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The Evolution of International Aviation Security,
From Politics to Warfare

A Thesis for the Degree of Doctor of Philosophy

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June 2006



Abstract

This thesis examines the relationship between terrorism and counterterrorism through an exploration of terrorism's impact on the international aviation security regime. It begins by exploring the practical implications of the seemingly esoteric debates over the meaning of *terrorism* and how the international civil aviation community developed sensible practical solutions to avoid the debilitating debates over the concept while crafting important, if weak, international conventions. As a major civil aviation power the U.S. was a predominant influence in security developments in the 1960s and 1970s. However, as the thesis demonstrates, U.S. civil aviation policy failed to keep pace with the changing nature of the terrorist threat. The author examines efforts to upgrade civil aviation security in the wake of 9/11 and the impacts of the developments to the international civil aviation system.

The thesis rests on the application of regime theory to the existing international civil aviation security structure, with an emphasis on the regime's ability to develop and disseminate knowledge/intelligence. The regular failure to adequately address the obvious failings in this all-important element of counterterrorism is a constant theme of this work. A significant flaw in the system was its inability to fully recognize the strategic threat posed by the re-emergence of religiously motivated terrorism and how this threat environment was radically from earlier waves of terrorism faced by the international civil aviation system. The detailed discussion of terrorism past and present, places the threat in its proper context for both the international civil aviation community and its largest individual actor: the United States.

The commanding position that the U.S. maintains in international civil aviation provides a microcosm of the promise and perils faced by the world's super power. The deep ambivalence the U.S. has towards its role, and the all-too-real dangers it faces, has been reflected in the structuring of its intelligence and security establishment. Despite its efforts to centralize its security establishment to face the now-distant Soviet threat, longstanding historical, cultural and bureaucratic difficulties led to the creation of a divided and often ad hoc approach to security threats. This is dramatically illustrated in the fragmented, poorly resourced and many times ignored pre-9/11 U.S. aviation security system. This work covers many individual failures in international civil aviation security, none more complete than the ones exposed by Al Qaeda and its war against international civil aviation, dramatically illustrated by the poor man's cruise missile attack of September 11, 2001.

This thesis is intended not only to highlight the already well-documented failures in international civil aviation and proffer recommendations to redress them, but also to bridge the gap between the voluminous non-academic literature and the small but growing academic work on this subject. The most effective way to protect international civil aviation is to layer security so no one failure can lead to catastrophe disaster. This layering needs to include not only security and threat specialists, but also the academic community, in both the hard and social sciences, to provide both knowledge and practical solutions to this threat.

I, John Harrison, hereby certify that this thesis, which is approximately 100,000 words in length, has been written by me, that it is the record of work carried out by me and that it has not been submitted in any previous application for a higher degree.

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I was admitted as a research student under Ordinance No. 12 in October 2000 and as a candidate for the degree of Doctor of Philosophy in June 2000; the higher study for which this is a record was carried out in the University of St Andrews between 2000 and 2004.

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I hereby certify that this candidate has fulfilled the conditions of the resolution and regulations appropriate for the degree of Doctor of Philosophy in the University of St Andrews and that the candidate is qualified to submit this thesis in application for the degree.

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Acknowledgments

This thesis started as an essay in the M.lit course at St. Andrews in the Spring of 2000 when Paul Wilkinson suggested that the essay I wrote on aviation security may be a useful starting point for further research on this topic. Paul has contributed an enormous amount to the study of aviation security and the broader terrorism field. The opportunities he has provided me to assist him and CSTPV are truly appreciated. More than a supervisor, you have been a mentor in some many ways. I am sure I speak for many of his former students when I say I hope to have an impact on the field that is worthy and lasting as yours.

There are many individuals who have contributed to this work and my growth as a student of terrorism studies. I have been fortunate to meet and speak with many individuals but I want to recognize several for special mention. Peter Frost, Sophie Ruggie, Julia Stobie, Gerald Fitzgerald and Malcolm Cook, you all lent their time and invited me to participate in conferences and seminars where I hope I contributed at least as much as I learned. I would like to offer special tanks to Dr. Rohan Gunaratna for his generous support, gracious hosting, and challenging opportunities. I do hope our paths will continue to cross and I look forward to working with you in the future.

To my friends Anthony, Andy, Su, Maria, Davood and Gillian, it has been a pleasure working, talking, and sharing this experience with you all. I know it has not always been easy for us, sharing so much time and space together but I am happy to have gone through it with you.

I would like to thank Dr. Creevey for giving your time and advice during this thesis. I would especially think her for recommending several possible editors. I decided on Betty who came with strong recommendations and exceeded those. I appreciated, and indeed look forward to, your comments and humour.

I have been blessed to have the encouragement and support of my family. There are truly no words that can every express the thanks I owe my Parents, Jane, Ann, Peter, and Tim. Your love and support have been there in so many ways, great and small, known and unknown. I will never be able to fully express or return that encouragement, support, and love. I hope I can repay a small portion of that support with this work.

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Abbreviations

ACI Airports Council International
ACSSP Air Carrier Standard Security Program
ANO Abu Nidal Organization
ATAP Anti-Terrorism Assistance Program
BA British Airways
CAPS Computer Assisted Passenger Pre-Screening
CCC Communist Combat Cells
CIA Central Intelligence Agency
COINTELPRO Counterintelligence Program
COMMINT Communications Intelligence
CTC Counter Terrorism Center
DEA Drug Enforcement Administration
DHS U.S. Department of Homeland Security
DIA Defence Intelligence Agency
DOD U.S. Department of Defence
DOJ U.S. Department of Justice
ELINT Electronic Intelligence
FAA Federal Aviation Administration
FAM Federal Air Marshals
FARC Spanish Acronym for the Revolutionary Armed Forces of Columbia
FBI Federal Bureau of Investigation
FIR's Flight Information Regions
GAO U.S. General Accounting Office. Changed its name to Government Accountability Office in 2004.
GIA Armed Islamic Group, Algerian terrorist group
GIGN French National Police Counterterrorism Unit
GSG9 German Federal Border Policy Counterterrorist Unit
HRT US FBI Counterterrorism Unit
HSC Homeland Security Council
HUMINT Human Intelligence
IATA International Air Transport Association
ICAO International Civil Aviation Organization
ICC International Criminal Court
IG/T Interagency Group on Terrorism
ICJ International Court of Justice
IMINT Image Intelligence
INS Immigration and Naturalization Service
JRA Japanese Red Army
JSOA Joint Special Operations Agency
JTTF Joint Terrorism Task Force
KAL Korean Airlines
KKK Ku Klux Klan
KSM Khaled Sheik Mohammad
LEAA Law Enforcement Assistant Agency
LTTE Liberation Tigers of the Tamil Eelam
MANPADS Man Portable Air Defence Systems
MID Military Intelligence Division
NCT National Commission on Terrorism

NOC No Official Cover
NSC National Security Council
NSA U.S. National Security Agency
ONI Office of Naval Intelligence
OSS Office of Strategic Services
PDIB Presidents Daily Intelligence Briefing
PFLP Popular Front for the Liberation of Palestine
PIRA Provisional Republican Army
PLO Palestine Liberation Organization
RAF Red Army Faction
SAC Security Advisory Committee
SARPS Standards and Recommended Practices
SAS Special Air Service
SCC Special Coordinating Committee
SIGINT Signals Intelligence
SWAT Special Weapons and Tactics teams.
TECHINT Technical Intelligence
TNA Thermal Neutron Accelerator
TSA Transportation Security Administration
TTIC Terrorist Threat Integration Centre
TWA TransWorld Airlines
UN United Nations
USC United States Code
USPS United States Postal Service
UTA French Airline
WTO World Trade Organization

Introduction

I have always been interested in politics: the rise and fall of candidates and parties, electoral campaigns, the formulation, passage and implementation of laws. At its most basic, politics is an ongoing battle of ideas that have been given voice. When the rhetorical give-and-take of politics escalates and one party becomes the aggressor, the stakes are raised exponentially. What drives people to take up arms, to employ rough tactics? What occasions particular responses to such behaviours? I have long pondered such questions. The ideological and actual battles involving insurgency and terrorism in the post-World War II world provided an entry point for my studies. The international civil aviation system is a useful canvass on which to trace the evolution of both terrorism and counter-terrorism.

Aviation is a relatively recent phenomenon, in some ways, and it defines today's world. The short flight of the propeller-powered aircraft piloted by the Wright Brothers at Kitty Hawk, North Carolina, in 1903 began a revolution in transportation and communication that still reverberates. It once took five days for the fastest ocean liners to cross the Atlantic Ocean; now just eight hours by plane is routine. In 1968 an obscure Arab terrorist group captured the international spotlight by hijacking an Israeli jet, inaugurating the modern age of aviation terrorism. Subsequent assaults against international civil aviation by Al Qaeda and its acolytes have ushered in a new age of terrorism and, perhaps, of warfare itself.

The nexus between terrorism and transportation, politics and commerce, is dramatically illustrated by the United States. It generates roughly 40 percent of the total aviation business worldwide, which in 2000 constituted just over 5 percent of the

almost \$10 trillion dollar U.S. Gross Domestic Product (GDP).¹ More than 15 million jobs are directly or indirectly associated with aviation.² Countless industries rely in large part on the availability of frequent and inexpensive flights. Government is impacted at all levels, and many United States municipal and regional governments depend on revenues from taxes on services associated with the industry, such as hotel rooms and rental car hires. Clearly, the true broad-based economic impact of aviation on the United States, let alone the world, can not be ascertained with accuracy. Suffice it to say, however, that much can be learned from focusing upon the United States and its response to aviation security threats.

Questions and Themes

The interaction between the international civil aviation community and the United States will be studied by means of the international relations framework. Through application of the structures provided by regime theory, a picture will emerge of how international civil aviation functions in both the formal legal regime and in the larger informal international civil aviation community. The assumption is that the precepts of regime theory (a common set of shared principles, values, and norms that allow for any expected outcome) exist in international civil aviation. It is assumed, further, that the regime is a formal legal structure that has the power, at least in theory, to sanction those who violate its precepts. This brings to mind several questions: How does the regime interpret its values and norms? How does it enforce its directives? Are its security elements appropriate and fully utilized?

Although the international civil aviation community is legally represented by the International Civil Aviation Organization (ICAO, founded in 1945) of the United

¹ J. Robbins Tucker, Presentation at the Air Traffic Controllers Conference, July 2002, slide 12.

² Ibid., slide 13.

Nations, it is only one of many in that community. How does the community interact with the regime relative to security matters? The international community consists of more than 190 independent sovereign states, most of which are members of the ICAO. This creates an inherent contradiction: the ICAO has jurisdiction over international civil aviation matters, but one of its founding principles is the recognition of absolute state sovereignty over national airspace; how is this contradiction dealt with?

Depending on the theoretical school in international relations, the state is deemed the only actor, or is the lead actor in an ensemble cast. Either way, the individual state and its relationships are important. The international civil aviation community recognizes the importance of the state and delegates implementation of the regime's regulations to the state. In the security field, such delegation is known as the "host state doctrine." This mirrors the notion in international diplomacy that the state hosting a diplomatic delegation is responsible for its security.

The United States is the predominant individual actor in the international civil aviation community; hence, its responses to international civil aviation directives have an enormous effect on the rest of the community. This brings up several points: How does the United States view and interact with its fellow actors? How does it structure its aviation security system to comply with the international community standards? And, does the diffuse way in which it deals with counter-terrorism hamper or enhance the system's security?

The underlying themes of this work are failure and missed opportunities. The ICAO has failed to enforce its mandatory security requirements. It has missed its chance to make interference with aviation (the terminology employed in various aviation conventions) an international crime, by not lobbying for the

International Criminal Court (ICC) to have statutory authority over crimes covered in the conventions. The international community has failed in many cases to take strong or sustained action against terrorists or their state sponsors.

Individual states routinely fail to enforce existing security standards required by the international community, and have regularly neglected to develop and implement proven security practices and technologies until after disaster has struck. Government security and law enforcement bodies are either barred from cooperating, or fail to cooperate with such bodies of their own state, let alone those on the international stage. Terrorist atrocities might have been prevented had states been aware of information in hand. States and air carriers continue to parry and thrust over where the responsibility lies, and which party foots the bill. Poorly trained, equipped, and compensated security staff have exacerbated existing gaps and new ones become evident periodically.

Academic and other independent analyses have failed as well. Policy makers have not been persuaded to address the changing nature of terrorism and its implications, and consequently do not present a sufficiently forceful case for investment in research and training in counter-terrorism. Sustained and relatively small proactive investments in research and training can avoid more costly reactive approaches after an atrocity.

This work has two main parts. The first comprises chapters 1-3, the balance of the definitional and theoretical framework. The second addresses the United States and how it dealt with and deals with counter-terrorism as seen through the lens of aviation security. There are generally thought to be four broad categories of aviation. The first is international civil aviation, which refers in the main to commercial civil passenger aviation; this will be the primary focus of this work. The second is military

and other government related aviation. Aircraft having to do with this aspect are targets of terrorists, e.g., Al-Qaeda tried to shoot down a U.S. military cargo aircraft in Saudi Arabia in 1995.³ But actions against such official aircraft do not usually generate the publicity that assaults on passenger aviation do, and are not covered in depth here. The third, cargo aviation, is economically important, yet has, to my knowledge, never been explicitly targeted. The 2003 attempt to shoot down the DHL aircraft in Baghdad was a target of opportunity as few passenger aircraft serve Iraq.⁴ Although Al-Qaeda has allegedly been interested in hijacking a cargo aircraft, to date there has been no publicly disclosed evidence, so while the author periodically refers to cargo security issues, it is not a major focus of this work. The fourth category is general aviation, which includes private aviation, corporate aircraft, charter aviation, agricultural aviation, and all other aviation sectors not mentioned earlier. The thesis does not cover this category because terrorists have generally ignored it until recently. Al-Qaeda has been interested in “crop dusters” as a means of dispersing chemical or biological weapons and may have plotted to attack the U.S. Embassy in Paris⁵ by use of a suicide helicopter attack, but with these possible exceptions no other terrorist group has employed these means for political reasons.

The author began this study in 2000 as many new researchers do: full of questions about an important, but niche, topic. Aviation is a component of virtually every society’s well-being, but until disaster strikes, its safety is taken for granted. The tragic events of September 11, 2001 shattered that complacency for the U.S.

An issue that the author continued to mull over is how terrorism was and is being dealt with on the international level, particularly relative to intelligence. The

³ Dr Rohan Gunaratna during a question and answer session after the author’s presentation at the Changing Face of Terrorism Conference Singapore, 2003.

⁴ Robert Wall and David Hughes, “Missile Attack on DHL Jet Keeps Self-Defence Issue Bubbling,” *Aviation Week & Space Technology*, November 30, 2003.

⁵ Malcolm Brabant, “French Police Probe Helicopter Attack,” BBC online, September 26, 2001.

multitudinous definitions of terrorisms -- roughly two hundred -- are at times conflicting. Briefly, the term in this study of international civil aviation means:

Use or threatened use of violence against noncombatants for the purpose of influencing the political and/or social policies of a state.⁶

Terrorism became a threat to international civil aviation in the late 1960s, and in succeeding years the ICAO adopted the Tokyo (1963), Hague (1970), and Montreal (1971) conventions that produced legal mechanisms to punish terrorist acts against its member states. Nowhere in the conventions is the term *terrorism* used, much less defined. All actions that interfere with the free and efficient movement in aviation are deemed to be criminal, irrespective of motivation, thus foreclosing any claim to legitimacy.

Civil aviation is one of the most regulated industries in the global economy, internationally through the ICAO, and nationally through individual states' agencies such as the U.S. Federal Aviation Administration (FAA). This regulatory duopoly is repeated across the full range of aviation issues. The friction inherent in this structure is somewhat alleviated through the Montreal based ICAO, a UN agency created to help achieve the five freedoms of aviation:

- (1) the privilege for one state's aircraft to over fly the territory of another;
- (2) the privilege of a state to land an aircraft in another state for non-traffic reasons;
- (3) the privilege of a state to land passengers and cargo from its territory in that of another state;

⁶ As defined at various times by Paul Wilkinson.

- (4) the privilege to pick up passengers and cargo destined for its territory in another state; and
- (5) the privilege to pick up passengers and cargo in another state destined for a third state and the privilege to put them down in the third state.⁷

Each of the freedoms is based on shared values and norms relative to the positive impact of aviation on the international community. To assure positive implementation of these values, nations around the world established an international body whose sole responsibility was to operationalize the values. Although each state ceded some national sovereignty to the ICAO, the ICAO recognized the absolute sovereignty of a state over its airspace. The dichotomy is most clearly illustrated in the security field.

