual nation responded after losing lives at the hands of terrorists and how the international community responded to the victim-states' response led me to four conclusions. First, after each terrorist attack there was a choice to be made both by the victim-state and by the

international community. Due to media coverage, everyone, from the individual worker on the street to politicians in national capitals, knew that an attack had occurred and carnage had been wrought. Therefore, the victim-state had the opportunity to choose to respond within the scope of existing international law, interpret international law to more clearly account for factors that are vague regarding terrorism, or retaliate using tactics outside of international law. The international community, also, had the opportunity to either support the victim-state and help it respond to the attacks while showing a unified front of condemnation against terrorism or to remain silent.

Furthermore, each terrorist attack gave the international community the opportunity to affirm that terrorism is wrong and can not be tolerated. John O'Sullivan provides a succinct opinion on how this issue might be simplified in order for the international community to establish whether terrorism can be right or is always wrong. Discussing the commonly heard statement, one man's terrorist is another man's freedom fighter; O'Sullivan refutes this statement stating, "A man who murders innocent by-standers is not the same thing as a man who resists oppression. The first is defined by his actions, the second by his aspirations. And if someone seeks freedom by murdering innocents, he is to be condemned as a terrorist, even if we sympathize with his aspirations."²⁴⁷ Although the goal of a terrorist may be justified, and therefore sympathized with by different nations and peoples, the murder of innocent people in pursuit of this aim is never justified. Nevertheless, the international community continues to debate this point in the midst of continued terrorist incidents and the loss of many innocent lives.

Second, I conclude that international condemnation of terrorism on a political level is not adequate. Socially, the vast majorities of people dislike terrorist tactics and perceive them as

²⁴⁷ John O'Sullivan, *Munich vs. Vengeance* [on-line] (National Review Online, 27 January 2006 [cited 25 September 2006]); available from <http://www.nationalreview.com/jos/osullivan200601270808.asp>.

wrong. However, social feelings are not sufficient to instigate political change on a world-wide scale. Societies in each country must recognize that after years of appeasing terrorists, by paying ransoms, releasing prisoners, and otherwise giving the terrorists' causes recognition, more blood will be shed before individual groups are stopped. This recognition will allow the political leaders to stand firm against terrorist pressure, not concede to terrorist demands, and convince terrorists that their tactics are no longer effective.

Third, time has made terrorism a recognized threat, but national interests remain paramount when decisions are made regarding terrorism. Furthermore, a nation's military and economic strength and its international influence impact how the international community applies international law to state responses. This inconsistency poses a problem for the international community because terrorism is a worldwide phenomenon that will no doubt worsen as technology provides easier and faster international communication and travel, better and more disguised weapons, and new means of recruitment. Although this technology also presents an opportunity for nations to increase international cooperation, it seems that a nation's interests will override international attempts to thwart terrorism. This continued approach of individual nations responding differently to terrorism provides terrorist organizations the ability to operate in areas that are more vulnerable if they are not welcomed outright.

Last, and most important for the use of international law to fight terrorism, the international community provides leeway to victim-states when responding to terrorism. Victim-states may not have the freedom to operate at will, but they also may not be punished for stepping outside of the boundaries of traditional threat responses. In addition, because terrorist attacks are often different from attacks previously witnessed, posing different threats, utilizing different weapons, threatening different targets, and causing different numbers of casualties, the

chaotic aftermath of a terrorist attack will always lend itself to much debate. Consequently, as political leaders try to respond to the attack, the legality of proposed responses and the ongoing threat may not be crystal clear. This will allow nations to take action with little immediate criticism from the international community.

Each of these case studies represent real lives lost and real victim-state responses that have changed and will continue to change the course of history for that individual state and the international community. In each case, legal questions pertaining to the treatment of terrorists and the legality of using force have arisen. Most importantly, each case occurred in the past, and terrorism continues to haunt the international community today. These case studies are invaluable in helping to identify criteria and fundamental legal principles that are important to victim-states and commonly needed after a terrorist incident. Based upon this insight, Chapter VI will tie together lessons learned from the three case studies, the complexities that currently exist in applying international law to terrorism, and the benefits and disadvantages of characterizing terrorist acts as criminal acts or acts of war. The chapter concludes the thesis with my proposal for how international law may be modified in order to more appropriately address this grave, international threat.

