

ADDRESS: ANTHONY D'AMATO*

Terrorism is a national issue. The people recently kidnapped were not kidnapped because of who they were or what they had done; they were kidnapped as representatives of the United States.

Professor Francis Boyle has commented that terrorists are not motivated by the immediate considerations of an ordinary criminal. He said that they are seeking some kind of political goal—that they are working for a different kind of cause. The six hostages were abducted because they are representatives of you and me. The abductors performed their deed, not for personal reasons, but for political reasons.

In a way, we are talking about war. Several centuries ago it was not uncommon that people traveling abroad would be abducted and either held for ransom or subjected to torture. Entire nations would go to war as a result. And why not? If a foreign submarine launched an invasion on the United States and six Americans on a beach were shot as a result, that would certainly mean war.

There is little functional difference between the submarine hypothetical and a situation where six Americans traveling abroad are innocently arrested or killed. After all, our country is the people and our people have been attacked. Thus there is some basis for a claim that a war, in part, has been declared against the United States.

While some may deplore the United States' response to the Libyan situation, it is clear that the United States never intended to use Libya's terrorists' acts as an excuse for a war of aggression against that country. No one claims that the United States is trying to take over Libya. This is not like classic war. This is something less. What then is it?

Had the United Nations Charter worked as planned in 1945, enforcement action against international terrorism would come from the United Nations. Professor Boyle's commentary points to

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provisions in the United Nations Charter which outlaw the threat or use of force against the territorial integrity or political independence of other countries. When the Security Council was set up in 1945 it was to have been able to create a world army, larger and more powerful than any nation's army. This world army could move in when international peace was threatened. The army would be drawn from all the nations in the world. The proposed world army was vetoed, but it could have happened.

The concept was to have a world police force so strong that no nation would be able to resist it. The goal was to ensure international peace and security. This could happen someday. The possibility remains that the United States and the Soviet Union might agree one day and create an international army.

If we admit that the United Nations has been rendered impotent in terms of its security and enforcement function, the Security Council cannot be looked to as the organ to stop terrorism. What remains is the individual actions of countries.

The United States, taking the position that there is no alternative, has responded to the terrorist situation in Libya. Since the Security Council and the United Nations could have responded to a terrorist act of war against the citizens of any one country, the only question is whether the very same substantive response can be effectuated by a nation acting unilaterally. There are two aspects to investigate in this regard.

First, it must be determined whether the terrorists' acts were ordered and directed by the government of Libya. This is key issue because an act of war must be the conscious choice of a foreign power.

Where terrorists falsely claim they are acting on behalf of a political organization, we have no right to retaliate against the country that the terrorists claim they are working for. The country is just as much an innocent victim of the terrorists as we are. For example, this sometimes happens with terrorist attacks attributed to the Palestinian Liberation Organization (P.L.O.). There are different factions in the P.L.O. trying to gain dominance over that organization. An extreme faction engages in acts of terrorism and calls it a P.L.O. sponsored action in order to gain political muscle within the P.L.O. itself. These terrorist acts cannot be attributed to the P.L.O. because, as an organization, it would be opposed to them.

The United States Government must determine whether there is clear and convincing evidence that the acts of terrorism were ordered by the government of Libya. The media has reported that some

congressmen are persuaded that such clear and convincing evidence exists. This may be. Yet if there is clear and convincing evidence, why hasn't the evidence been made public? Second, the retaliation itself must not be disproportionate to the initial harm. Under one of the standard laws of warfare, civilian casualties are acceptable as long as the attack is directed at military targets. In a situation where retaliation is in response to the loss of a few lives, the strictures are even more severe. The retaliation must be precise. Leading members of the Reagan Administration disagree on this point. Some members say that the United States can only respond against terrorism if it can identify the targets which are specifically related to the terrorist activities. Others say we can retaliate on a broader scale.

On the general question of legality, I disagree with Professor Boyle. The United States is justified in what I call an enforcement action—an action to stop the terror. Sporadic acts of warfare, directed against a foreign government that can be shown to have ordered acts of terrorism, are justified. It is not much different from what Israel has done with respect to raids across its borders. In my view, it is legal under international law to respond militarily under the conditions which I have described.

No one can condone unprincipled retaliation just because the United States is strong, or claim that the United States can arbitrarily choose from the tenets of international law. Nor can anyone contend that, on any basis of provocation, we can attack and murder innocent people whenever the administration in Washington thinks it appropriate.

We are faced with the very difficult problem of how to reconcile our actions with international law. Nevertheless, within that framework, there is a great deal in common in the reasoning processes of international law that lead to understanding the problems of terrorism and appropriate responses. The same reasoning process goes on in any government. In fact, Professor Boyle has written an article about the processes that went on in Israel after the raid on Entebbe. Various people narrowed the options, depending on their view of international law and what the effect would be.

The response to Libya is informed by a relatively common view. This view is held by many in the State Department and the Justice Department. It is a response that is not oblivious to the constraints and norms of international law. There is some hope in that situation for students of international law. This is not a highly contentious, disputable and vague subject. The areas of agreement are far more

profound and vast than the areas of disagreement. We do not hear about the areas of agreement. All of the attention is directed to the areas of disagreement. However, that does not mean that the world is full of illegal action. It simply means that a lot of invasions are not taking place and a lot of people are not being shot. The few that do take place—such as the U.S. enforcement action in Libya—are surrogates for the U.N. police action that would have occurred were it not for the veto. I still think there is ample room to prove the existence of mutually respected restraints that we call the norms of international law.