Security policy is the overall responsibility of the ICAO, but the policy's implementation belongs to individual states under the "host state" doctrine. The ICAO lays out basic standards to which all member states must adhere, and then each member state is free to flesh out the details. The widely ranging technical, economic, and threat environments faced by the member states have eventuated in the haphazard application of what were supposed to be universal security standards.

Security is one cog in the complex machinery of international civil aviation. The ICAO established common air routes, communication frequencies, and a common aviation language. It continues to work toward efficiencies through the standardization of ticketing, and baggage and cargo transfer procedures, as well as carrier liability for lost or damaged goods. At one time the ICAO was to have had the authority to control ticket prices and passenger capacity on the highly profitable

⁷ http://www.icao.int/icao/en/trivia/freedoms_air.htm

transatlantic routes, though it delegated this authority to its airline industry counterpart, the International Air Transport Association (IATA, founded in 1945).

The issue of how best to govern a complex international industry is not confined to international civil aviation; communications, the maritime industry, and financial networks are all similarly complex and suggest some useful theoretical avenues to explore. The most productive way to examine both the larger issue of governing and the more focused issue of security issues is regime theory (see Chapter 2.) Applying regime theory to international relations was first introduced by John Ruggie and followed by such other theorists as Robert Kohane, Joseph Nye, Hedley Bull and Stephen Krasner. This author subscribes to Krasner's definition of regimes, "implicit or explicit principles, norms and decision making procedures around which actors' expectations converge in a given area of international relations,"⁸ because it appears to be the most widely accepted definition among its adherents and critics. The aforementioned theorists settled on the idea that regimes are formal legal constructs.

Regimes have institutional structures, rules, and enforcement mechanisms, all of which adequately govern how the international civil aviation system functions. States contract with the ICAO to participate in the benefits of the system and agree to adhere to its rules and regulations. An interesting anomaly exists as a result: states create and enforce the rules of the regime and are sanctioned for rule violations, yet private parties, the airlines, gain most of the ICAO benefits while escaping sanctions for rules they break. In the early age of aviation when most states owned their carriers, if a carrier broke a rule, the state could be said to have responsibility as the

⁸ Stephen Krasner, In International Regimes, ed. Krasner, p. 2.

owner. But with private ownership increasingly the norm in aviation, it is unclear why states should still bear the heaviest costs for rule violations.

This anomaly also underscores the complexity of international civil aviation. States, through the ICAO, are the only legitimate rule-making actors, but an enormous community of stakeholders in aviation also exists, among them air carriers, aircraft manufacturers, airports, flight crews, and passengers. The carriers, through their trade association, the International Air Transport Association (IATA), are the most influential. This is due in part to the traditional state ownership of carriers, and in part due to IATA's now lapsed ability to establish ticket prices and capacity on the transatlantic routes, particular between the UK and the U.S.

The regime and its stakeholders rely on the free transmission of information throughout the community. Technical, economic, and, most important, security information, all have to be shared to allow for the continued prosperity of all members. This community of like-minded actors conforms to Ernest Hass's concept of the epistemic communities. For Hass, knowledge is "the sum of technical information and of theories about that information which commands sufficient consensus at a given time among interested actors to serve as a guide to public policy designed to achieve some social goal."⁹ He describes not only the way knowledge is used in the broad sense of the regime, but also strategic intelligence in the economic sense—and, for this work the more vital security elements of the regime. Knowledge/intelligence allows actors to understand the goals and capabilities of other actors involved in a given situation. The most effective way to protect aviation from the threat posed by terrorism is to prevent terrorists from acting out their plans against

⁹ Ernest Hass, "Why Collaborate? Issue-Linkage and International Regimes," *World Politics* 32:3 (April 1980), pp. 367-368.

aviation in the first place; advance warning is provided by intelligence (see Chapter 1.)

Not all nations face the same threat from terrorism, and even those that do have not faced the same type or level of threat for a prolonged time. The nature and orientation of the threat in many ways dictates how a state will respond. The United States has viewed terrorism as a criminal act to be handled by local or federal law enforcement, principally the Federal Bureau of Investigation (FBI). This approach worked adequately throughout much of its experience with the phenomenon; terrorist actions rarely occurred within its borders and were generally of short duration causing limited casualties and damage.

Abroad, things were different. Terrorist acts against the United States and its interests were frequent, longer, and more damaging to life and property, and more costly economically and politically. As the agency tasked with international affairs, the Department of State had lead responsibility for handling international terrorist attacks and counter-terrorism efforts with various nations. Department of Defence (DOD) installations and personnel are frequent targets of terrorist attacks, and although the DOD response is usually very public and widely praised, it has a mixed impact. (The reasons for this and a full discussion on the American counter-terrorism structure are found in chapter 4.)

The general approaches to countering terrorism are developed in Chapter 2. A state facing a threat from terrorism, especially a sustained campaign of violence, has three approaches available: military, criminal justice, and political. None is tried in isolation and none should be deemed exclusive. Each has its own strengths and weaknesses. One of the most important elements in determining which approach or combination of approaches is best is to understand why some people turn to violence.

The literature on the reasons why people choose violence is growing, particularly in the political realm. The author will make reference to two broad categories, physiological and instrumental. The physiological school sees terrorists as driven by a need to belong. Repeated failure in life, alienation from the traditional societal anchors, and an externalized victimology, coalesce in creating a person seeking revenge; such a person may be more vulnerable to a charismatic individual who persuasively explains the disaffection and advances the possibility of redress. Many of the same formative elements are also found in members of criminal gangs or cults. The author is not wholly satisfied with this school of thought. Clearly physiological motivations to join a terrorist organization exist, and even more forceful ones to remain in them, but such motivations are common to many people and groups. One can gain the benefits provided by the terrorist organization in other collective groups, and at a greatly reduced cost. Whether by self-justification or otherwise, the member believes in the goals of the struggle. He or she is taking part in a political act and may and most likely does personally benefit from participation, but the risk-reward ratio is not favourable.

The author tends to be more satisfied with the instrumental, or rational choice, theory: the terrorist has identified a critical issue, is unable or unwilling to work on it within the existing political system, and hence turns to violence. The tactics utilized by the group of choice directly correlate with its resources and those of the state. If the group is small and weak, it is more likely to engage in terrorism because limited resources are thereby utilized for maximum gain. The smaller the group, the less able it is to establish territorial control and to engage the security forces even in guerrilla attacks. Accordingly, it attacks where the state is weakest: the civilian population.

Here the thesis adopts Thomas Marks's notion of a physical and political space.¹⁰ For Marks, a guerrilla organization needs space to develop its base (physical) and its ideology (political). The state can deny the latter by allowing open discussion on issues and legitimate peaceful expression of views. Where states do not permit such activities, groups will find avenues for dissent, such as the Mosques utilized by Al-Qaeda sympathisers. Physical space is more difficult to deny; dense jungles and remote mountains are ideal for concealment. There are even some urban ghettos where government officials fear to tread. These hidden spaces within society are becoming more difficult to maintain because modern technology makes possible extensive state surveillance. Underlying the existence of space is a population's relationship with the government. If the state is able to deliver services to the population, and provide for legitimate avenues for dissent, then there is little chance for political violence to take root. If the state cannot deliver services and fails to provide legitimate avenues of expressing grievances, then there is room for violent opposition to emerge. In the former situation, the population has a positive experience with government and is unsympathetic to the methods or agenda of violent opposition; in the latter case, however, the roots of terrorism may grow.

The state's understanding of the motivations and tactical capabilities of the terrorist organization is made possible by high quality knowledge/intelligence. Irrespective of the approach taken to countering a terrorist threat, limited or poor quality intelligence can render impotent any counter-terrorism effort.

¹⁰ Thomas Marks, Maoist Insurgency since Vietnam, London, Frank Cass, 1996.

Why Terrorists Target International Civil Aviation.

The most important question facing international civil aviation is why has it been the chosen terrorist target over the past three decades? The primary reason is that terrorists are looking for ways to inflict damage on their opponents that outweigh the cost to them of the attack. Disrupting international civil aviation is their choice, and it has an added benefit: the appearance of a David and Goliath match up. The reasons are multiple, and roughly classifiable:

- 1 Aviation is a powerful symbolic target.
- 2 Aviation is part of a unique multinational stage.
- 3 Aviation offers unrivalled media exposure.
- 4 Operations against aviation are relatively simple.
- 5 There are enormous economic consequences for the carrier and the targeted nation.
- 6 It can politically embarrass the intended targets.
- 7 It is a useful tool for revenge.
- 8 It is effective.

Al-Qaeda has become the main source of aviation threats; however, it should be noted that many groups representing a range of ideological motivations have targeted aviation interests at one time or another. Ethno-nationalist groups such as the Irish Republican Army attacked Heathrow Airport in London and attempted to sabotage-bomb aircraft. Croatian nationalists also hijacked an aircraft in order to drop propaganda leaflets over Paris. The Liberation Tigers of the Tamil Eelam (LTTE) in Sri Lanka attacked Colombo International Airport to embarrass the government.

Ideological groups such as the Japanese Red Army have attacked aviation; the most famous such incident was the Lod airport massacre conducted on behalf of the Popular Front for the Liberation of Palestine (PFLP) in 1972. The FARC (communist insurgents in Colombia) have hijacked aircraft in an attempt to undermine the government. Religio-political groups such as the Hezbollah terrorist organization in Lebanon, or the Armed Islamic Group (GIA) in Algeria, have used attacks on civil aviation to further tactical if not strategic goals.

The motivations and the groups involved in attacks against international civil aviation are covered in chapter 3, which discusses the three-phased threat faced by international civil aviation. Phase one involves flight from persecution or prosecution. No overt political message is presented; hijacking is only the most convenient means of escape. Phase two, introduced by Dr. George Habash, founder and leader of the PFLP, tried to use attacks on civil aviation as a strategic weapon against Israel. That effort failed but did introduce a new terrorist tactic: the use of international civil aviation as a stage for political theatre. Al-Qaeda and its acolytes invented phase three: the use of international civil aviation as a weapon and/or battlefield.

Chapter 5 discusses the historical development and structure of U.S. domestic counter-terrorism. It discusses the development and role of the FBI, CIA, military and local law enforcement and the tactics they developed to deal with pre-September 11, 2001 threats. The U.S. system is fragmented vis-à-vis the federal and non-federal security services, but also within the numerous layers of government. The system seems to have developed more to protect citizens from the government, rather than to deal with a non-governmental threat. This system may have been adequate to address the threats of the past, but it was exposed as severely lacking in respect to 9/11.

Chapter 6 details the inability of the international civil aviation regime to deal adequately with the known threats and to understand the new threat posed by Al-Qaeda. The subject of this chapter is the shortcomings of the U.S. security systems, government and private, in handling the changing threat environment, developing intelligence or effectively deploying the information they did have.

The current phase of the threat against international civil aviation is the war perpetrated primarily by Al-Qaeda, which has used or attempted to use three of the four tactics discussed in Chapter 4 (hijacking, bombing, assaults on airports, and shooting down aircraft). Al-Qaeda has hijacked, sabotage-bombed, and has attempted to shoot down civilian aircraft. It singled out international civil aviation because of its potential for human and economic damage. The group's actions are part of its strategic aim to drive the West, particularly the United States, from what it perceives as Muslim lands, by using aviation attacks as a strategic weapon, just as George Habash had tried to do more than three decades earlier.¹¹

Chapter 6 describes in detail the five operations or attempted operations planned or implemented by Al-Qaeda (the 1993 World Trade Centre bombing, the Bojinka Plot, the September 11, 2001 attack, the Richard Reid episode, and attempts to shoot down aircraft in Kenya and London), and shows what the international civil aviation community knew at each stage.

The last chapter presents ways to invigorate international civil aviation and outlines some necessary government and private sector reforms.

¹¹ The founder and leader of the Popular Front for the Liberation of Palestine (PFLP), the Marxist Habash tried to strangle Israel's economy and stop immigration by severing air links between the Jewish state and its Western allies. This was the first attempt to use international civil aviation as a political weapon. (See chapter 5.) While Raul Castro was the first person to hijack an aircraft during an insurgent struggle, it was a domestic Cuban aircraft and it was not a strategic decision, but a convenient choice.

Literature and Methodology

The body of available literature on terrorism in general is very robust, but the same cannot be said for aviation security and terrorism. Broadly, the literature encompasses four categories: academic, professional, journalistic, and government.

There is a surprising paucity of academic literature dealing with international civil aviation. The journal *International Organizations*, for example, has carried no more than five articles since the founding of the ICAO in 1945 on this unique industry. It has extensively covered the annual proceedings of the ICAO, but there has been little else. Christer Jonsson examined the international civil aviation system through the prism of the emerging regime theory in the early 1980s and largely achieved his objective.¹² Several key theoretical works on regime theory are discussed in more detail in chapter 2. Why so little? In any event, the complex interaction among perhaps a score of key issues at the core of international relations seems to provide a fruitful area for research. The ICAO is mentioned in passing in numerous articles dealing with international regimes and organizations, but has almost never been the focus. This may be due in part to the ICAO's goal: to remain a small, technical, and apolitical institution. Its non-controversial existence reduces its exposure in many quarters; hence the lack of academic interest may be a subtle recognition of the ICAO's success in achieving its goal.

Terrorism, on the other hand, has not lacked for academic attention. The leading academic in this field is Paul Wilkinson, whose work over the past three decades covers the full range of topics, with particular attention to aviation security. His numerous publications include the Lessons of Lockerbie, an outstanding analysis

¹² Christer Jonsson, "Sphere of Flying: The Politics of International Aviation," *International Organizations* 35:2, Winter 1995, pp. 273-302.

of the causes of the disaster as well as the steps necessary to avoid like disasters in the future.¹³ Wilkinson stresses the need for both international cooperation and domestic coordination among the various security and intelligence services dealing with aspects of terrorism across many nations. Failure to heed his long-standing advice contributed to the downing of Pan Am Flight 103. None of the three major Western democracies involved (United States, United Kingdom, and West Germany) had at that time achieved more than the most basic level of cooperation, both among themselves and within their individual states.

Wilkinson followed the Lessons of Lockerbie with the publication of Aviation Security and Terrorism,¹⁴ co-edited with Brian Jenkins, that treats many aspects of civil aviation security, including the threat posed by man-portable air defense systems (MANPADS).

Jin-Tai Choi's Aviation Terrorism¹⁵ is one of the few general academic works available. It provides a useful history of aviation terrorism, as well as an interesting examination of regional responses. Wilkinson also has an excellent chapter on aviation security in Terrorism Versus Democracy.¹⁶ Prior to 9/11, the Lockerbie disaster was the most examined aviation terrorist attack in history. The media coverage and its impact are well examined by Joan Deppa and Maria Russell in The Media and Disasters PAN AM 103.¹⁷

Aviation security is maintained by means of international conventions that are implemented by national authorities. The international legal structure is covered by two excellent works: a volume edited by Edward McWhinney, Aerial Piracy and

¹³ Paul Wilkinson, Lessons of Lockerbie, *Conflict Studies 226 RISCT*, December 1989.

¹⁴ Paul Wilkinson and Brian Jenkins (ed), Aviation Terrorism and Security, Frank Cass, London, 1999.

¹⁵ Jin-Tai Choi, Aviation Terrorism, New York, St. Martins Press, 1994.

¹⁶ Terrorism Versus Democracy, London, Frank Cass, 2000, chapter 8.

¹⁷ Deppa Joan, Maria Russell, et al., The Media and Disasters PAN AM 103, London, David Fulton Publishers, 1993.

International Law,¹⁸ and Ruwantissa Abeyrathne's Aviation Security Legal and Regulatory Aspects.¹⁹ McWhinney provides a comprehensive coverage of the international civil aviation legal environment, as it existed in the early 1970s. Although many of his conclusions are now no longer applicable because of succeeding conventions and events, his book is still valuable. Abeyrathne's work is one of the most instructive discussions on the structure of the ICAO (of which he serves as a senior staff member) and on how and why the various conventions emerged.

The number of general works on terrorism is vast and in many ways beyond the scope of this thesis. Even so, several authors, in addition to Wilkinson, should be mentioned, including Bruce Hoffman and Rohan Gunaratna. Hoffman has made tremendous contributions to the field through his work and many publications for RAND and others. His Inside Terrorism²⁰ provides a useful grounding in terrorism, but does not deal with aviation specifically. Gunaratna's Inside Al Qaeda²¹ is one of the most useful early academic works on that terrorist group. He provides a detailed profile of early Al-Qaeda and how it had already begun to evolve into new structures. He also highlighted its interest in using aviation as a weapon, and why it favors the tactic.