CHAPTER VI

CONCLUSIONS

Introduction

Many groups of people, including scholars, politicians, and lawyers, continue to debate what international terrorism is and what methods and laws can be used to counter it. This thesis introduced only some of the difficulties faced when defining terrorism and when victim-states respond to terrorism. The horrors of World War II inspired a generation of world leaders to unite, building the foundation of the United Nations and creating a charter for peace. War was discouraged, and various economic and diplomatic processes for solving issues and maintaining peace were encouraged in its place. These alternative methods have not eradicated warfare. Many recent conflicts have been created by the deliberate disregard for international law and the sovereignty of another nation. However, nation-states have also cooperated and responded against states that have broken international law. For example, when Iraqi troops invaded Kuwait, the international community was quick to condemn Iraq's violation of Kuwaiti sovereignty. Unfortunately, there is a lack of clear guidance in international law when the violent perpetrators are a loosely organized group of nonstate actors from multiple nations, operating worldwide. This insufficient guidance is exemplified by the different responses by states to terrorism and conflicting interpretations of provisions regarding self-defense in international law. Although domestic law and international criminal law may adequately provide guidance for enforcing justice against some terrorist attacks, the unique attacks which stem from adept organizations that operation internationally, cause significant damage, or utilize new methods to achieve violence requires additional guidance from international law to better guide appropriate and effective responses.

Lessons learned from the three case studies discussed in Chapters IV and V will portray how international law can play a vital role in the aftermath of a terrorist attack. This brief review and discussion provides the basis for my proposed criteria which can be used to measure a terrorist attack to help determine whether military force or the use of law enforcement mechanisms are more appropriate during the victim-state response.

My explanation of these criteria is followed by recommendations for modifications that could be made to international law to make it more applicable to issues nation-states currently face as well as my proposed definition of terrorism. In addition to agreeing to an international definition of terrorism, the international community must consider further action against terrorism in order to show unanimity against these tactics. Terrorism is not a phenomenon that will go away nor can it be completely defeated. It is a concept, a method of fighting that has been used throughout history by a variety of people for many different reasons. Similar to fighting crime, it is worthwhile to fight against terrorism in order to deter people from terrorism and hopefully safeguard some lives. With that in mind, I hope to illustrate how despite the complex nature of terrorism, international law, can improve victim-states' approaches when responding to a terrorist attack and encourage the international community to consistently support international law tailored for terrorism to effectively fight terrorism.

Lessons Learned

The three case studies of terrorist attacks and corresponding victim-state responses provide valuable insights into the perspective of a victim-state following an attack and the role international law plays in determining how a state responds to an attack. Five lessons obtained from analysis of all three case studies help identify shortcomings in how the international

community currently reacts to terrorist attacks and similarities that occurred in each victim-state that may reflect a commonality among all states that are victims of terrorism.

The first lesson is that a nation's sovereignty overrides all other considerations immediately following a terrorist attack. A nation will take the action it deems the most important despite potential international concerns. Although each case study revealed different victim-state responses, each victim-state was similar in the underlying motivation for its actions. Israel's leadership knew its use of targeted killings would be controversial, yet decided this response was the correct response. Disregarding the international community, they chose to proceed with their response but tried to hide traces of governmental involvement in the operations. Similarly, even though the U.S. tried to persuade the international community in its favor and build a coalition in which multiple nations would assist in the U.S. response to the terrorist attacks, ultimately, neither the U.S. public nor its political leaders required international confirmation. As polls referenced in Chapter V revealed, the United States' response was not dependent upon U.N. agreement. Finally, Spain also chose to act according to the immediate needs of the country. International pressures both for and against Spanish involvement in Iraq were not the determining factor in Spain's withdrawal of its troops. International law, in order to be accepted and followed, must recognize the importance and supremacy of national sovereignty. If the law makes this allowance, nations will be more apt to respect it after an attack has occurred.

The second lesson learned is that when international cooperation is achieved, law enforcement measures using domestic law and international criminal law can be effective and advantageous but may still not be sufficient. The cooperation of multiple countries helped Spain arrest and prosecute terrorists responsible for the Madrid bombings. Thus far, Spain has

successfully used law enforcement to help exact justice. Unfortunately, some countries will not always cooperate with a victim-state, leaving a victim-state with the possibility that law enforcement will not be adequate. Also, it is too soon to determine whether or not Spain will continue to be a target for terrorism. Consequently, international law must recognize the usefulness of both criminal law and international humanitarian law.