Of several journals dedicated to terrorism studies in the past three decades, two that dominate are *Terrorism and Political Violence* and *Studies in Conflict and Terrorism*. Founded in 1989 and co-edited by David Rapport of UCLA and Paul Wilkinson, the former is the more comprehensive. It provides not only useful

¹⁸Edward McWhinney editor, Aerial Piracy and International Law, Dobbis Ferry, Oceana Publications Inc., 1971.

¹⁹Ruwantissa Abeyrathne, Aviation Security Legal and Regulatory Aspects, Haunts, England., Ashgate Publishing, 1998.

²⁰Bruce Hoffman, Inside Terrorism, New York, Columbia University Press, 1998.

²¹Rohan Gunaratna, Inside Al-Qaeda, London, Hurst &Co., 2002.

academic commentary on all aspects of terrorism and political violence, but also trends in research and periodic coverage on various databases. Bruce Hoffman of RAND Corporation currently edits the latter, which deals with conflicts that go beyond terrorism. The leading journal in the field of intelligence studies is *Intelligence and National Security* edited by Christopher Andrew. Although it suffers from the obvious lack of current material, it does provide a useful focus on historical cases. The discussion on current intelligence issues has tended to focus on broad topics.

The professional literature can be divided into two categories: works by private sector aviation security personnel and works by governmental officials be they law enforcement, military or intelligence operatives. One of the more prolific contributors is the former director of security for IATA, Rodney Wallis. His 1993 Combating Air Terrorism²² is an enlightening diagnosis of the strengths and weakness of the aviation security system and prescriptions for current and future threats. A very important follow-up is his 2003 work How Safe Are Our Skies,²³ a long catalogue of failures on the part of the international community and particularly the U.S. Federal Aviation Administration to improve security. Andrew Thomas provides a highly readable critique of the aviation security industry both pre- and post- 9/11 in Aviation Insecurity.²⁴ He makes no new accusations against either the industry or government, but lays out information relating to security and intelligence failures leading up to that attack. Thomas pays close attention to the weaknesses in the FAA's New England Region and at its primary airport, Boston's Logan International, citing poor leadership, low morale, and failure to act on intelligence. He is emblematic of much of the authorship in this field.

²² Rodney Wallis, Combating Air Terrorism, New York, Brassey's, 1993.

²³ Rodney Wallis, How Safe Are Our Skies, Parger, Westport ,CT, 2003.

²⁴ Andrew Thomas, Aviation Insecurity, Amherst, NY, Prometheus, 2003.

Many works criticize the system, but few examine the approaches to protecting aviation from both terrorism and crime. Kenneth Moore has the most detailed work on securing the aviation system in the second edition of Airport, Aircraft, and Airline Security.²⁵ This masterful volume carefully describes the threats facing passenger and cargo aircraft and facilities, and is clearly written for security professionals, both novice and seasoned, and the general reader.

Counter-terrorism personnel in law enforcement, intelligence, and the special operations community write in the primary field of professional literature. Danny Coulson co-authored a magnificent account of the formation, operation and philosophy of the Federal Bureau of Investigation's elite Hostage Rescue Team (HRT). In No Heroes: Inside the FBI's Secret Counter-Terror Force,²⁶ he not only traces the ad hoc development of the Bureau's response to terrorism, but also delineates what he views as the most important distinction between the military and the law enforcement approach to counter-terrorism. The military deploys overwhelming violence to stop terrorism, whereas law enforcement uses overwhelming force to prevent violence. The HRT was established to provide the FBI with a force trained and equipped to rescue hostages and apprehend terrorists. HRT members are FBI agents first, specialists second. When the HRT has forgotten that rule, it has created more problems than it has solved. This is a critical distinction and one that needs to be borne in mind as the FBI reorients itself to tackle Al-Qaeda.

Former Delta Force operator Eric Haney has made one of several contributions to the growing body of work on the world's elite counter-terrorism military units. As a founding member of Delta Force, he has a unique insight into the

²⁵ Kenneth Moore, Airport, Aircraft & Airline Security, Boston, Butterworth-Heinemann, Second Edition, 1991.

²⁶ Danny Coulson, Elaine Shannon, No Heroes, Inside the FBI's Secret Counter-Terror Force, New York, Pocket Books, 1999.

training and philosophy that underpin this and other elite units. Because of the small number of Delta operatives, perhaps as few as 120, they frequently have to conduct missions alone. These experienced soldiers must have served in the military for a minimum of fifty months before they can volunteer for the qualification course, where they learn how to operate independently of others. This runs contrary to much of the traditional military doctrine where teamwork is stressed. The retraining and the intense physical and mental pressure the candidates face is well thought through. Haney also discloses the close relationship Delta Force has maintained with the U.S. aviation industry, particularly Delta Airlines. His Inside Delta Force²⁷ also has a gripping firsthand account of Delta Force's failed attempt to rescue the American hostages in Iran in 1980.

The intelligence community has slowly begun to emerge from the shadows by contributing to a very useful body of literature. One primary example is Robert Baer's See No Evil.²⁸ Baer is a former CIA field agent who worked for many years in the Middle East and on counter-terrorism. He highlights the Agency's over-reliance on technical intelligence to the exclusion of recruiting human agents. This charge, echoed by most of the post-September 11 literature on intelligence, including the July 2004 United States Senate report on Iraq,²⁹ developed out of a risk-averse culture that had become pervasive in the Agency during the 1990s. Baer was a career field officer who didn't always have a clear understanding of the policy goals of the United States, and by his own admission had very little understanding of the domestic policy-making process. This failing seemed to hinder his ability to achieve national policy objectives, while using his invaluable field experience. He remains skeptical

²⁷ Eric Haney, Inside Delta Force, London, Bantam Press, 2002.

²⁸ Robert Baer, See No Evil, New York, New York, Crown, 2002.

²⁹ Report on the U.S. Intelligence Community's Prewar Intelligence Assessments on Iraq, United States Senate Select Committee on Intelligence, July 7, 2004.

that the cultural changes articulated by President Bush for the intelligence services after 9/11 will rapidly, if ever, take hold in the entrenched bureaucratic culture of the U.S. intelligence community.

Although they are not strictly counter-terrorism professionals, attorneys Jerry Adler and Allan Gerson stress civil litigation as a tool in counter-terrorism. Their Price of Terror³⁰ traces the development of the civil lawsuit filed against Libya by the families of the victims of the downing of Pan Am Flight 103, and then explores the moral, legal, and political issues associated with the use of civil law to punish perpetrators of terrorism, particularly states. The book was published long before the 2003 settlement of the claims by Libya. A follow-up work on the results and lessons of this new tool against terrorism would be highly useful.

Numerous publications of professional associations have content that is focused all or in part on terrorism and security. Two of the best non-association publications are *INTERSEC* for general issues and *Aviation Security International* for aviation issues. *INTERSEC*, "The Journal of International Security," offers articles on security issues ranging from on-going regional conflicts to technical developments, and has dedicated several special issues to aviation security. *Aviation Security International*, "The Journal of Airport and Airline Security," has provided the most comprehensive coverage of developments and trends in the field. Although at times occasional articles read as if they came from the marketing departments of security equipment manufacturers, it is still a credible guide to aviation security.

The third cohort contributing to the literature is journalists and other non-specialist writers; they tend to choose events or groups as subjects. During the past decade, Al-Qaeda has been the focus of many of them; perhaps the best have been

³⁰ Allan Gerson and Jerry Adler, The Price of Terror, New York, New York, Harper Collins, 2001.

Simon Reeve,³¹ Peter Bergen,³² Jane Corbin,³³ and Benjamin and Simon.³⁴ They all tell of the all-too-familiar interlocking of individuals and institutions that make Al-Qaeda a formidable and unique foe. Yosri Fuda and Nick Fielding have taken as their subject the careers of Al-Qaeda leaders Khalid Shaikh Mohammad and Ramzi Binalshibh, both of whom were, prior to their capture, key figures in the September 11th attacks.³⁵

Terrorist actions are carried out in part to capture the attention of a wider public. It is not until well after their conclusion that the full and often harrowing picture emerges. William Stevenson has produced one of many interesting works on the daring rescue of the Israeli hostages from Entebbe, Uganda in 1976.³⁶ Peter Koch and Kai Hermann wrote of the 1977 GSG-9 rescue of German hijack victims from Mogadishu, Somalia.³⁷ There have been books aplenty on the unsuccessful attempt to rescue the American hostages in Iran in 1980, but seemingly there is no English-language material on failed or, more precisely, successful aircraft storming in which large numbers of passengers were killed, such as the 1985 Egypt Air rescue effort.³⁸

Salim Jiwa provides one of the few examinations of a non-Western bombing³⁹: The Death of Air India Flight 182.⁴⁰ It deals with the twin 1985 bombings, of Flight 182 off the Irish coast, and at Naritua Airport in Japan by Sikh

³¹ Simon Reeve, *The New Jackals*, London, Andre Deutsch Limited, 1999.

³² Peter Bergen, *Holy War Inc.*, London, Orion Publishing, 2001.

³³ Jane Corbin, *The Base: Al-Qaeda and the Changing Face of Global Terror*, London, Simon & Schuster, 2003.

³⁴ Daniel Benjamin and Steven Simon, *The Age of Sacred Terror*, New York, Random House, 2002.

³⁵ Yosri Fuda and Nick Fielding, *Masterminds of Terror*, New York, Arcade Publishing, 2003.

³⁶ William Stevenson, *90 Minutes at Entebbe*, New York, Bantam Books, 1976.

³⁷ Peter Koch and Kai Hermann, *Assault at Mogadishu*, London, Corgi Books, 1977.

³⁸ David Gero, *Flights of Terror*, p.86. The Egypt Air flight was hijacked from Athens airport and diverted to Malta. After negotiations failed Egyptian Commandos stormed the aircraft. The ensuing gun and grenade battle killed sixty passengers.

³⁹ While most of the passengers were Canadian, the target carrier, and the intended target country, was India. For this author it makes this attack a non-Western attack.

⁴⁰ Jiwa Salim, *The Death of Air India Flight 182*, London, Star Book, W.H. Allen & Co., 1986.

extremists in an act of revenge against Indian interests for the bloody retaking of the Golden Temple, the Sikh holy shrine. It is a graphic account of what happens in an aircraft when a bomb explodes in flight and the numerous failures in the Canadian aviation security system that contributed to the disaster (both bombs originated in Canada). The failure of the international civil aviation system to learn from this experience contributed to the Lockerbie disaster just three years later.

The December 1988 attack on Pan Am Flight 103 has spawned a cottage industry of related literature, to which many journalists have contributed including David Johnson,⁴¹ David Leppard,⁴² Steven Emerson and Brian Duffy.⁴³ Their three books tell of the high-quality painstaking efforts of Scottish authorities, and the often poor cooperation among the various international investigative authorities, particularly those in Germany. The Emerson and Leppard books are perhaps the best of the field.

The two most useful general works on U.S. counter-terrorism are the aforementioned Age of Sacred Terror⁴⁴ and David Martin and John Walcott's work.⁴⁵ One of the concerns highlighted almost two decades ago was the difficulty in coordinating the FBI and CIA counter-terrorism efforts. The inability of the two premier U.S. security agencies to cooperate is of long-standing concern and is not confined to terrorism. Mark Riebling provides an excellent history of the often-troubled relationship in Wedge.⁴⁶ Riebling dwells on the long history of infighting and personality clashes that have characterized that relationship right from the

⁴¹ David Johnson, Lockerbie The Real Story, London, Bloomsbury, 1989.

⁴² David Leppard, On The Trail of Terror The Inside Story of Lockerbie, London, Jonathan Cape, 1991.

⁴³ Steven Emerson and Brian Duffy, The Fall of PAN AM 103, London, Futura, 1990.

⁴⁴ Daniel Benjamin and Steven Simon, Opt.cite.

⁴⁵ David Martin and John Walcott, Best Laid Plans The Inside Story of America's War on Terror, New York, Harper & Row, 1988.

⁴⁶ Mark Riebling, Wedge, New York, Knopf, 1994.

inception of the CIA's predecessor, the Office of Strategic Services (OSS). It created many problems in Cold War counter-intelligence and is now creating problems in counter-terrorism.

The governments of the United States and the United Kingdom have accumulated a wealth of information on aviation security and its weaknesses. Congress and its investigative arm, the General Accounting Office (GAO), have produced more than 250 reports on various aspects of terrorism since 1980. Of these, about 25 are related to aviation security, ten of which are post-9/11.⁴⁷ One of the prime contributions of government has been the empanelment of commissions to investigate terrorist attacks. Their important reports dealing with aviation terrorism include the report of the National Commission on the Terrorist Attacks on the United States (the so called "9/11 Commission") and the United States Congress Joint Committee Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks on September 11, 2001 (hereafter the "Joint Intelligence Report" or JIC). The 9/11 Commission issued its final report in July 2004, but has not contributed any new substance to the discussion on the failures of 9/11 or aviation security in general. However, the revelations that have emerged have been shocking in both the extent and reasons for the intelligence failures of September 11, 2001.

The 858 page Joint Committee Report in December 2002 opened to public view the multiple failures across the U.S. intelligence community, many of which are discussed in Chapter 6. The Report's thrust is that even in the face of the plentiful (but unconnected) information "dots" possessed by the national security community, Al-Qaeda was still able to execute a devastating surprise attack on U.S. territory. Because of administrative failures, wretched inter-agency communication, and a

⁴⁷ www.gao.gov. Information as of spring 2004.

failure to realize the extent of the information available throughout the government, the intelligence community was unable to “connect the dots.” The 9/11 Commission reexamined much of this same ground, but has already provided some startling details.

Two other U.S. government commission reports, The Vice President’s Commission on TWA Flight 800 (chaired by the then vice president Albert Gore, informally called the “Gore Commission”), and The President’s Commission on Aviation Security and Terrorism (1990), turned out valuable contributions. The Gore Commission was charged with investigating the explosion, shortly after takeoff, of TWA Flight 800 from New York’s John F. Kennedy International Airport in July 1996. The FAA determined that an electrical spark that ignited fuel vapors in the empty center fuel tank caused the explosion.⁴⁸ The Gore Commission was also charged to examine aviation security in general and found that little had changed in American domestic aviation security since the Lockerbie bombing in 1988.

Shortly after his inauguration in January 1989, President George H. W. Bush convened a commission to investigate the Lockerbie bombing. The report highlighted numerous failures in the U.S. approach to civil aviation security and made numerous recommendations, the most notable of which had to do with passenger baggage reconciliation, public disclosure of threat warnings, and disaster response.⁴⁹ The only recommendation fully implemented was improvement in the U.S. government’s disaster response and the financial support offered victims and families. The United Kingdom’s Fatal Accident Inquiry Report reflected a similar investigation. Its recommendations followed the same general topics as the U.S., but the UK

⁴⁸ Eyewitness reports at the time suggested that a missile may have destroyed the aircraft; many observers on the ground asserted that they saw a line of flame streaking towards it. Investigators say that what witnesses saw was flame spreading from the center fuel tank down the wing away from the aircraft, not towards it.

⁴⁹ The President’s Commission on Aviation Security and Terrorism, Washington, DC, May, 1990.

implemented a baggage reconciliation system that is widely considered one of the world's best.

It is worth mentioning that a new issue is emerging in terrorism literature: the fate and rights of victims. Aviation provides the two best examples in works by Captain John Testrake⁵⁰ and Susan and Daniel Cohen.⁵¹ Testrake was the pilot of TWA Flight 847 when members of Hezbollah hijacked it in June 1985. His relating of the event and how his faith enabled him to survive, furnishes valuable insights and an interesting contrast in competing uses of religion. The Cohens lost their only child, daughter Theodora, on Pan Am Flight 103. Their moving account of the disaster and its impact on the survivors is emblematic of the human cost of aviation security failures.

The wide availability of relevant literature made it possible to research a mix of historical survey and policy analysis. The historical survey adds to an understanding of the tactical environment inhabited by the terrorists and their targets. It also enables a better understanding of the international legal and security response, and at the same time, of the full impact of the all-too-frequent and repeated failures. Security is more often a reactive enterprise geared to preventing the most recent atrocity from happening again. Government reports and commissions all underscore the failings of specific policy areas rather than looking at the security regime. This practice inhibits proactive policy with its dual benefit: lives saved at a lower cost.

Noticeably absent in aviation security literature is a study that links and thereby provides a more comprehensive academic and policy picture. This thesis

⁵⁰ John Testrake and David Wimbish, Triumph over Terror on Flight 847, Old Tappan, New Jersey, Fleming H Revel, 1987.

⁵¹ Susan and Daniel Cohen, PAN AM 103, The Bombing, The Betrayals, And A Bereaved Family's Search For Justice, New York, New American Library, 2000.

attempts to tie the theoretical framework of regime theory to the practical experience of international civil aviation security professionals. But before doing so it is critical to answer a basic question: Why does the international community deem civil aviation to be vital?

Why Civil Aviation is Important to States

International civil aviation is perhaps one of the most regulated of industries. Carriers face both international and domestic regulatory structures whose purpose is to improve safety and efficiency. States are concerned with civil aviation for four main reasons: (1) national security; (2) economic issues; (3) safety; and (4) prestige.

National Security. States face two security issues: defence of their sovereign territory and, at least for global powers, the desirability of being able to project power through aviation. Territorial sovereignty has been at the heart of international civil aviation. Nations have always reserved the right to protect themselves and their territory by denying certain countries access to their national airspace, either entirely or partially.⁵² Pre-World War II colonial powers wanted to have a rapid way to connect their far-flung colonial outposts to the metropole. The UK also saw airpower as a relatively inexpensive way of policing its Empire.⁵³

No national military force, including that of the United States, has the necessary internal capabilities to transport large numbers of military personnel into a theatre of operations. A nation's civil aviation fleet is therefore considered to be a "reserve" in case a mass deployment is necessary. The U.S. military has utilized the Civil Reserve Air Fleet (CRAF) and its more than 900 passenger and cargo aircraft to

⁵² For an excellent discussion see David MacKenzie, "Canada and the Civil Aviation Discussions During the 1937 Imperial Conference," *British Journal of Canadian Studies*, pp. 97-109.

⁵³ Philip Anthony Towle, Pilots and Rebels, p. 2.

assist the armed forces during various mobilizations.⁵⁴ In conflicts ranging from Vietnam to the Gulf War, civil aviation has transported troops and materials. Even small peacekeeping operations, such as the Sinai force, utilize civilian aircraft so as not to divert limited military air transport resources.

Economic Issues: States are concerned with civil aviation because of the considerable economic impact that the industry has on the overall economy. From the industry's earliest days governments recognized its importance. Colonial powers wanted to link their empires and established national flag carriers pursuant to this desire. They allowed competitors to use aviation facilities only if the host nation or carrier was able to receive a sometimes substantial fee.⁵⁵ The U.S. government did not establish a state carrier but subsidised private carriers by granting exclusive rights to carry mail on certain routes, including some lucrative international ones.

Many governments use aviation as a development tool, usually by refusing foreign carriers access to their market, forcing passengers to use that nation's flag carrier and thereby capturing more foreign currency from foreign travellers. Many states are developing airports as regional hubs (Singapore's Changi Airport) or as a tool to develop more remote areas of their countries (Ireland's Shannon or Knock Airports).

Today's U.S. aviation industry represents slightly over 5 percent of the Gross Domestic Product (GDP). In 2001 the GDP was about \$10 trillion; aviation's share was about \$512 billion. More than fifteen million jobs were then dependent on aviation.⁵⁶ Industry forecasters projected 143 million people and more than 600

⁵⁴ Military Readiness, Civil Reserve Air Fleet Can Respond as Planned, But Incentive May Need Revamping, GAO-09-278, December 23, 2002, page 8.

⁵⁵ David MacKenzie, *op. cit.*

⁵⁶ Air Transport Association powerpoint slideshow to Congress June, 2004.

million emplanements⁵⁷ in 2001⁵⁸ but, even in the face of the global recession and the Al-Qaeda attacks, 150 million people travelled worldwide, on 4.5 million aircraft movements.⁵⁹

This does not mask the enormous impact of the attacks on the industry and on the economy. In the weeks following 9/11 air travel fell slightly more than half and 850,000⁶⁰ industry-related jobs were lost. The airlines lost about \$7 billion while the economy lost \$53 billion, (representing a .03 percent decline in the GDP). Cargo aviation was no exception. Much of the “just-in-time” management strategy that had developed during the last twenty years depended on rapid global delivery of supplies by air, which makes the system acutely vulnerable to disruption. The air cargo industry saw an 8.4 percent decline in tonnage.⁶¹ This is even more critical in regions such as South East Asia, where land links are sparse. Governments also felt the impact of 9/11 in decreased tax revenues from declines in hotel room taxes and the like. None of these numbers includes the costs to aviation, consumers and the general taxpayer of industry bailouts, increased security costs, and insurance.

Safety. Governments are reluctant to put their citizens and economies at risk by allowing unsafe transportation. In early 2004 the Swiss and UK governments took the unusual step of publicly naming carriers from several nations, including Flash Air, an Egyptian charter company, as having been prohibited from flying to their countries due to safety concerns.⁶² In the early 1990s, the U.S Government banned its employees and contractors from using any of the Soviet successor airlines in light of

⁵⁷ Emplanements are passengers boarding aircraft. As one passenger can board different aircraft during a trip an individual passenger can be counted numerous times. For example one passenger on a round trip will count as two emplanements.

⁵⁸ U.S. Department of Transportation Basic Transportation Statistic 2004.

⁵⁹ Airports Council International, 2001.

⁶⁰ www.gao.gov. information as of spring 2004.

⁶¹ Aircraft Technology Engineering and Technology, Cargo Conversions-a revival, p. 14.

⁶² BBC on-line, “Swiss publish banned planes list,” January 15, 2004.

their deplorable habit of inadequately fuelling their aircraft. The ban increased time and costs for those subject to it, but it did increase their safety.

Prestige. One has only to see a list of names of many of the state carriers around the world to gauge the importance states place on airlines. Air France, Air India, Air Gabon are just a few that are owned by the states that bear their names. Even some of the world's most famous privately owned carriers, British Air, Air Canada, American Airlines, US Air, carry the name of their nation, and more to the point, the national flag on the aircraft. This sends a message to the world that the nation is important enough to have an airline as its representative to the world.

The above considerations are four primary reasons that nations have always been directly involved in aviation. They are also some of the reasons terrorists target the industry. Aviation is about communication, the free flow of goods, people and ideas. One of the recurring themes of this thesis is the flow of ideas, by which is meant knowledge and intelligence to the industry and the security services. It is the shocking and all too frequent breakdown of this intelligence that underscores so many of the disasters that figure herein. If this thesis helps to highlight, and more important, overcome the breakdown, it will have made a contribution.

At the heart of this rather gloomy beginning is what is being referred to when discussing terrorism. Semantic debates are usually dry and ultimately bear little consequence for policy. In terrorism, this debate has had a very practical impact. The International Criminal Court declined to acquire jurisdiction over terrorism due to the lack of a universal definition. The framers of the International Criminal Court (ICC) chose to overlook the numerous conventions covering the criminalization of various terrorists' tactics and instead looked at the larger phenomena. They accepted the usual charge that plagues the study of this field: one can not study what one can not

define. The next section will define terrorism and attempts quickly to undermine that assumption.

Definitions.

The uncertain number of definitions of *terrorism* render the subject of terrorism problematic for—among others—lawmakers and academics. Absent an agreed field-wide definition, obfuscation and confusion tend to dominate discussions on this topic. This situation is particularly serious for persons attempting to craft legislation and formulate policy because of the necessity for clarity and precision of language in this politically charged topic.

The primary reason policy makers have difficulty defining terrorism is the inability of the academic community to settle on a definition. Part of the problem is that the term has and continues to evolve. The word first emerged during the French Revolution and referred to the attempt by the revolutionary government to restore order.⁶³ Thus the word began with a more favorable definition.⁶⁴ The political shift unleashed by the French Revolution, from divine to popular sovereignty, and the necessity of violence to bring about that transformation, cast political violence in a popular vein until the First World War.⁶⁵ Terrorism now meant anti-state action. This first period established some basic concepts for terrorism: it is political violence, meant to change society, through calling attention to the need for change through “propaganda of the deed.”⁶⁶ The definition would take on a negative connotation and refer to the state again during the 1930s as a result of Nazi and Soviet state repression,⁶⁷ and return once again to anti-state groups after World War II, though the interpretation would be more ambivalent.⁶⁸

⁶³ Bruce Hoffman, *Inside Terrorism*, p. 14

⁶⁴ *Ibid.*, p. 15

⁶⁵ *Ibid.*, p. 20

⁶⁶ Charles Townshend, *Terrorism: A very Short Introduction.*, p.55.

⁶⁷ Bruce Hoffman *op.cit.*, p.23

⁶⁸ *Ibid.*, p. 25.

The final definitional stage occurred during the anti-colonial and cold war struggles, thus linking many definitions of terrorism to the individual's normative position, giving rise to the often quoted "one man's terrorist is another man's freedom fighter," a quite unhelpful comment. An interesting attempt to construct a definition was undertaken by Alex Schmid and Albert Jongman in their research guide, Political Terrorism. They examined 109 different definitions of terrorism and extracted the frequency each used particular words. For example, 83% of the definitions they examined contained violence and force,⁶⁹ while 65% used political.⁷⁰ Thus a substantial majority of the definitions make clear that terrorism is violence for a political end. Criminal gangs may be said to be terrorizing a neighborhood, or a bully the playground, but as it is for personal gain it is not terrorism.

Some scholars have tried to escape the "box with a false bottom"⁷¹ of a definition and attempt a typology of terrorist actions.⁷² The difficulty with this is that many of the tactics terrorist employ, such as sabotage, assassination, and ambush, are common to both guerrilla and even conventional conflicts. The key difference between terrorist groups and guerrillas is that the former is smaller and does not control territory.⁷³ Terrorists are then small groups that employ or threaten to employ violence for a political end. The above discussion should not be taken to imply there is no definition possible. The most useful one is put forward by Paul Wilkinson, "terrorism is the systematic use of coercive intimidation, usually to serve political ends."⁷⁴ The terrorist is using violence to "create and exploit climate of fear among a

⁶⁹ Alex Schmid and Albert Jongman, Political Terrorism, p.5

⁷⁰ Ibid.

⁷¹ Charles Townshend, op.cit., p .5.

⁷² Ibid.

⁷³ Paul Wilkinson, Terrorism Versus Democracy, p. 16.

⁷⁴ Ibid, p. 12.

wider target group than the immediate victims.”⁷⁵ The terrorists are both conducting propaganda of the deed as well as “to coerce a target to acceding to the terrorists’ aims.”⁷⁶

Over the past several decades at the state and federal levels in the U.S, there has been enactment of increasingly vague statutes that have inhibited implementation and allowed misinterpretation. The courts frequently are left to rule on their meaning and applicability. The inherent danger in this situation is that terrorism is a political crime, an unusual and dangerous crime in a democracy, and if the law is imprecise it allows for abuse. All this obtains because *terrorism* is susceptible of multiple meanings.

The definition offered here governs the text:

The use or threatened use of violence against noncombatants for the purpose of influencing states’ political and/or social policies.

Violence then, is the instrument in the effort to influence. Terrorism is about message and agenda. Its practitioners, individuals and groups, are denied a political voice or perceive themselves as having been denied that voice. Violence will tilt the balance in their favor. Their desired impact is “a lot of people watching not a lot of people dead.” This is what is referred to as the “old” terrorism.

What some scholars refer to as the “new” terrorism is deemed to be motivated by a desire to kill as many as possible of the designated ‘enemy,’ including civilians, and to replace the established world. Its targets are chosen for symbolic value or as targets of opportunity. The distinction between the old and new terrorism, particularly

⁷⁵ Ibid.

⁷⁶ Ibid. p. 13.

relative to civil aviation, is more than of academic concern because if terrorism itself has changed, then counterterrorism must change.

Despite definitional difficulties, there is sufficiently wide agreement on the basic elements of terrorism to enable the academic and counterterrorism community to discuss and research terrorism.

The notion of coercion figures in all terrorists' actions (armed assaults, bombings, hijackings, arsons and the like), as does the threat of such actions, direct or implied, against noncombatants for political reasons. Violence for personal gain, even if it has political consequences, is not terrorism. The political reasons can include societal change, such as Marxist groups using violence to topple a non-Marxist state or Islamic terrorists attacking a secular state in an effort to create a pure Islamic state. A terrorist group can be interested in changing a single policy (say, on animal rights or abortion), but irrespective of the goal, they resort to violence to underscore their message. In what some scholars call the "new" terrorism, groups are motivated by their adherence to absolutist forms of religio-politico ideology, and their victims are chosen for symbolic value or are targets of opportunity. Thus, an industrialist can be a target, or even a McDonald's as representative of U.S. capitalism, global reach, or dominance of its culture. A Palestinian suicide bomber destroying himself or herself in a crowd maximizes destruction and symbolically kills Israel. The World Trade Center and Pentagon were attacked not primarily for their economic or military impact but because they were widely recognized symbols of U.S. power and prestige. The targeting of thousands of civilians was aimed at terrorizing a government and its citizens into heeding the terrorists' message and submitting to their vision.

The most troublesome term here is *non-combatant*. The U.S. Department of State defines that as civilians and off-duty unarmed military personal.⁷⁷ Clearly, civilians are non-combatants and targeting them is terrorism. However, if the challenge is to government authority, is it not legitimate to target all members of the government, irrespective of duty status? This distinction is moot in liberal democracies because there are legitimate non-violent avenues to seek political change. Hence all armed resistance is criminal and should be considered terrorism.

One of the more successful efforts to escape the definitional morass was by the development of a group typology based on motivation. While this does not define what terrorism is per se, it does provide a means of classifying groups that are engaged in political violence. There are five categories of terrorist motivation: (1) ethno-nationalist, (2) ideological, (3) religio-political, (4) single issue, and (5) state and state sponsored terrorism.⁷⁸ As with the definitional question there is no perfect motivational typology; many ethno-nationalist groups cast their struggle in a broader ideological milieu, while religious struggles can also be cast as ethnic conflicts. The key to these distinctions is the primary motivating factor in the conflict.

Ethno-nationalist groups are those struggling to either establish a state based on a particular ethnic group, or to join their fellow co-ethnics in an existing state. An example of the former are the Basque separatists ETA, who are attempting to establish an independent Basque state from territory in Spain. The Irish Republican Army (IRA) is attempting to break Northern Ireland off from the United Kingdom and join their fellow Irish in the Republic of Ireland.

The most famous ethno-nationalist struggle has been that between the Palestinians and the Israelis, which has also become the proto-type of ethno-national

⁷⁷ US State Department, *Patterns of Global Terrorism 1999*, p. 7, from on-line version.

⁷⁸ Paul Wilkinson, *Terrorism Versus Democracy*, pp.19-21.

terrorism and its use of international civil aviation.⁷⁹ It was the Popular Front for the Liberation of Palestine (PFLP) that began the hijack war against international civil aviation on July 23, 1968 and it was a splinter group, the Popular Front for the Liberation of Palestine General Command that developed sophisticated explosives for use against aviation. The Palestinians were not the only ethno-nationalists targeting civil aviation; Croatian nationalists hijacked a U.S. domestic flight, forced it to fly to France where the hijackers were given the opportunity to issue propaganda about their cause.⁸⁰ The Armenian Secret Army for the Liberation of Armenia (ASALA) attacked the Turkish state airline at Orly Airport in Paris in July 1983 and Ankara's Esenboga a month later.⁸¹ A wide range of nationalist groups have been involved in targeting civil aviation and pose a danger to its safe operation.

Ideological terrorist groups "seek to change the entire political, social and economic system either to an extreme left or an extreme right model."⁸² In the post World War II period the violence, particular against international civil aviation, has emerged from the left. Raul Castro is credited by many for introducing ideological hijackings during the Cuban Revolution. After that, groups such as the German Red Army Faction (Baader-Meinhof Gang) and the Japanese Red Army (JRA) were involved in hijackings and, in the case of the JRA, attacks on airports.⁸³ Right wing groups have attacked transportation; the Italian right wing attacked the Bologna Railway station in 1980⁸⁴ and the American right derailed an AMTRAK train (U.S. national railway) in 1995,⁸⁵ none has attacked international civil aviation, however.

⁷⁹ See Chapter 3 for a full discussion.

⁸⁰ David Gero, *Flights of Terror*, p. 136.

⁸¹ Bruce Hoffman, op. cit, p.77.

⁸² Paul Wilkinson op. cit, p.20.

⁸³ The JRA attacked Israel's Lod Airport in 1972 on behalf of the PFLP.