The third lesson is that the scope of attack, as a sole factor, will not determine a victim-state's response to a terrorist attack. A state's response is often, but not always, heavily influenced by its people. A nation's people are not experts in either international law or political theory. Instead, the strongest reactions occur in the heat of the moment, immediately following an attack. This initial reaction can profoundly influence political leadership and result in a harsher response. For example, Israeli and U.S. military strikes may have been more instruments of hostility while emotions were raw rather than the results of sound, effective policy pursuing justice and accountability. International law, therefore, must address other factors in addition to the size of the attack when establishing what types of attacks warrant military responses.

The fourth lesson to be taken from the case studies is that world events will play a large role in determining a victim-state's response. International economies, events, et cetera cannot easily be forecasted, and therefore taken into account, by people drafting policy and law today. The varied strength of each victim-state also influences how they can respond. Israel was a small nation in a volatile region when it suffered the Munich attack. Consequently, covert action corresponded more closely with their capabilities and international tolerance for Israeli retaliatory action. Israel's strength and status in the world differed from the United States', which was a superpower, when it was attacked in 2001. These variables make it even more important for the international community to develop guidelines for all countries to follow.

Previously, international law was written to be vague and open for interpretation in order to account for world changes. To remain relevant, international law must clarify when an attack meets the threshold that permits a large scale military response. As a result, stronger nations will be bound not only by their military strength but by international guidelines.

Finally, the last lesson is that although the international community consistently provides latitude to victim-states when they first start to respond to an attack, questions and criticism regarding the extent of the victim-states' reprisal actions will always follow. This initial leniency and then scrutiny once the response has commenced continually evokes questions regarding the engagement and treatment of nonstate actors. If international law was modified to clarify these questions, the international community could still respect individual victim-states and continue to provide leniency. However, the victim-state could immediately tailor its response to follow pre-established guidelines.

The following five lessons learned from the case studies expose some of the variables that international law must account for when providing guidance to a victim-state:

- 1) Sovereignty is paramount to a state responding to an attack
- 2) Law enforcement measures are advantageous but may not always be sufficient in response to terrorism
- 3) The scope of the attack is not the only, or in some cases even the leading, factor weighed by victim-states when formulating their response
- 4) World events and victim-state strength are variables that guidance regarding terrorism in international law must account for
- 5) Leniency is given by the international community but will result in continuous legal unknowns unless guidelines are established in international law

Further, these lessons show that some unknowns will always be present and cannot be predicted by politicians drafting laws today. Therefore, an overarching policy regarding terrorism and terrorists is needed to provide some fundamental groundwork from which states can then continue their own individual policies.

Chapters II and III discussed complexities that occur when trying to apply international law to terrorism and some benefits and disadvantages associated with approaching terrorism as a crime versus an act of war. The first step toward reconciling many of the questions created by terrorism is to determine the nature of an attack. This determination of whether the terrorist attack is akin to an act of war or more closely affiliated with a crime enables modifications to be made to international law that will better address three fundamental questions: when does the law apply, who does the law apply to, and what are the protections afforded by the law. The changing and varied nature of terrorist attacks makes classifying it solely as a criminal act or an act of war extremely difficult. It is more appropriate to establish a set of criteria from which to measure the attack which, in turn, will guide the victim-state's law-enforcement or military response.

Five Criteria

Throughout Chapters II and III, a variety of criteria taken from the Inter-American Commission on Human Rights and Sean Murphy's article, "Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter" were discussed. Similarly, I suggest five criteria that can be applied to a terrorist incident in order to determine whether a nation should respond to a terrorist attack using predominantly law enforcement personnel, procedures, and legal guidance or if a military response is appropriate. According to how the criteria is measured for each incident, an attack will either warrant a military response and thus initiate applicable portions of international humanitarian law or law enforcement action triggering domestic law, transnational criminal law, and international human rights law. The criteria are as follows:

- 1) Severity of the terrorist incident
- 2) Nature of the terrorist incident
- 3) Character of the terrorist/terrorist organization
- 4) Perception of threatened security

5) International acknowledgement of the terrorist incident

Prior to the international community accepting these criteria, it must first accept that both state and nonstate actors are responsible for the success and perpetuation of terrorism. This statement has two consequences. First, states and the international community, as an entity, must hold each other accountable to standards dictated by international law. This accountability will increase cooperation among states and put pressure on those states that either directly support terrorists or choose to allow terrorists the freedom to train and hide within their borders. Second, acknowledging that nonstate actors can pose grave security threats to states worldwide necessitates the clarification of legal standards that once only applied to nation-states and individuals acting on behalf of states.