⁸⁴ Paul Wilkinson, op.cit. p.62

⁸⁵ Jim Hill, Sabotage Suspected in 'Terrorist' Derailment, CNN online, October 10,1995.

Religion has returned as a motivation for terrorism, and has been the focus since the revolution in Iran in 1979. In many cases, religious groups see violence as a sacramental duty, and easily justify the most extreme violence against infidels and apostates because they either do not believe or have turned away from the true faith. All religious traditions have spawned violence during the modern age of terrorism: Jewish,⁸⁶ Christian,⁸⁷ Hindu, Muslim, and cults,⁸⁸ among others, have all seen violent spasms. Yet none has targeted international civil aviation except two religions, Islamic and Sikh extremists.⁸⁹ And they have caused extreme loss of life, thus making religious groups the greatest danger to international civil aviation.

Single issue terrorist groups deploy violence to force a society to change a particular policy. Groups such as the Animal Liberation Front have attacked commercial and research facilities in Europe and North America to stop environmental damage. Groups such as the Army of God in the United States have attacked abortion providers to change that policy. Neither group has attacked international civil aviation and is thus no threat to that industry.

Finally, state terrorism (using one's own agents in an act of terrorism) or state sponsored terrorism (using a sub-state group) still play a significant role. States use terrorism to advance either domestic or international objectives. Libya, Iran,⁹⁰ North Korea,⁹¹ Syria, Sudan and others have all used terrorism to achieve either strategic or tactical objectives. It is not always clear why and what state may be behind an incident. There are legal judgments against Libya and public confessions by a North

⁸⁶ Bruce Hoffman, *op.cit.*, pp. 100-105.

⁸⁷ *Ibid.*, pp. 105-120. The section looks exclusively at the groups on the Christian Right but it should be noted that there have been attempts to combine Christianity and left wing ideologies, most notably in the Liberation theology found in Latin America during the 1960s and 1970's.

⁸⁸ *Ibid.*, pp. 120-127.

⁸⁹ Please see chapter 3 for more discussion.

⁹⁰ Jerrold Green, "Terrorism and Politics in Iran," in *Terrorism in Context*, pp. 553-594.

⁹¹ David Kang, "North Korea: Deterrence Through Danger," in *Asian Security Practice*, pp. 257-259.

Korean agent to support the conclusions that at least these two states have been directly involved in attacks against international civil aviation while many others are suspected. Thus states still pose some threat to international civil aviation.

U.S. Government Definitions of Terrorism

The absence of a comprehensive government-wide definition also serves a general policy goal: to avoid the thorny issue of deciding who is a terrorist based on motivations and thereby allow the government to focus on the act committed. Thus, a terrorist is defined by the act committed, and because almost any act in which a terrorist engages is a crime under existing law, the perpetrator is a criminal. Prior to 1983 (fifteen years after the dawn of the new age of terrorism), there was still no common legal definition of *terrorism* among the U.S. departments and agencies because there was, and is, no applicable federal statute. Many terrorist tactics are, or have become, crimes (hijacking, use of a weapon of mass destruction, murder), but unlike some other Western democracies⁹² the United States has no unique criminal category of terrorism. It has defined international terrorism in order to develop a statistical tracking system for the phenomenon.⁹³ The definition: “premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience.”⁹⁴ The definition has now evolved into Title 22 of the United States Code (U.S.C) sec. 2656F(d).⁹⁵ Its general definition illuminates the key elements of terrorism: motivation, message and audience.

⁹² United Kingdom, Ireland, Israel are examples.

⁹³ Paul Pillar, *Terrorism and U.S. Foreign Policy*, page 13.

⁹⁴ Ibid.

⁹⁵ CIA web page.

The lead agency in dealing with international terrorism is the Department of State, uses Title 22 as well. Here again the basic elements of terrorism are present. The department views terrorism as criminal violations of international treaties protecting diplomats and other designated persons. It defines *non-combatant* as a civilian or an unarmed off-duty military person; the purpose is to provide protection for all personnel in its charge, be they Americans or foreign diplomats within the United States. State sees international terrorism as an activity involving the citizens or territory of more than one country.⁹⁶

The Department of Defense also has an interest in international aspects of terrorism because its personnel deployed world wide, are ready-targets.⁹⁷ U.S. military forces have been prevented from participating in domestic law enforcement since passage of the Posse Comitatus Act in 1878 (though there are exceptions and some recent amendments relating to certain kinds of threats), so they have in the past given no attention to domestic response. The deployment of the National Guard across the nation after September 11, 2001, particularly within airports, has some long-term implications for the military and law enforcement. The Department further defines two key elements in defending its assets: anti-terrorism (defensive action), and counter-terrorism (offensive).⁹⁸ Anti-terrorism involves target hardening, alerts and other security measures designed to stop a terrorist attack; it is a passive, defensive approach, which allows the terrorists to maintain the initiative. Counter-terrorism allows the military to be active or even pro-active.

The Federal Bureau of Investigation (FBI) is the investigative arm of the U.S. Department of Justice (USDOJ) and the premier federal law enforcement agency. It

⁹⁶ U.S. Department of State, Patterns of Global Terrorism 1999, web edition, p.7.

⁹⁷ The threat is not exclusively international; during the 1960s and 1970s military installations on college campuses were frequent targets of anti-Vietnam demonstrators. Puerto Rican nationalists have attacked bases in Puerto Rico, and even a right wing group plotted a raid on Fort Hood in Texas.

⁹⁸ Thomas C. Tompkins, Military Countermeasures to Terrorism in The 1980s, RAND Note, page V.

has lead agency status in all domestic terrorist events and investigates international terrorist attacks against the United States around the world. The FBI defines terrorism as “the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”⁹⁹ It distinguishes domestic from international terrorism: domestic terrorism involves “Groups that exist and operate wholly within the United States and receive no foreign direction.”¹⁰⁰ International terrorism is “violent act or acts dangerous to human life that are a violation of criminal law if they had happened within American jurisdiction.”¹⁰¹ A problem here is that the focus is far too narrow and at the same time broad. The narrowness relates to the poorly defined terms. It seems that almost any Department of Defense action could be seen as terrorism. It could be argued that presidential or congressionally approved actions are lawful, but are actions that are not explicitly approved lawful? Is a special operations raid on an alleged terrorist camp legal or is it terrorism because persons in the camp are conducting a self-declared war against the United States, one that the U.S. does not recognize? If a suspected terrorist is killed, is that an extrajudicial murder? If the occupants of the camp are only participating in training with firearms and espousing anti-American views it is not criminal; in fact those are protected activities in the United States.¹⁰² No one in the camp has been accused of a crime or is under indictment, so what are the legal grounds for a raid?¹⁰³ It is unlikely that the FBI would ever arrest a member a commando team or a policy maker for the above scenario, but it does illustrate the problems inherent in a poorly defined concept.

⁹⁹ FBI, Terrorism in the United States, 1997 p. 1

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² The Intelligence Reform Bill makes it illegal for foreign residents to knowingly receive training in a camp run by a foreign terrorist organization.

¹⁰³ A raid such as the one alluded to did occur against a camp in Libya according to The Terminators

The emphasis on violation of law is obvious and correct for a criminal justice agency and underscores the U.S. position that counter-terrorism should be dealt with as a criminal offence; at issue is the deed of the offender not the ideological motivation. In the pre-September 11 2001 world, this was a comfortable and valid primary approach to the non-strategic threat posed by terrorism. The approach has been one of many aspects of counter-terrorism that had to be reevaluated.

The U.S. Department of Transportation (USDOT) has been concerned with the safety and security of the national transportation network, particularly with aviation security. The USDOT regulates all aspects of aviation through the Federal Aviation Administration (FAA). Neither has its own definitions of *terrorism*, but relies on the international treaties that use the phrase *interference with aviation* to encompass all acts of crime against aviation as defined through the Chicago, Tokyo, Hague and Montreal conventions (governing acts such as hijacking, sabotage and attacks on aviation infrastructure). These conventions are more fully discussed later, but here it is important to note that none defines, or uses the term *terrorism*; they all make hijacking and sabotage criminal under international law irrespective of the motivation.

The Change in Terrorism

Terrorism is as old as politics itself. Groups have resorted to political violence in order to advance their particular causes for much of recorded history. The current age of international terrorism emerged in the 1960s with the rise of such typical groups as the Palestine Liberation Organization (PLO), Provisional Irish Republican Army (PIRA), and the Red Army Faction (RAF). Each has or had a secular ideology:

a Palestinian state, reunification with the Republic of Ireland, changes in Western political and social systems. Each has or had a political goal and believed that armed struggle was the only or key means whereby the cause could be advanced. Their targets (industrialists, banks, aircraft) had symbolic propagandistic value. They were attempting to appeal to a wide constituency, so they limited casualties and either underplayed or rejected sectarian notions related to religion. Drawing the masses' attention to the cause was their *raison d'être*. If they had an overarching ideology it was the fidelity to the oppressed and anti-Americanism.

During the late 1960s and early 1970s there were several attempts at introducing religion, synthesizing its notions of justice with the prevailing revolutionary ideologies or Marxism-Leninism. Examples are liberation theology in Latin America or the attempt to fuse Islam and Marxism in Iran.¹⁰⁴ None had a lasting impact on the revolutionary milieu and were soon marginalized. It was not until after the Iranian Revolution in 1979 that there were any identifiable religious groups. At the time only two of the 64 known terrorists groups were of a religious nature.¹⁰⁵ In 2003 19 of the 37 groups on the State Department's Foreign Terrorism Organizations¹⁰⁶ list were religious in nature, a significant increase.

Of course, religious violence and particularly religious violence of the terrorist type is far from new. It can be argued, gingerly, that the destruction of Sodom and Gomorrah and the killing at Passover, both by God, were terrorist acts.¹⁰⁷ But three more "conventional" perpetrators provide a glimpse of religious violence in the past: the Thugs of India; the Assassins of Islam; and the Zealots of Israel. The Thugs may have reigned for two and half millennia or more, and killed a total of one million

¹⁰⁴ M.E. Yapp, The Near East since the First World War, p. 340.

¹⁰⁵ Bruce Hoffman, Inside Terrorism, p. 90.

¹⁰⁶ U.S. Department of State, Patterns of Global Terrorism, 2003 Appendix B.

¹⁰⁷ The fact that they were indiscriminate and used to change the attitudes and behavior of a larger audience seems to conform to the modern definition of terrorism.

people, perhaps 30,000 a year.¹⁰⁸ Yet, because they had no discernible political goal and killed only to appease their god, it could be said that they did not constitute a true terrorist group.

The Islamic Assassin cults of the ninth through eleventh centuries engaged in assassination of Muslim leaders pursuant to their goal that their branch of Islam, the Ismaili one, had preaching rights in a given territory. A leader who declines their request was signing his own death warrant.¹⁰⁹ The violence sent a message to others of like-mindedness. In short, each incident constitutes terrorism. The Zealots of Israel wanted God to rescue Israel from Roman occupation and believed that only their extreme dedication would convince God that Israel was worthy of saving.¹¹⁰ Their campaign included civil disobedience, assassinations, the poisoning of public wells and a range of other atrocities.¹¹¹ This group's most dramatic act was committing mass suicide in Masada, a foreshadowing of current happenings. When the Crusades, Reformation upheavals, and the struggles between the Shia and Sunni traditions in Islam are joined to the above-truncated history, the deep linkages between religion and violence become starkly evident. The compassion and pacifism that figure in many religious traditions are not immutable.

This age of religious terrorism is critical for two reasons. First it is wide spread. All faiths have experienced some form of violence that is linked to a fringe interpretation of its tenets. Second it the virulence of the violence. The access to a terrifying array of weapons, and a lack of moral constraints on their deployment, do make this an age where Armageddon appears to be within easy reach.

¹⁰⁸ Rapoport, "Religion and Terror: Thugs, Assassins, and Zealots," *International Terrorism*, pp. 146-147.

¹⁰⁹ David C. Rapoport, "Sacred terror," in Walter Reich's *Origins of Terrorism*, p. 121.

¹¹⁰ David C. Rapoport, "Religion and Terror: Thugs, Assassins, and Zealots" in *International Terrorism*, pp. 152-156

¹¹¹ *Ibid*, pp. 152-156.

Conclusions

Although there are some tactical innovations allowed by modern communications and weapons, much of the “new” terrorism is not new. All of its elements are found at other times in history. The speed, reach and lethality characteristic of modern groups have changed, but little else. The central weakness of the concept of the new terrorism is that it fails to address terrorism as a strategic weapon, as Al-Qaeda deployed it on 9/11, but is still utilizing an older tactical framework. The most dramatic way to illustrate the change is Al-Qaeda’s involvement with aviation terrorism. As will be illustrated in chapter 4, Al-Qaeda has ushered in the third phase of aviation terrorism, aviation as a battlefield/weapon. Prior to the 1990s aviation terrorism involved either using the aircraft as a means of fleeing persecution or prosecution (late 1940s-1960s, phase one), then as a stage for political expression (late 1960s –late 1980s, phase two) and then in the early 1990s aviation became the weapon of choice. Al-Qaeda has attempted a mass bombing of aircraft (Bojinka Plot 1995), attacks on airports (Los Angeles International Airport on the eve of the Millennium 1999/2000) and suicide hijackings and attempted bombings during 2001 and the attacks with MANPADS in 2004. None was attempted to gain a political stage; they were attempts to inflict enormous loss of life. What Al-Qaeda did on 9/11 was to invent the poor man’s cruise missile. It is the first confirmed group to successfully use a suicide hijacking.¹¹² This has caused a tectonic shift in how aviation security is approached.

¹¹² The Israeli Air force shot down a Libyan civilian Jet in 1973 because intelligence had indicated it was attempting to crash into an Israeli city. When the Libyan aircraft refused to communicate with IDF aircraft it was fired on. The crash landing killed 108 of the 112 on board. Israel apologized for the incident and compensated the families.

This thesis is attempting to provide a wide ranging discussion on aviation security and the threats facing the industry. The focus is on terrorism as a politically oriented threat. The author thus does not examine criminally oriented threats as they are for personal not political gain. The author is not attempting to be a group expert either; only to provide the reader with a sketch of the types of groups engaged in political violence and which pose a threat to international civil aviation. Then this thesis looks at the experience and structure of the United States. There are many states that share similar experiences with the United States and the author recognizes that, but as this was not a comparative study, and the United States offers the largest and most complex system in the world, the focus thus remains on that country. The ready availability of English language materials on aviation terrorism events is rather large, particularly for events such as Lockerbie. The thesis uses many high profile terrorist attacks to illustrate various points throughout the work. The thorough written coverage of these few attacks, has allowed the examination of many of the themes of the thesis but has created some repetition.

It is important to remember that irrespective of how it is employed, terrorism is the use or threatened use of force against property or non-combatants in order to change a policy or structure of a society. Whether the new or the old terrorism, the violence is directed against non-combatants with the goal of influencing the larger society. In the words of Chinese military thinker Sun Tzu, kill one to influence ten thousand. The brutal logic, penned in 400 BC, still, echoes around the world today.

Chapter 1

The International Civil Aviation Regime

Over much of the past two decades international relations has been dominated by the term and concept of *globalization*. One key reason is the explosive growth in the speed and variety of contacts with even very remote parts of the world. If there is one industry that seems to embody the concept, it is the international aviation system. But if people or cargo can travel, say, from New York to New Zealand in less than a day, the aviation industry that allows that to happen is still one of the most heavily regulated industries on both the domestic and international levels.

It is appropriate and logical here to first examine regime theory in general, then why regimes form in policy areas, particularly aviation, and how the international civil aviation regime is manifested in the security realm. This thesis will examine strategic intelligence and how it underpins not only security, but also regime theory itself, and will focus in particular on the international and the United States security structure.

One important question that has emerged from the actuality of an interdependent world, is how to manage, or govern, the increasingly complex network of global interaction. John Ruggies introduced the idea of regimes in international relations. Such theorists as Robert Keohane, Joseph Nye, Hedley Bull and Stephen Krasner contributed to the development of the theory. For Krasner, a regime consists of “implicit or explicit principles, norms and decision making procedures around which actors’ expectations converge in a given area of international relations.”¹¹³ All the above-mentioned theorists largely agree that a regime is a formal legal construct. It has an institutional structure, rules and enforcement mechanisms. These elements are present in an international regime, which clearly implies that the state actors are ceding some of their sovereign power to an international body. Why are they doing so?

¹¹³ Stephen Krasner in *International Regimes*, ed. Krasner, p. 2.