The first criterion is the severity of the terrorist incident. When analyzing this criterion the number of casualties and the amount of destruction wrought by the terrorist incident should be considered. It is important to consider the consequences of an attack since a terrorist incident resulting in zero deaths and minimal property damage differs greatly from one which kills hundreds of people or targets a nation's infrastructure. The consequences should not only be measured in terms of monetary damage and loss of life but also in the psychological impact of the attack on its victims.

The second criterion is the nature of the terrorist incident. This criterion includes the methods used by the terrorists to accomplish the attack as well as who or what the intended target of the attack was. The methods used by the terrorists are important to consider, in part because they correspond with the number of casualties, and because they reflect different levels of training, funding, and organization. Who or what the terrorists target is also important to nations responding to terrorism. A target could include civilian as well as military personnel, though

they might not be weighed the same. Higher military casualties may be more acceptable than civilian casualties. Similarly, an attack against a military installation could be perceived more or less threatening to a nation's security than an attack on a shopping mall.

This criterion also considers the frequency of attacks on a nation-state. The frequency of attacks may not be important when determining a response against a large-scale attack, such as 9/11. However, it is a necessary consideration for both the victim-state and the international community when determining how to respond to smaller terrorist incidents. A pattern of smaller attacks could portray different capabilities of a terrorist organization, reveal a repeated ability to breach a nation's security, and result in equal amounts of death or destruction when observed together. Previous attacks against a nation-state may also reflect a growing security threat. Whereas a smaller terrorist incident may not warrant a military response, a small terrorist attack preceded by multiple attacks by the same terrorist organization may affirm a nation's fear of a security threat. Utilizing this criterion helps to distinguish between criminal acts that should be addressed as crimes under established domestic and transnational criminal law and terrorist acts that were motivated by organizational influences or ideology that emanates from a much broader population than those directly responsible for the attack.

The third criterion focuses on the character of the terrorist/terrorist organization. This criterion helps reveal if there is a defined leader, an organized intent behind the incident, and whether or not there is a future threat by the same terrorist organization. Although not always the case, a better planned event, such as 9/11, more often reveals a larger, more structured organization and consequently, a higher potential for future security threats. Terrorist incidents perpetrated by a sole actor or small organization may reveal no future security threat if the actor(s) are imprisoned. However, this is not always the case. Splinter groups may be motivated

by a larger phenomenon, not posing a long-term threat if the actors are imprisoned but revealing a larger security problem for a nation.

The fourth criterion to evaluate when determining how to respond to a terrorist incident is the victim-state's perception of its threatened security. Although perception may differ from reality, it is important for the international community to understand not only the real threat that faces an individual state but also how the state's political leaders and population internalize the threat. A state may feel threatened in a variety of ways for many differing reasons. For example, the Japanese attack on Pearl Harbor and the 9/11 attacks on the World Trade Center and the Pentagon were similar in the casualties and destruction suffered. However, the methods used to attack the U.S. and the circumstances surrounding each attack were very different. Consequently, the U.S. perceived its security was threatened in different ways. Although war resulted from both attacks, underlying motivations were unique in each U.S. response.

The final criterion is international acknowledgment that the incident was a terrorist incident. I include this criterion using broad but simple language for two reasons. First, it is important for the international community to acknowledge that a terrorist incident has occurred. This recognition would allow for the use of international law specified for terrorist incidents and encourage international cooperation. Second, this criterion does not mandate that the international community confirm the nation's perceived fear after each attack. I do not include this restriction because of the international community's difficulty with finding common ground and acting on agreement in a timely fashion. Although it would be advantageous to always have international confirmation of a nation's fear prior to that nation responding to a terrorist incident, adding this requirement to the criteria could slow action against terrorists and jeopardize the safety of a victim-state and its people.

One hindrance that could arise when using the proposed criteria could be the unavailability of some information immediately following a terrorist attack. This would cause trouble primarily in accurately identifying the perpetrators of the attack. For example, the Spanish government initially blamed Basque separatists for the Madrid bombings. However, investigations quickly implicated Islamic extremists instead. Victim-state responses need to ensure they respond against terrorism by targeting those responsible for the attacks. This may require a victim-state to respond more slowly than desired. However, the analysis of four of the five criteria should not change regardless of this additional time. The criterion which may be affected is how the victim-state perceives the threat to its security. As mentioned earlier in this chapter, stronger reactions and consequently harsher responses may be used if a victim-state responds immediately to a terrorist attack. Although not true in every situation, taking additional time, if necessary, to accurately identify the responsible terrorists may result in a clearer perception of the extent of the security threat and generate a more effective response. One of the questions raised in this thesis is when can nations use force in response to a terrorist attack. Although Article 51 maintains the right of self-defense, this portion of the Charter is more idealistic than realistic. The law needs to be applied or it becomes a theoretical argument used by some people and scoffed at by others. Consequently, international law should be modified so as to not require state action to stop in anticipation of U.N. action. My proposed criteria can help determine whether force is or is not a legal response as well as augment the two legal principles discussed below.

Establishing the Terrorist Identity

In addition to using the five criteria discussed above to determine how terrorist incidents should be categorized, the international community must also establish a clearer identity for

terrorists within international law. Although a terrorist could be labeled as a criminal or a combatant depending on how the terrorist incident is analyzed according to the five criteria, in order to establish a standardized method of handling terrorists, the international community should label terrorists as such and not try to put them into a mold already established for criminals who perpetuate crimes addressed by domestic law or military forces bound by international humanitarian law. It would be advantageous for the international community to establish two fundamental legal principles to be applied specifically to terrorists.

First, it should be recognized and recorded that terrorists are unlawful combatants. They should not be treated as mere criminals because they are engaging in warfare against a nation-state but should also not be given the protection and legal rights due to a state's armed forces. Establishing terrorists' identity as unlawful combatants necessitates a modification, or addition, to international law in order to alleviate uncertainties regarding how a terrorist should be treated, confined, tried, and punished. Ideas as to how this might be accomplished follow in the next section.

Second, individual nations should retain the right to use domestic law to prosecute and punish terrorists. The international community moves at much too slow a pace to consider drafting legislation and establishing the infrastructure to try all terrorists. Furthermore, it provides healing and closure to a victim-state if they are responsible for punishing those who attacked it. Nonetheless, international law should provide general guidance as to how nation-states create laws that address terrorists. Modification of international law will also help to reconcile some of the benefits and disadvantages that occur when addressing terrorism with both domestic law and international humanitarian law.

Modifications to International Law: A Revised Approach to Terrorism

Both domestic law and international law provide useful and desired guidance to victim-states responding to a terrorist attack. However, as Chapter III revealed, the two legal frameworks do not always coincide with each other. Nations have been more proactive in modifying or creating domestic legislation to better protect innocent people and prosecute terrorists. As they continue to do so, individual countries will become better equipped to counter terrorism. The international community must also continue to work towards understanding and agreement regarding the illegality of terrorism and its methods and the legality of victim-state responses to terrorist attacks. Three specific modifications to international humanitarian law and a comprehensive definition of terrorism will bring the international community much closer toward this mutual understanding and posture against terrorism. These recommended modifications and the proposed definition address international terrorism. Recalling from Chapter I, terrorist attacks referenced are those where targets were outside of the terrorists' nation or domestic targets with international significance or association. This distinction allows states full criminal jurisdiction as well as the ability to prosecute terrorists for treason if the attacks are domestic terrorist attacks occurring within a nation's borders by citizens of the state.

The first modification to be made in international humanitarian law is to establish that conflicts initiated by terrorists occur between a state and a group/organization/individual which acts in support of a cause or movement not directly affiliated with a state. This point is fundamental to the next two proposed modifications. Although a state may provide funds or weapons, such as Iraq providing monetary compensation to the families of suicide bombers or Iran providing arms to Hezbollah, terrorist groups such as Al Qaeda and Hezbollah operate separately from a specified state and claim allegiance to people and ideas that are outside of or

distinct from a specified state. This distinction is necessary due to previously written international law, to include the Geneva Conventions and the U.N. Charter, focusing on actions of and relationships between states.

The second modification needed in international humanitarian law is the establishment that terrorists are unlawful combatants. This modification would apply to terrorists captured within the state they are citizens of or abroad. It would also negate qualifying conditions used in the Geneva Conventions to distinguish between uniformed forces and militias that can legitimately wage war, such as fighting under a designated leader or command structure, wearing a fixed and distinctive sign, carrying arms openly, and obeying international law. Further, it would inhibit terrorists from being afforded the protections of a combatant given by the law of armed conflict. Perhaps most importantly, determining that terrorists are unlawful combatants negates the necessity to release them at the end of hostilities as mandated for legal combatants.