Regimes come into existence in essentially two ways: consensus or imposition.¹¹⁴ A consensual regime rests on negotiations that often emerge from a convergence of interests. An imposed regime is “established by dominant actors who succeeded in getting others to conform to the requirements of these orders through some form of coercion, cooptation, and manipulation of incentives.”¹¹⁵ The latter would be stronger because the viewpoint of the hegemonic actor is the only viewpoint that has any value. The latter is also unstable because its survival rests on its actual or perceived power to maintain the regime and the dominant power’s interest in doing so. Absent such actual or perceived power, the regime collapses. A consensual regime would be inherently stable because of its negotiated basis, but negotiations have an accommodation component that may open the regime to destabilization

Young and Puchala and Hopkins¹¹⁶ posit a third regime type that comprises informal and spontaneous regimes. Although both categories may have some elements of a regime -- common norms, values and principles for example -- they lack formal institutional frameworks and most critically, enforcement mechanisms. Puchala and Hopkins assert that colonialism was a regime because all the participants (at least the major European actors) subscribed to the same value (cultural superiority) and principle (non-intervention in another power’s colonial affairs).¹¹⁷ Colonialism was enforced through its participant’s fear of exposure, so silence covered-up abuses. The Congress of Berlin, in 1878, could be said to have been the starting point for a

¹¹⁴ Ibid., p. 12.

¹¹⁵ Oran Young, *Regime dynamics: the rise and fall of international regimes*, in International Regimes, Krasner (ed.), p. 100.

¹¹⁶ Donald Puchala and Raymond Hopkins, *International regimes: Lessons for inductive analysis*, in International Regimes, Krasner (ed.), pp. 61-91.

¹¹⁷ Ibid., pp. 70-72.

colonial regime but it never formalized agreements or institutional structures.¹¹⁸

Informal agreements enforced by peer pressure may create a stable environment and even function more effectively than a formal regime, but they do not constitute a regime.

Five elements are common to each regime formation: (1) self-interest, (2) political power, (3) norms and principles, (4) usage and custom, and (5) knowledge or intelligence. Self-interest involves an actor (in this case, a state) engaging in activities that will maximize its position in a given situation. This could take the form of a zero-sum calculation (a gain for one actor is a loss for another) or a cooperative model (whereby all actors gain something from the process). There is an assumption of some level of rational calculation embedded in a self-interest approach; an actor must ascertain the value of the gain/gains for a given transaction, understand the possibilities of a loss, and determine the best way of maximizing the profit while minimizing the loss, or at least controlling the damage caused by a loss. The calculation must be based on dispassionate evaluation of the objectives and relative positions of the actors involved, not on envy of others' positions but indifference to them.¹¹⁹ The zero-sum model would follow from an imposed regime.

The second element, political power, can be divided into political self-interest, and the public or cosmopolitan interest.¹²⁰ Political self-interest tends to characterize an imposed regime. The Warsaw Pact could be seen as an example: the Soviet Union forced (through the coercive presence of the Red Army) Eastern Europe to join the common defence pact that the Soviets controlled. A less coercive instance is the

¹¹⁸ Ibid., pp 61-91.

¹¹⁹ Andreas Hasenclever et al, *Theories of International Regimes*, pp. 28-29.

¹²⁰ Steven Krasner, *Structural Causes and regime consequences: regimes as inverting variables*, in *International Regimes*, Krasner (ed.) pp. 13-16.

“price leader in an oligopolistic industry.”¹²¹ The public or cosmopolitan interest is exemplified by a regime established to assist all actors, even if one is more dominant than the others, in accord with the theory that a rising tide helps all boats. A nation or nations may establish a regime to regulate an activity that will benefit all participants such as a security regime or an economic activity like aviation.

The third element, shared norms and principles, provides the common philosophical bonds that underpin all regimes. International civil aviation rests on the principle that all states should equally participate in the free, efficient and safe flow of people and goods and that states have the right to control access to their markets.¹²² These principles are broken down into four normative areas: jurisdictional rights, damage control, technical and procedural barriers, and price and market share.¹²³ Normative areas allow for a regime to establish formal procedures operationalizing the particular principles. In the security realm the damage control and jurisdictional rights are combined, placing the responsibility on the host state for security. Thus the United States is responsible for protecting aircraft operating within its jurisdiction.

The fourth element is that a regime, irrespective of how it formally emerges, often rests on informal understandings and practices referred to as use and custom. Many modern regimes have formal legal frameworks and governing practices that reflect long-standing traditions. The “Law of the Sea” (and some aspects of aviation law) is in large part a codification of preexisting uses and customs in treaties and maritime procedure. Common law is another manifestation of how informal understandings of great duration can become more or less codified. Use and custom may be necessary, but they are insufficient for the creation of a regime. It is the process of codification that creates a regime.

¹²¹ Ibid., p. 101.

¹²² Mark Zacher and Brent Sutton, Governing Global Networks, p. 88.

¹²³ Ibid., p. 4.

The fifth element in regime formation is knowledge. One of the key scholars of knowledge-based regimes is Ernst Haas, who defines *knowledge* as “the sum of technical information and of theories about that information which commands sufficient consensus at a given time among interested actors to serve as a guide to public policy designed to achieve some social goal.”¹²⁴ Essentially Haas just describes strategic intelligence, a concept discussed in detail later in this paper. Knowledge/ intelligence allows actors to understand not only the goals but the capabilities of other actors involved in a situation. Haas, Stein, Cohen and others focus on how knowledge influences the structures and goals of entire regimes,¹²⁵ but the focus could also be on single aspects of regimes, such as the security element in the aviation regime. Haas astutely highlights the key failing relative to knowledge: acceptance. Actors have to accept the information presented to them antecedent to acting on it.

How a regime is established aside, the actors involved must accept the consequences good and bad. Arms control regimes rest not only on the principle of conflict reduction, but also on the practical ability to verify compliance through what is called national technical means (intelligence gathering). The information thereby gained, allows participants to maintain confidence in the regime through the ability to identify violations, and to “transcend prevailing lines of ideological cleavages.”¹²⁶ Haas is asserting that irrefutable objectivity of knowledge will overpower any bias and will leave only sound objective policy. He is correct that facts are objective (an event did or did not happen) but the interpretation of the fact, its meaning, cannot

¹²⁴ Ernest Haas, “Why Collaborate? Issue-Linkage and International Regimes,” *World Politics* 32:3, April 1980, pp. 367-368.

¹²⁵ Stephen Krasner, *op.cit.*, pp. 19-20.

¹²⁶ Ernest Haas, *op.cit.*, pp 367-368.

be separated from the ideological cleavages he wishes to transcend, and hence the overemphasis on the neutrality of knowledge.

There is, however, a more fundamental importance of knowledge for regimes: the first step in solving a problem is to admit that there is a problem. It must be known that there is a problem -- or more generally an issue -- that transcends individual sovereignty and should be addressed. Absent that knowledge, there is no impetus for creating an international regime. Or if the problem or issue can be addressed informally by a single state or by several states, there is no need to establish a regime. If the problem or issue is global, a regime gives the actors involved one set of universal rules and standards, which creates cost efficient compliance.

Susan Strange is one of the leading critics of regime theory. Her points are that it is: (1) a fad, (2) imprecise, (3) value-biased, (4) distorts the nature of stability and change in the international system, and (5) is too state-centric.¹²⁷ Her central objection to regime theory stems from its being a largely American fascination, and she accurately observes that early regime adherents were reacting to the perception of U.S. decline and to the practices of the Reagan administration in the 1980s.¹²⁸

Regime theory follows in a long line of political/social science theories that wax and wane in an ongoing attempt to discover a unifying theory of everything.

One of the key faults that Strange attributes to the theory is its imprecision. Regimes seem to mean everything to everyone: Krasner sees them as implicit or explicit principles, norms and rule-making procedures.¹²⁹ Keohane and Nye see them as “sets of governing arrangements.”¹³⁰ They agree, at least implicitly, that regimes are formal structures. But Puchala and Hopkins identify informal regimes such as

¹²⁷ Susan Strange, *Cave! Hic dragons: a critique of regime analysis*, in *International Regimes*, Stephen Krasner (ed.), p. 37.

¹²⁸ Ibid., p. 338.

¹²⁹ Stephen Krasner, op.cit, p.2.

¹³⁰ Ibid., p. 2.

colonialism or détente.¹³¹ Here then are two conflicting definitions of a central concept of the theory. Still, there is broad agreement that regimes share principles, norms and values, sufficient to define them. *Regime* has both a political and non-political meaning: the word comes from the French and is usually applied to improving health and physical condition. Strange believes that applying the notions associated with individual health to types of governments that are objectionable (Stalin, Hitler or the Taliban) is not productive. It highlights the difficulties with the actual and perceived meaning of a word, but does a perception lessen the value of a concept? The crux of her argument is that a regime implies (though not to everyone) a formal structure. Although Strange is correct that there is no world government analogous to a national government, there are particular issue areas that have authority and do provide the formal transmission of norms, values and rules that regimes imply. For this to work a regime requires formal institutional structures and procedures; there can be no regime, an agreement, or even the precursors of a regime *sans* some formal structure. Strange's argument is important; if a regime-like entity without a formal structure can be deemed a regime, then it could be said that anytime there is agreement on values and principles a regime exists, thereby diluting the rigor of the theory.

Another charge against regime theory is that it is premised on a static view of history. In this connection, Strange points out that international trade regimes were never fully implemented, so that it is spurious to assert such regimes existed. In their examination scholars failed to take into account the incomplete nature of what they identified as regimes. This led to an overemphasis on change in general and particularly on shocks to regimes, because the scholars' assumption was that the

¹³¹ Donald Puchala and Raymond Hopkins, International regimes: Lessons from inductive analysis, in International Regimes, Stephen Krasner (ed.), pp. 65, 67-75.

regimes existed in the way in which formal structures indicated they would. When such was not the case, and when a propertied regime failed or changed (such as Bretton Woods, or the IATA price cartel) the event was interpreted as more than what it actually was.

The last of the shortcomings of regime theory seen by Strange is an overemphasis on the state. It is a natural tendency, because states are the only sovereign authority in the international system, and only they can cede sovereignty to another body. Hence states are the natural focus of any study of the field. For Strange, this fails to understand the multiple forces that actually shape the modern world.

Regimes are influenced by phenomena that individual states have difficulty controlling (global finance, environmental concerns, terrorism). Regimes are sometimes sabotaged by member states themselves, or by the use of nonstate actors when they no longer serve the interest of the state. An example of such member-sabotage is the United States' encouragement of domestic charter air carriers to operate on North Atlantic routes in order to undermine the Bermuda Agreements.¹³² Those agreements gave powers to the International Air Transport Association (IATA) to establish price controls and market access to this highly profitable air market.¹³³ The United States wanted the market to determine these questions while the UK wanted an international body -- the ICAO -- to regulate them.¹³⁴ The U.S. was forced to concede international cartel control through a more market friendly IATA in the immediate aftermath of World War II. The Bermuda Agreements only applied to scheduled carriers. Irregular or charter carriers were not covered by the cartel, so in an effort to destroy IATA's control, the United States encouraged charter carriers to

¹³² Mark Zacher and Brent Sutton, *opt.cit.*, p 114.

¹³³ *Ibid.*

¹³⁴ *Ibid.*,p.110.

enter the market, eventually destroying the regulated price and market access controls.¹³⁵

Technology and information sometimes change regimes. The ability to move currency around the world by means of a keystroke has undermined many post-World War II financial regimes, as has the science that underpins many of the attempts at environmental regimes. The emergence of global non-governmental organizations (NGOs) and even violent protest movements (anti-globalization) and terrorist groups has served to change the regimes. Some anti-globalization groups have marketed fair-trade products, which they hope will impact future trade agreements. Various environmental and labour groups have influenced how the World Trade Organization (WTO) views the impact of trade on communities, and are having some of their concerns incorporated into new treaties. The UN Convention against Financing of Terrorism could lead to a broader anti-terrorism regime.

All of these examples are driven in some fashion by non-state actors but cannot be accounted for by the existing regime theories. Despite the valid criticisms (poorly defined terms, Western (American) orientation, state centeredness, and static analysis) regime theory does have value. China viewed its admission into the World Trade Organization as a significant diplomatic achievement, far beyond its economic importance. The WTO as an institution and as a regime represents all the weaknesses highlighted by Strange, but it is still a body that nations want to join. This is only one reason that it is important to explore why regimes emerge and why, how, and if regimes change.

¹³⁵ Ibid.

The International Civil Aviation Regime:

Is International Civil Aviation a Regime and if so How Does It Handle Security?

The first aircraft was flown in the United States in 1903 for a distance measured in yards. That was followed only six years later by the first international flight, between the UK and France.¹³⁶ The potential of aviation was recognized during World War I. European nations quickly began to regulate its international aspects on the European Continent and in the vast spaces associated with the imperial reach of many nations. Relative to the former, the small domestic markets (in both economic and geographic terms) meant that most European carriers would be travelling among neighbour nations. Relative to the latter, aircraft could rapidly connect the imperial subjects to the metropol; in accomplishing this system the limited range of the aircraft of the era required frequent stops, many in territory not controlled by the carrier's nation. The circumstances eventuated in the establishment of the International Commission on Air Navigation within the League of Nations system.¹³⁷ The United States neither participated in this nor other League of Nations bodies.

The United States had an enormous domestic market and limited foreign contact, so it felt no need to be part of a world aviation system. Even so, it signed and ratified the 1925 Warsaw Convention, which limited the financial liability of carriers for accidents. Had the United States not been a signatory, its aviation industry could

¹³⁶ Mark Zacher and Brent Sutton, *Governing Global Networks*, p. 81.

¹³⁷ Eugene Sochor, *The Politics of International Aviation*, p. 2.

have faced financial disaster. The Warsaw Convention remained in effect and largely unamended until the 1980s.¹³⁸

In the waning days of World War II international civil aviation issues were again addressed. This time the United States supported the creation of two primary bodies involved with developing the legal and professional structures for the international aviation system: the International Civil Aviation Organization (ICAO) and the International Air Transport Association (IATA).

International Civil Aviation Organization

The ICAO is the United Nations' civil aviation body. It and its affiliated bodies, such as the European Civil Aviation Conference (ECAC),¹³⁹ set voluntary and mandatory international standards involving a wide range of aviation policy issues, including security. The "constitution" of the ICAO is the Chicago Convention of 1944, which created a unique body within the UN system; it has *jurisfact* and *jurisdiction*.¹⁴⁰ The Chicago Convention established several unique bodies and powers for the ICAO: its Assembly, Council, and Secretariat. The 187 member Assembly is officially the 'sovereign body of the ICAO.'¹⁴¹ It meets triennially. Its authority is found in Article 50(a) of the Chicago Convention, but is only "preserving the illusion" that the real authority rests here.¹⁴²

The ICAO's 33 member Council is the key power in the organization because it holds executive, legislative, and judicial power over the civil aviation system.¹⁴³ A

¹³⁸ Ibid., pp. 20-21.

¹³⁹ Rodney Wallis, "The Role of International Aviation Organizations in Enhancing Security," *Terrorism and Political violence*, 10:3, autumn 1998, Special Edition, pp. 93-97. Mr. Wallis points out that the ECAC has greater influence than many regional bodies since it speaks for the EU and involves the International Federation of Airline Pilots Associations as technical support.

¹⁴⁰ Ruwantissa I.R. Abeyratne, Aviation Security Legal and Regulatory Aspects, page 11.

¹⁴¹ ICAO Web site.

¹⁴² Eugene Sochor, The Politics of International Aviation, page 56.

¹⁴³ Ibid. p. 57.

permanent body, the Council has an influential and unique standing in the international community. Its members are elected from among the members of the Assembly for three-year terms and represent one of three categories: (1) states of chief importance in air transport, (2) states that make the largest contribution to aviation navigation but are not already in category 1, and (3) states not represented in categories 1 and 2 but which would bring representation from all geographic regions to the Council.¹⁴⁴ There are no clear criteria for any of the categories, although the United States and the Soviet Union/Russia, for example, have always been represented on the Council as category 1 members. Nations such as Australia have shifted between categories 1 and 2.¹⁴⁵

One interesting trend has been to create ‘blocks’ of seats reserved in categories 2 and 3 for geographic regions. These seats are rotated each term among countries in a region; the Scandinavian countries have been one of the leading participants in this approach, one that allows a region to maintain a seat by preventing national competition for diluting votes.¹⁴⁶ The approach also allows the values and views of many member states and regions to be voiced and evaluated through the prism of the ICAO’s guiding principles, a feature that maintains organizational vibrancy. Four committees assist in the Council’s mission, dealing with technical, economic, financial and other support matters.¹⁴⁷

The ICAO is administered through the Secretariat, whose professional international civil service is “recruited from a broad geographic basis.”¹⁴⁸ The Secretariat provides advice for the Assembly and Council through support bodies that

¹⁴⁴ Ibid. p. 58.