The third modification speaks to how terrorists, as unlawful combatants, should be treated if captured. Victim-states who capture terrorist suspects should refrain from using violence to life and person, in particular murder, mutilation, cruel treatment and torture. In the spirit of human rights law, they should also not commit outrages upon personal dignity, such as humiliating or degrading treatment. The international community must clarify these generalized standards of treatment as the U.S. government is currently trying to do so as not to limit themselves from gathering useful information from captured terrorists but also to ensure that they uphold human rights.

If captured, terrorists should be tried before a qualified judge and be given the opportunity to present a defense with the assistance of a qualified advocate or counsel. These trials can occur before either a domestic court or a military court-martial. However, in either

case, the legal standards established by these modifications to international law must be followed (i.e. terrorists must be designated as unlawful combatants and treated according to distinct standards established by the international community for nonstate, illegal combatants). The leeway provided in the law to enable trials to occur in both domestic and military courts accounts for two issues. First, due to continued variance in how and where a terrorist may be captured, on the battlefield outside of a victim-state's borders or at the scene of a terrorist attack within a state's borders, the detained terrorist suspect can be tried where the victim-state is logistically competent. This allowance also enables domestic courts that already have necessary existing infrastructure, such as judges, investigators, and lawyers, to serve as the setting for trial. Second, it safeguards the terrorists' rights, ensuring that in either forum they receive proper counsel and a fair trial.

Using the same broad international guidelines to detain and prosecute all terrorists will also help to ensure that regardless of where terrorists are detained, they are treated humanely and have the opportunity to meet with counsel. The international community's efforts to establish standards regarding issues, such as how long a terrorist can be detained without trial and minimum sentences for terrorist acts, would still allow individual nations to determine details, such as where prisoners are detained, what kind of sensitive information is revealed in the courtroom during trials, and impose stiffer penalties if desired. National sovereignty could therefore be upheld while also establishing common benchmarks worldwide.

All of these modifications are reliant on an agreement by the international community regarding the definition of international terrorism. I propose the following definition:

premeditated actions involving the citizens or territory of more than one country, predominantly against civilian targets, taken by nonstate actors, to include subnational groups and clandestine actors, who threaten, attempt, carryout, assist with, direct, or organize incidents, that damages life and/or property and endangers and disrupts the

public in order to influence the government and/or provoke fear and intimidate the public regardless of motivation or cause used to justify the actions.

This definition serves a number of purposes. First, it focuses terrorism around action. The motivations underlying terrorist attacks are not being judged. As a result, although individual nations may sympathize with the aspirations of the terrorists, a strict standard of actions that further these aspirations that are legal or illegal is established. This definition clarifies the actions that will not be tolerated and can be applied to terrorist attacks irrespective of the terrorists' motivations.

Second, it specifies who terrorists are. First, they are nonstate actors. State actors can fund and arm terrorists. These actions are already prohibited according to conventions enacted by the United Nations. Written law is also already in place to guide state interactions. It is essential for the international community to use available laws, political pressure, and U.N. assets to enforce these prohibitions against state actors. Second, terrorists are not only the individuals who carry out the attacks but also those who lead, equip, and inspire people to commit terrorist acts. This specification serves a dual purpose. First, it recognizes the importance of the leadership of terrorist organizations. Individual terrorists may have numerous reasons for joining a terrorist organization and for committing terrorist acts. However, these motivations, alone, would not enable them to carry out an attack. The leadership and broader organization provides training and tools and continues to recruit other people to carry out their ultimate mission. Second, it enables the international community to take action against people who may not directly work in a terrorist organization but who directly incite this illegal form of violence.

The third aspect of the definition specifies what the actions do. This portion of the definition is broad but accounts for damages to life, property, and the psyche of a nation. Each

of these factors plays an important role in the economic and political well-being of a nation. In addition to what terrorist actions accomplish, the definition states that terrorism predominantly targets civilians. A violent, terrorist incident that targets innocent civilians is often more impressionable. However, this does not negate the ability of terrorists to also target military personnel and infrastructure. Military targets are lawful targets when a state is at war with another state. Terrorists are nonstate actors and cannot lawfully declare war against a state. Although a government and its public may accept higher military casualties when considering its response to a terrorist attack, the attack against a military target remains a terrorist incident.

In addition to establishing a common definition from which to modify international law and implement existing law, the international community will play a pivotal role in the continued success of terrorism as a tactic or its failure and the diminishment of its use.

Role of the International Community

Three broad responses to terrorism must come from the international community in order to deter terrorism: condemnation, cooperation, and negative consequences.