¹⁴⁵ Ibid., p. 59.

¹⁴⁶ Ibid., p. 61.

¹⁴⁷ ICAO web site.

¹⁴⁸ Ibid..

deal with various aspects of aviation. Security issues are handled through the Air Transport Bureau and its director of security.¹⁴⁹

The Council's uniqueness lies in its ability both to serve as an "umbrella" with executive, legislative and regulatory powers and also to implement decisions in regard to contracting members. It has judicial functions in interpreting policies and determining member compliance. This combination of authority has aroused surprisingly little controversy, a circumstance chiefly due to a strong but often under-examined principle of apoliticality. Despite this principle, however, it is clear that there is politics within the body -- there is intense lobbying for seats on the Council,¹⁵⁰ and member states try to force votes on political controversies outside the jurisdiction of the ICAO. But the ICAO views itself as a technical body and believes that the UN's Security Council properly deals with political disputes.

Pressed throughout its history to take positions on contentious political issues, the ICAO has always vigorously rejected the pressure and offered to assist "only if the Council satisfies itself that in the specific case ICAO is not likely to be involved in questions of a political nature or in disputes between two or more members."¹⁵¹

The ICAO faced a very troublesome situation for several decades concerning the membership of South Africa and its policy of apartheid. Many African states attempted to have South Africa expelled. Although neither the ICAO nor the UN could expel the South Africans on political grounds, because such action was not in their purview, the ICAO did suspend their membership on technical grounds (failure to pay dues).¹⁵² Once South Africa withdrew from the UN, the ICAO could expel the

¹⁴⁹ Ibid.

¹⁵⁰ Eugene Sochor, The Politics of International Aviation, p. 61.

¹⁵¹ Ibid, p. 112.

¹⁵² Ibid. pp. 44-48.

South Africans because it is bound by mandates of the Security Council. It was this precedent that was followed in the Pan Am 103 case.¹⁵³

The ICAO has never taken a position of declaring an aggressor in a conflict, nor has it offered to serve as an intermediary between parties to a conflict. It deals only with the direct impact of a conflict on civil aviation. Continued funding by the United States rewarded this careful adherence to matters technical. The Reagan administration divided independent UN agencies into three categories based on size, mission, and hostility toward the United States. One category comprised small technical bodies that were apolitical or positively disposed towards the United States; the ICAO fell into this category and never had difficulty receiving US funding. This disciplined focus on technical matters -- policing the sky through establishing such items as Flight Information Regions (FIR's), aircraft noise standards as well as security measures -- has served the aviation regime well.

. The Chicago Convention rests on the notion that states are sovereign over their land and air space. At the same time, it details the actions states are required to perform with regard to safety and security. Annex 17¹⁵⁴ to the convention allows the ICAO to issue Standards and Recommended Practices (SARPS), detailing what states must do and should do. Standards are actions states must take under all

¹⁵³ There will be a more detailed discussion of the Pan Am 103 Case in Chapter 3. A brief description of the particular incident follows. The U.S and U.K. were not satisfied with the Libyan Government's response to the Lockerbie bombing in December of 1988. Libyan intransigence involving the disposition of the accused bombers of Flight 103 led to the U.S. and U.K. seeking sanctions against Libya in the UN Security Council, requiring among other things that the accused be surrendered to them for trial. Libya was not required to do so under any ICAO convention and attempted to have the ICAO Council use its judicial power to find in its favor. The UN Security Council passed the sanctions resolution before the ICAO ruled and thus forced it to support the sanctions.

¹⁵⁴ Rodney Wallis, *Combating Air Terrorism*, p.97-102. Annex 17 to the Chicago Convention details security procedures states are required to undertake and well as those that are desirable. Disputes over language and the ability to ignore without consequence mandatory practices has allowed states, such as the United States to ignore section 5.1.4 of the Annex requiring positive passenger-baggage matching until the aftermath of September 11. But even then only in limited cases.

circumstances,¹⁵⁵ while recommended practices are things states should do if the situation allows.¹⁵⁶ The SARPs, conventions and other treaties and documents signed by the members create the formal structures of the regime. Although the language of the treaty provisions says that they are mandatory, there is no mechanism for enforcement. This weakness does not render the pacts valueless; they are important instruments in developing the framework for international understanding as well as in establishing targets and minimal standards for contracting states to achieve. But the failure to enshrine the ability to enforce the conventions renders them of little practical value beyond that.¹⁵⁷

The International Air Transport Association (IATA) was founded in 1946, as was the ICAO, to be the voice of the civil aviation industry relative to many aspects of aviation issues. Since the late 1960s a prominent aspect has been security. Through the Security Advisory Committee (SAC) IATA has policy input and a formal audit function under the mandate of safe, regular and economical air transport.¹⁵⁸ Member airlines can nominate an airport for review by the SAC. The process is useful on two levels: (1) the SAC weighs not only the security needs of a facility, but also the most economical way to enhance security; and (2) the SAC is viewed as a neutral party,¹⁵⁹ because it comprises not governments but commercial carriers that do not have a political agenda. Its above-the-fray status enables SAC to make recommendations that are viewed as both security enhancing and economical, such as the sterile lounge and positive baggage matching.

¹⁵⁵ Yonah Alexander and Eugene Socher, Aerial Piracy and Aviation Security, p.4

¹⁵⁶ *Ibid.*, p. 4.

¹⁵⁷ Rodney Wallis, "The Role of International Aviation Organizations in Enhancing Security," *Terrorism and Political Violence*, 10:3 autumn, 1998, Special Edition Issue, pp. 83-88.

¹⁵⁸ *Ibid.*, pp. 88.

¹⁵⁹ *Ibid.*, pp. 90.

Another international body merits mention. The Airports Council International (ACI), founded in 1991 as a merger of two older bodies, is the voice of more than 475 international airports and authorities in more than 152 countries. It provides the same type of professional services as the IATA, but for airports. The ACI and IATA cooperate on various issues, including security. All the bodies discussed here can urge, but not compel, members to develop standards. The lack of standards can be overcome by issuing public advisories not to travel through certain airports; the Reagan administration did this to Athens Airport, and it had a negative economic impact on the Greek economy.¹⁶⁰

The author now turns to the principles and norms of the international civil aviation regime. Although all the above institutions contribute to the regime, it is the ICAO, and to a lesser extent the IATA, that establish the regime. Six principles govern international transport and communication networks: (1) free movement of commerce, (2) free movement of information, (3) efficiency, (4) transnational damage control, (5) internal political control, and (6) equity.¹⁶¹ All but the fifth principle are actually obligations: states must reduce barriers to the efficient flow of commerce and information (knowledge). The fifth principle is the right of states to control access to their territories (sovereignty). For aviation, the other five principles are referred to as the “Five Freedoms.” (Appendix A) For example, the first freedom allows for the free traversal for non-stop flights across territory, a restating of the principles of freedom of movement and efficiency. The damage control principle is achieved through the second freedom, the right to land in a state for non-traffic reason (refueling or emergency). State sovereignty is protected through cabotage rights, the control of transport rights between domestic destinations. There is an interesting and potentially

¹⁶⁰ Paul Wilkinson, “Designing Effective National Aviation Security Systems: Building Blocks for an Enhanced Global Response,” *Terrorism and Political Violence*, 1:3, July 1989, pp. 382.

¹⁶¹ Mark Zacher and Brent Sutton, *Governing Global Networks*, p. 88.

important semantic difference between the word *obligation* in the six principles and the word *privilege* in the Five Freedoms. *Obligation*, a cognate of the word *oblige*, denotes a duty that is morally or legally binding. *Privilege*, on the other hand, denotes a right to a benefit to enjoy something, seemingly implying a lesser, more transient standing, which would weaken any regime from the start.

Irrespective of the words chosen, the principles translate into operational norms covering four areas: jurisdictional rights, damage control problems, technical and procedural barriers, and economic questions.¹⁶² Zacher and Sutton use the normative categories to ascertain the strength of each part of the civil aviation regime, determining the individual dispositions of each norm. Security, for them, falls under the damage control norm, which includes phenomena such as accident prevention, pollution control, and criminal control. Criminal control issues involve the freedom of commerce and efficiency principles; Zacher and Sutton divide this category into commercial and political crime, assigning aircraft sabotage and hijackings to the latter.¹⁶³ Although the commercial crime control aspects of the aviation regime are considered strong, the uncertain and dangerous nature of political crimes are, in Zacher and Sutton's terms, of medium strength (although in reality they seem to be very weak).

The need for security issues to be incorporated into the existing international civil aviation regime first emerged during the early 1960s, a time when there was a wave of hijackings between the United States and Cuba. The *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (commonly referred to as the Tokyo Convention, because the negotiations that developed it occurred there in 1963) was a cooptation of the bilateral agreements between the United States and Cuba

¹⁶² Mark Zacher and Brent Sutton, *Governing Global Networks*, pp. 88-90.

¹⁶³ *ibid.*, p. 89.

establishing obligations and jurisdiction. Chapter II of the Convention established, for the first time, legal jurisdiction over any criminal act that occurred on board an aircraft. The Tokyo Convention creates a hierarchy of jurisdiction:

- primary responsibility rests with the state of aircraft registry,
- next, it falls to a state where the incident took place,
- the victim of the act is a citizen or resident of that state,
- the act involves state security,
- the act violates existing laws of the state,
- and finally the exercise of jurisdiction is an obligation of a state as part of other international agreements.¹⁶⁴

If the hijacking took place over international waters or other non-state areas, the signatory state having the first or last point of contact has jurisdiction.¹⁶⁵ The Convention also obligates signatories to rapidly return aircraft in their possession as a result of an incident to the legal authority, which the Convention identifies as the captain.¹⁶⁶ The Convention does not require the state having custody of the presumed violator to prosecute or extradite the suspect, but it does require the custodial state to inform interested states of its intentions.¹⁶⁷ However, one of the Convention's provisions allows the Convention itself to serve as an extradition treaty even if one does not exist between the states that are parties to a criminal interference with an aircraft. The Convention was a valuable first step in establishing the legal framework for the international civil aviation regime to address the changing security environment further.

¹⁶⁴ Tokyo Convention 1963, in Aerial Piracy and International Law, Edward McWhinney (ed.), p.148.

¹⁶⁵ Ibid., p.149.

¹⁶⁶ Ibid., p.149

¹⁶⁷ Ibid., p.153.

The Tokyo Convention did nothing to deter hijackings of aircraft, and as they became more frequent, the regime agreed on the new *Convention for the Suppression of Unlawful Seizure of Aircraft* (popularly known as the Hague Convention of 1970). That agreement attempted to remedy two shortcomings in the Tokyo Convention by designating hijacking as a distinct criminal action by definition, and by mandating that states either utilize existing anti-hijacking national statutes or incorporate the treaty into domestic legislation.¹⁶⁸ The Hague Convention also reminded states of their obligations under the Tokyo Convention to remand suspects to their state's prosecuting authorities to determine if grounds for prosecution exist.

Although Articles 6 and 7 of the Hague Convention have become known as the obligation to "prosecute or extradite," this is not their meaning. Paragraph One of Article 6 requires a state to take the accused into custody and maintain custody until "such time as is necessary to enable any criminal or extradition proceedings to be instituted."¹⁶⁹ Despite insistence by the United States and the Soviet Union on a requirement of extradition, none was included in the convention.¹⁷⁰ Its absence created the conditions for the UN Security Council Resolutions regarding the attacks against Pan Am 103 and UTA 772. The United States, the UK and France were fully aware that Libya had neither an obligation to extradite the accused saboteurs nor an obligation to prosecute them. The weakness had been built into the Hague Convention because of the reluctance on the part of some ICAO member states to impose an obligation on national executive authority and potentially compromise the independence of a national judiciary.¹⁷¹

¹⁶⁸ Ruwantissa I.R. Abeyratne, *Aviation Security Legal and Regulatory Aspects*, pp. 157 and 159.

¹⁶⁹ Hague Convention 1970, in *Aerial Piracy and International Law*, Edward McWhinney (ed.), p. 173.

¹⁷⁰ Ruwantissa I.R. Abeyratne, *Aviation Security Legal and Regulatory Aspects*, pp. 161-162.

¹⁷¹ *Ibid.* p 161.

The Hague Convention also failed to deal with sabotage and on-board hijackers and accomplices.¹⁷² Although the effort to strengthen the existing security regime was well intentioned, its most basic weakness is that it does not obligate states to take action against hijackers. The Tokyo and Hague Conventions address threats of sabotage to aircraft or ground facilities such as interfering with ground-based navigation.

The *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal Convention of 1971) attempted to address the lack of protection for ground based aviation assets in the international civil aviation regime. Its first major addition to existing aviation law is the definition of the term *in service* to mean in operation for the interval defined as “beginning of the preflight preparation of the aircraft by the ground crew or by the flight crew . . . until twenty-four hours after landing. It shall . . . extend to the entire period the aircraft is in flight.”¹⁷³ This protracted coverage is critical, because the threat to interfering with an aircraft on the ground, by any means, had not been deemed a criminal offence by the international community. Article I of the Convention spells out for the first time, offences that can be carried out by persons not actually in contact with the aircraft. The ground-breaking aspects are delineated in Article I (b-e), which criminalize destroying or damaging an aircraft in service: the placing or causing to be placed a device or substance that will destroy, damage, incapacitate or endanger the safety of the aircraft and/or navigation facilities, or knowingly communicate false information that will interfere with safe flight operations.¹⁷⁴ Unlike previous conventions, which state that an offender has to be present on the aircraft to be deemed criminally responsible for interference, the accused merely has to have caused the interference.

¹⁷² *ibid.*, p. 158.

¹⁷³ Ruwantissa I.R. Abeyratne, *Aviation Security Legal and Regulatory Aspects*, p. 165.

¹⁷⁴ *ibid.*, p.167.

The Montreal Convention was an effort to “suppress” the growing threat of aircraft sabotage; there were 12 bombings in the period 1968-1971.¹⁷⁵ Even though the convention calls for “severe penalties” it does not elaborate on what constitutes such penalties. Like the Hague Convention, it does not require a state to prosecute or extradite a suspect; it must submit the case to the proper authorities. The Convention was amended in 1988 to include attacks on airports (in response to the attacks on the Rome and Vienna airports in 1985) and other land based facilities such as ground navigation centers. It was the first time all elements of the international civil aviation industry had the same level of legal protection. The ICAO has also adopted conventions dealing with specific weapons used against aviation, such as the 1991 *Convention on the Marking of Plastic Explosives for the Purpose of Detection*¹⁷⁶ in response to the Pam Am 103 and UTA 772 bombings.

The Tokyo, Hague and Montreal Conventions and other documents published by the ICAO operationalize the principles and norms of the existing regime. Its participants want safe, reliable and efficient air travel and the benefits there from. The ability of the regime to deal with changing operating conditions is in direct proportion to the knowledge it possesses. The ability to acquire, process, disseminate and apply information allows a regime to adapt. The international civil aviation regime accordingly depends on its ability to have access to what the military would call tactical information (weather conditions, airspace congestion, security conditions and the like) and strategic information (technological changes, fuel costs, security trends and the like). The question of how the aviation regime and its associated epistemic communities¹⁷⁷ (such as airports, aircraft manufactures, unions,

¹⁷⁵ Aviation Safety Network, Safety Issues Database Sabotage bombings. www.Aviation-safety.net.

¹⁷⁶ [Www.ICAO.org/atb/avsec/conventions](http://www.ICAO.org/atb/avsec/conventions)

¹⁷⁷ Andreas Hasenclever et al., *Theories of International Regimes*, pp. 149-152. These communities are communities or networks of likeminded organizations that serve as transition nodes for the regime.

governments) access information and then apply it points to the most glaring weakness in the system.