Condemnation

Unanimous condemnation of the use of terrorist tactics is essential to decreasing the appeal of these tactics. Recently, verbal condemnation of terrorist attacks is given by most nations soon after a state suffers an attack. This worldwide disapproval of terrorist tactics is positive and reflects an increase in disapproval of terrorism since terrorist tactics became more prominent in the late 1960s. This condemnation must continue from as many nations as possible and will be most effective when it is unanimous across the entire community of nation-states as well as influential leaders in each nation-state to include political and religious leaders and

educators. International condemnation can also be manifested through international cooperation against terrorism.

Cooperation

In most cases where victim-states used military force in response to a terrorist attack, they did so because another state was assisting the terrorists. The overall violence associated with terrorism could be reduced if each state patrolled its own borders and refused to allow its territory to be used for terrorist recruitment, training, et cetera. One of the disadvantages of limiting a victim-state to responding to terrorism using only law enforcement measures is that this requires international cooperation. If the entire international community cooperated with each other to crush terrorism within each nation and extradite and prosecute individuals who continue to use terrorist methods, the use of military force against terrorism would probably decrease substantially. Therefore, cooperation with the international community to internally monitor each individual nation and cooperation throughout the international community to share intelligence and extradite and punish terrorists will further exemplify international condemnation and augment the world's fight against terrorism in every corner of the globe.

Consequences

The third aspect of the fight against terrorism necessary for the international community to embrace is ensuring that all terrorist actions are met with negative consequences. Gaining international attention and recognition and gaining power by using terrorist tactics shows terrorist organizations that their tactics are successful. This success breeds more terrorism and motivates terrorists to create more spectacular terrorist events. If the international community fails to respond to terrorism, or worse, takes action that can be seen as satisfying terrorist demands, terrorist tactics will become increasingly utilized. Although taking action directly

against terrorists might appear to increase terrorism, this should not deter states from using all necessary tools to freeze terrorist financing and paralyze terrorist operations. If the international community fails to take decisive action against terrorism, terrorism will not fade away. Instead, terrorist organizations will increase in strength and ability causing larger disasters when they do strike and developing infrastructure and organizational structures that are more difficult to disrupt.

Final Thoughts

The authority of the nation-state remains important to the international community in order to maintain disciplined armies rather than uncontrolled mercenaries. Not only do the nation-state and the participation of the nation-state in the international community provide restrictions on behavior, its' leaders are also responsible and accountable for their peoples' behavior and for their nation's policies. In order to maintain some semblance of order amidst the chaos of 193 nations and six billion people inhabiting Earth, private warfare cannot be tolerated.²⁴⁸ French President Jacques Chirac summarized this idea well in a 1986 speech in which he said, "Terrorism takes us back to ages we thought were long gone if we allow it a free hand to corrupt democratic societies and destroy the basic rules of international life."²⁴⁹

In order to effectively respond to terrorist attacks, the attack must first be measured using the five proposed criteria. If the attack is determined to not warrant a military response, the victim-state response should incorporate law enforcement agencies and procedures. A proper investigation followed by punishment of the terrorists and possible diplomatic and economic pressure on rogue states supporting the terrorists would be appropriate. If the attack is similar to

²⁴⁸ Matt Rosenberg, *The Number of Countries in the World* [on-line] (About, Inc., 1 July 2006 [cited 13 October 2006]); available from <http://geography.about.com/cs/countries/a/numbercountries.htm>.

²⁴⁹ Jacques Chirac, *Quotes on Terrorism* [on-line] (Notable Quotes, 24 September 1986 [cited 13 October 2006]); available from http://www.notable-quotes.com/t/terrorism_quotes.html.

an act of war, the response should involve the military. Either way, the individual terrorists who have acted using terrorist tactics should be held responsible for their actions under a nation's domestic law guided by one broad international terrorist law. Second, the overarching international response to the terrorist incident should always be the same. Terrorism should never pay. The international community should never allow terrorists to achieve their ultimate objective using terrorist tactics. The international community must always cooperate and always condemn the use of terrorist methods. Only when there is a unanimous resolution to not accept the use of terrorism, will terrorist tactics stop providing success to organizations using them.

Although seemingly a cliché, if the leaders of all nation-states unite and take necessary action in each corner of the world, terrorism will cease to become an effective method of imposing one's beliefs on another. However, as long as the international community remains divided, terrorism will create discord in domestic and international courts and uncertainty and fear for the future. Although conflict has persisted despite international efforts toward peace, the spirit of international law remains a significant aspiration for the world to work toward. Success in protecting the dignity of human life is still success even if it does not occur in every circumstance. Terrorism creates instability and diminishes some of this world's honor and dignity. An Associate Justice of the United States Supreme Court from 1939-1962, Felix Frankfurter, once said, "If one man can be allowed to determine for himself what law is, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process."²⁵⁰ Despite the worthiness of one's aspirations, using terrorist tactics will draw the world farther from equity, justice, and peace. The world must rise above this evil with

²⁵⁰ Felix Frankfurter, *Law Quotes* [on-line] (World of Quotes, [cited 13 October 2006]); available from <http://www.worldofquotes.com/topic/Law/2/index.html>.

ingenuity and conscience and create a better political and legal system for the generations to come.

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PROFESSIONAL HISTORY

December 2006

District 15 USAFA Nominating Committee, Viera, FL

- Member of the candidate interview board established by Congressman Weldon to determine Congressional District 15's nominations to the US Air Force Academy for the Class of 2011

October 2004 – September 2006

45th Mission Support Squadron, Patrick Air Force Base, FL

Chief, Career Enhancements

- Led Air Force officer and enlisted promotions, awards and decorations, officer and enlisted performance reports, special actions and military testing within the Military Personnel Flight
- Provided personnel support for over 20 Colonel through General Officer raters dispersed throughout US Air Force Southern Command: led quality check and editing on all officer and enlisted promotion packages and enlisted and officer performance reports
- Officer in Charge, Personnel Deployment Function and Disaster Control Group/Casualty Assistance Support Team
- Supervised nine Noncommissioned Officers, Airmen and civilian personnel

April 2004 – October 2004

71st Mission Support Squadron, Vance Air Force Base, OK

Chief, Customer Support

- Directed the Military Personnel Flight's customer service, evaluations, special actions, promotions, testing and military awards sections
- Supervised seven Noncommissioned Officers, Airmen and civilian personnel

August 2003 – April 2004

71st Flying Training Wing, Vance Air Force Base, OK

Wing Protocol Officer

- Focal point for all protocol matters to include billeting, transportation, and other arrangements for all distinguished visitors to Vance Air Force Base
- Advised Wing Commander on protocol procedures and events including conferences, changes of command, promotion and retirement ceremonies, and distinguished visitor events, ranging from international senior officers, to congressional members hosted by the commander

EDUCATION

Institution: Master of Arts, Political Science, Virginia Polytechnic Institute and State University-
December 2006, 4.0 GPA
Bachelor of Science, Foreign Area Studies, Distinguished Graduate (Summa Cum Laude),
U.S. Air Force Academy - May 2003

Training: Basic Personnel Officer Course, Distinguished Graduate (Top 10%), Keesler AFB, MI –
July 2004
Air and Space Basic Course – Apr 2004

Certification: Business Specialist Certification, Brevard Community College, Patrick AFB, FL – May
2006

HONORS/MAJOR AWARDS

- Air Force Commendation Medal, 45th Mission Support Squadron, Patrick AFB, FL – 2006
- Phi Kappa Phi (All-Discipline Honor Society) - 2006
- Outstanding Personnel Manager of the Year, 45th Space Wing, Patrick AFB, FL – 2005
- Air Force Achievement Medal, 45th Space Wing, Patrick AFB, FL – 2005
- Company Grade Officer of the Quarter, 45th Mission Support Squadron, Patrick AFB, FL – 2005
- Nominated Attendee for International Mission on Diplomacy, Eastern Europe – 2005
- Air Force Achievement Medal, 71st Flying Training Wing, Vance AFB, FL – 2004
- Distinguished Graduate, Basic Personnel Officer Course, Keesler AFB, MI – 2004
- Company Grade Officer of the Quarter, 71st Mission Support Squadron, Vance AFB, OK - 2004
- Academic Exceptional Performer, Air & Space Basic Course, Maxwell Air Force Base, AL – 2004
- Distinguished Graduate (Summa Cum Laude), U.S. Air Force Academy – 2003
- Outstanding Cadet in Foreign Area Studies Class 2003, U.S. Air Force Academy – 2003
- Jean-Pictet International Law Competition Competitor, Nafplion, Greece - 2003
- Phi Alpha Theta (History Honor Society) – 2003
- Pi Sigma Alpha (Political Science Honor Society) – 2002
- Jumpmaster, Wings of Blue Parachute Team, U.S. Air Force Academy – 2001-2002