A classic example is the 2001 Richard Reid (the so-called shoe bomber) case. The U.S. intelligence community uncovered an Al-Qaeda plot to attack an American aircraft through concealment of a plastic explosive in a high top shoe or boot (the use of a plastic explosive that was not “tagged” as required by the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection). The warning was passed to the FAA/TSA (media reports are unclear which), which distributed it to all American carriers¹⁷⁸. Understandably, there has been no public discussion on details of the industry response, nor any indication that the industry took additional security steps to counter the threat. The American Airlines station in Paris received the alert and shortly thereafter it turned a suspicious passenger -- Richard Reid -- over to French authorities. Two different shifts of French security searched Reid but apparently not his shoes, and cleared him for the next flight. American Airlines staff allowed him to board but again his shoes went unchecked. Two hours into the flight Reid attempted to detonate plastic explosive concealed in his high top tennis shoes. The regime itself covered this type of attack in the Montreal and Plastic Explosive Conventions and the intelligence community acquired a clear and credible warning and distributed it to the necessary parties. Computer profiling selected a passenger of interest and that person was searched, but no one seemed to have searched the shoes. In this case failure lay not in collection or dissemination of intelligence but in its use, which raises several questions about intelligence that are examined below.

¹⁷⁸ American broadcast media reported there was a warning passed to US carriers both before and after the incident.

Strategic Intelligence and Regimes

This section considers four questions: (1) what is intelligence? (2) what are strategic and tactical intelligence? (3) what is the intelligence cycle? and (4) how does intelligence support the aviation regime? Strategists throughout history have held that battles are won or lost long before they are ever fought, that the side with the best information has the clear advantage. This, of course, implies that information will be believed and applied effectively. Intelligence is a dedicated information support service for policymakers.¹⁷⁹ It allows them to make informed decisions and, it is hoped, contributes to better policy. The intelligence world is divided into producers and consumers. There is overlap, but essentially producers are agencies that collect, analyze, produce, and disseminate information to others; in the United States the producers are agencies such as the CIA, FBI, National Security Agency (NSA) or the Defense Intelligence Agency (DIA).

Information is produced in a variety of formats, such as that of the President's Daily Intelligence Briefing (PDIB), which provides an overnight review of relevant happenings in the world and information on important upcoming events. Other government agencies and personnel will receive similar products geared to their specific needs. Policy makers are the primary users (consumers) of the information, but agencies that utilize information provided by outside sources are also in this category. The former FAA Intelligence Division (now part of the Department of Homeland Security) did not produce information on its own, but used information generated by other agencies to develop threat assessments and inform carriers of possible threats. Of course the CIA may produce information that it consumes

¹⁷⁹ John Macartney, "What is Intelligence," Lecture notes SIS 53.526, US Intelligence Community, p.11.

internally for operational purposes, but the distinction provides necessary clarification.

There is considerable debate within the intelligence community (particularly that of the United States) about the relationship between the policy makers and intelligence personnel (especially analysts). Sherman Kent, considered by many to be one of the fathers of strategic intelligence in the United States, wanted an absolute separation: intelligence should support, not create, policy. That view dominated intelligence from the 1950s into the early 1970s, when more regular interaction began to occur. The thinking was that more contact helped analysts understand the policy-making process and would improve the quality of the analytical product. The controversies on both sides of the Atlantic over the use and/or manipulation of intelligence by or for policy makers, demonstrates the lack of a clear answer about the best form of interaction between consumers and producers.

The two broad categories of intelligence are tactical and strategic. Tactical intelligence involves information that can be used for a specific purpose. For example, information on the location of a particular troop deployment, the appearance of a new type of weapon, the location of a terrorist safe house or camp or rotation of guards at the camp serves a tactical purpose. It is information that provides no indication of the capabilities or intentions of the enemy, only place and current strength. Tactical intelligence can be used to detect a new *modus operandi* -- the introduction of a new type of explosive device may allow for a new strategic development -- but largely it is information used to support a current operation.

Strategic intelligence can be called "big picture intelligence." It is meant to provide the analysis of trends, intentions, and the prospect of avoidance of surprise attack. There are two kinds of strategic intelligence, basic and current. Basic

intelligence is background information, and includes data such as information on a particular country (climate, topography), the names of commanders of a state's military units or terrorist cells, and other information commonly referred to as "gossip."¹⁸⁰ Such data are collected, analyzed, and stored for possible later use. To have a cache of basic information is to have a fully fleshed-out target that can illustrate the links among various actors. For example, former CIA officer Robert Baer used local contacts in Lebanon to collect basic information (birth records and marriage licenses) on members of Hezbollah to construct a picture of the organization's membership and also to create a baseline to use for establishing the credibility of any agents recruited by the CIA.¹⁸¹

Current intelligence, as the name suggests, is necessary to support ongoing operations. It provides policy makers with "their own private newscast"¹⁸² on a daily basis. Intelligence professionals agree that current intelligence is the most labor intensive and expensive type of information gathered. It requires a full staff of analysts, briefers, graphics producers and a myriad of others to get the product to the consumer. Former CIA Director Robert Gates once described current intelligence as an "ATM card, while basic intelligence is the bank account." If the basic intelligence is not replenishing the funds of current intelligence, the ability to draw on the account will diminish.

Both basic and current intelligence are supposed to provide policy makers with indicators and warnings of upcoming events. Indications intelligence means there are signs that an event is in the offing (troops massing on a border may mean an invasion), while warnings mean an event that is going to occur (an order to attack will be issued to the massed troops). The terminology in the public discussion is often

¹⁸⁰ Amos Kivacs, "Using Intelligence," *Intelligence and National Security*, 12:4, p. 151.

¹⁸¹ Robert Baer, *See No Evil*, pp. 112-113.

¹⁸² John Macartney, "What is Intelligence," Lecture notes SIS 53, US Intelligence Community p.18.

used interchangeably, which leads to confusion and charges of intelligence failures. Two examples are illustrative. In connection with the Mossad information to the United States about Al-Qaeda activity, American broadcast and print media declared Mossad *warned* the United States of an impending attack. It is probable that the information was not that explicit but said rather that an attack *could* happen because of various factors.

The second example is the so-called Helsinki Warning of the Pan Am 103 attack. On December 5, 1988 the United States embassy in Helsinki received a call from an individual claiming to be a member of a group calling itself the Guardians of the Islamic Revolution; the message was that a Pan American airliner departing from Frankfurt for the United States within two weeks would be bombed. The bomb maker would be Yassan Gardart, and a Finnish woman would be an unwitting bomber. The caller, later identified as Samra Mahayoun, also said the woman would be given the bomb in Frankfurt from a man named Abdullah.¹⁸³ The details furnished, added to other calls to the Israeli embassy during 1988,¹⁸⁴ constituted a warning. No action was taken because both U.S. intelligence officials and Finnish authorities dismissed the call to the embassy as a hoax. The details are still a subject of controversy, it should be noted, but the scenario is well within the realm of a possible warning and helps to illustrate the type of information that could constitute a warning, and why it may not be believed. The key element in warning intelligence is the credibility of the threat.

The threat-assessment model has two stages. First, the intentions and capabilities of a group are equal to the risk posed by the group. Second, the risk is added to the vulnerability of the intended target and that creates the threat level.

¹⁸³ Rodney Wallis, *Lockerbie: The Story and the Lessons*, pp. 24-25.

¹⁸⁴ David Johnston, *Lockerbie: The Real Story*, pp. 111 and 114.

Assessment is, of course, more art than science. In the Helsinki example, the U.S. embassy security personnel and intelligence staff had to answer several questions to their own satisfaction. First, were the Guardians of the Islamic Revolution an actual group, or was the name at least a *nom de guerre*? If so, its capabilities can be ascertained. No one had heard of it, but the caller had said that the individuals named including the bomb maker were members of the Abu Nidal organization,¹⁸⁵ a well-known and highly capable terrorist group operating during the 1980s. The caller had also identified a specific airline, route, time frame, and the method of the bomb's delivery. All in all it was a high risk. Aviation's particular vulnerability to an unwitting bomber created a high threat environment.

Skeptical of the information relayed by the caller, U.S. officials asked the Finnish authorities to investigate. They interviewed the named bomb maker and determined that he had no connection to any terrorist group. They concurred that the call was a hoax, linked to a personal squabble between the caller and the man he accused of being the bomb maker. The three security services involved -- U.S., Finnish and Israeli -- reached the same conclusion and took no additional action. Pan Am 103 was destroyed on December 21, 1988, two days after the threat window expired. When asked by the families of the victims to explain the intelligence "failure," Frank Moss of the U.S. Department of State could say only that it was a "ghoulish coincidence."¹⁸⁶

Many would argue that the difference between indications and warnings is disingenuous hedging. But each term is precise and carries its own set of assumptions that dictates different responses to events. *Indication* suggests that an event *may* occur, in the future, perhaps a not too distant one, such as a terrorist attack on a

¹⁸⁵ Ibid., p.110.

¹⁸⁶ Steve Emerson and Brain Duffy, The Fall of PAN AM 103, p. 260.

variety of targets. Because there is no specific information on when or where an attack will occur the intelligence and security community will have to determine its likelihood, timing and site. In the meantime they will advise increased vigilance of as many possible targets as can be identified. *Warning* means an attack on a specific target or targets is imminent. The types of targets identified will determine the response. Embassies and other government facilities may be closed, airlines may cancel flights, and public events may have increased security. It is thus critical to use the terms *indications* and *warnings* carefully. In intelligence things are not always what they seem to be.

The Helsinki affair illustrated, on a small scale, the four step process through which intelligence proceeds before it can be utilized by the authorities: collection, analysis, production and dissemination. Information is collected through many sources both open (news media, conferences, embassies) and clandestine (human agents, signals intelligence, imagery intelligence). It is next correlated and analyzed by an individual or team as to validity and potential usefulness; then it is produced for briefing purposes (imagery intelligence is labeled, communications intercepts are transcribed) and finally it is disseminated to the policy makers responsible for acting on it or reacting to it. The above stages constitute what is broadly agreed upon as the intelligence cycle. However, it is a subsequent stage, tasking, that is perhaps the key stage. Tasking is the most vital stage of intelligence because it both drives and is driven by policy. The intelligence community is not able to provide coverage for all issues of potential interest to the U.S. government, so its resources are assigned to the issue the policy makers deem most important. The strategic tasking occurs early in each administration, and the seriousness of the threat a target poses determines its

priority rank.¹⁸⁷ Tasking was a straightforward process during the Cold War: the target was the Soviet Union. Later there were new areas on which to focus -- China and the Middle East -- but these represented the same type of threat, a state with identifiable assets and procedures that could be infiltrated and monitored. Terrorist groups were a threat, but they had identifiable structures to target and did not require new techniques in intelligence gathering. Groups such as the PLO or the IRA had hierarchical structures and were willing to talk as well as fight. The necessity of keeping any dialogue quiet provided the intelligence community with a role in diplomacy as well, sometimes called crypto-diplomacy.¹⁸⁸

Tasking is central for the intelligence community because it gives it the ability to develop appropriate resources for each defined threat. When the Soviet Union was the primary threat it was easy to determine what resources were needed. Russian linguists, Soviet Block weapons experts, and those familiar with Soviet ideology and doctrine were recruited and trained. Upon the demise of the Soviet Union the tasking became more defuse and vexatious. There was no longer a clear overarching threat. The intelligence community didn't know what to focus on, as there was little consistent direction for policy makers. Was the environment, AIDS, weapons proliferation, terrorism, or any of a half dozen other issues a national priority on which the intelligence community should focus? If a policymaker were to decide that the environment, say, is a substantial threat, the intelligence community needs to deploy monitoring resources and scientists who can interpret the climate data; linguists and agents would not be required. In addition, since much of the data are already in the public domain, it is unclear what added value the intelligence

¹⁸⁷ Loch Johnson, "Strategic Intelligence: The Weakest link in the Global War on Terrorism," in the *New Global Terrorism*, pp. 243-244.

¹⁸⁸ H. Brandford Westerfield, "America and the World of Intelligence Liaison," *Intelligence and National Security*, 11:3, 1996, pp. 543-545.

community can provide, but since policy makers were interested in the subject and there was no other overarching threat, the intelligence community would respond to consumer demands. Even when policy makers did provide guidance, such as Iraq's WMD capabilities, the intelligence community didn't seem to view it as a top priority.¹⁸⁹ It was this strategic drift at all levels that undermined the intelligence efforts.

The desire of disaffected individuals and groups to convey a message assisted in the collection stage of the intelligence cycle. There are four primary means by which to collect intelligence: human intelligence (HUMINT), imagery intelligence (IMINT), communications intelligence (COMMINT), and electronic intelligence (ELINT). Human intelligence is information provided by human agents, either defectors from the target or a "mole" in the target's camp. It is this means of collection that most people picture when they hear the word *spy*. It is the most dangerous task and clearly the one most fraught with moral ambiguities.

The first requirement of HUMINT is that a case officer be assigned to develop the contacts in a target country or organization. There are two types of case officers: legal (the officer with official cover as a member of a diplomatic staff) and illegal (those with no official diplomatic cover, NOC in CIA parlance). Developing the appropriate contacts in a government or terrorist organization to gain more than just tactical information can take years. Case officers need to be thoroughly "at home" in the language, culture, and individual motivations for potential agents -- a mistake in any of these areas can lose a potential agent.¹⁹⁰ Because of the safety and comfort provided by official cover, the CIA tends to deploy its staff members to U.S. embassies around the world, a practice that leads to the recruitment of government

¹⁸⁹ Select Committee on Intelligence The United States Senate, Report on the U.S. Intelligence Communities Pre-War Intelligence on Iraq, Conclusions 6 page 10.

¹⁹⁰ Robert Baer, See No Evil, p. 40.

officials; it is they, rather than terrorists, who then go to embassy social gatherings at which relationships conducive to recruitment can be developed. The CIA's regular rotation of case officers reduces their effectiveness. Assignment to an unfamiliar area where language and customs must be learned and understood "on the job" unnecessarily hinders accomplishment of purpose.¹⁹¹

When dealing with an agent in a target organization a case officer must never forget that he or she is dealing with a criminal and a liar. To reveal state secrets to unauthorized persons is a crime universally considered a capital offence. It is even more perilous to deal with an informant who is a member of a criminal or terrorist organization and who in all probability has committed criminal actions for the organization. A state has to weigh the value of the information provided by the agent against the crimes the agent may have committed to determine if the agent will be used. There are times when the balance cannot be achieved or maintained, but there is no general rule by which to gauge a decision.

Criticism of the intelligence community's failure to recruit agents holding senior positions in places such as, the Iraqi regime of Saddam Hussein and in Al-Qaeda has been widespread. Some of the difficulty stems from the moral dilemma described above. Some fear the career implications of a CIA or FBI agent if he or she gets the balance wrong. But mostly it comes from the shortage of trained individuals with the skills to infiltrate a regime like Saddam Hussein's or contact -- let alone infiltrate -- networks such as Al-Qaeda.¹⁹² Concerns about the cost (human and financial), time commitment, subjective nature of the intelligence sought and false

¹⁹¹ Loch Johnson, "Strategic Intelligence: The Weakest link in the Global War on Terrorism," in the New Global Terrorism, pp. 249.

¹⁹² Ibid., pp. 244 and 248.

agents¹⁹³ all contribute to the reluctance about using HUMINT even if its effectiveness against terrorism can be demonstrated.¹⁹⁴ Despite the potency of HUMINT, it was not spared the reductions of the mid 1990s, when the CIA Directorate of Operations (responsible for, among other things, developing and maintaining HUMINT) lost seven hundred positions.¹⁹⁵ Some permanent posts were filled by contract agents (either retired CIA or Special Forces personnel) who could be deployed for a particular, individual operation,¹⁹⁶ but lopping off hundreds of positions spells disaster for maintaining long term networks.

One-way of avoiding the moral issues of agent recruitment is to rely on “national technical means,” which subsume the remaining three areas of collection: IMINT, COMINT, and ELINT. Image intelligence (IMINT) involves photographic information provided by satellites, aircraft and unmanned drones such as the Predator. IMINT is considered cleaner and more reliable because the picture is displaying a particular location at a specific time. Some of the limitations imposed by weather and darkness have been reduced and, with the introduction of unmanned vehicles, the risks associated with manned aircraft have been eliminated without losing the flexibility of aircraft. It takes time and money to manufacture and deploy a satellite, and it is a predictable platform with limited flexibility.¹⁹⁷ Aircraft and unmanned drones have helped counter some of these weaknesses because both platforms are flexible and unpredictable in their deployment.

¹⁹³ During the summer and early fall of 2001 Al-Qaeda defectors were providing information to the CIA that there was a major operation about to be launched against the United States. While many of the agents may have been legitimately defecting some were clearly planted defectors sent to provide U.S. intelligence with false and misleading information to distract any focus on the actual operation.

¹⁹⁴ Amos Kivacs, “Using Intelligence,” *Intelligence and National Security*, 12:4, 1997, pp. 160-161.

¹⁹⁵ Loch Johnson, *op. cit.*, p. 248.

¹⁹⁶ Robert Baer, *See No Evil*, p. 171.

¹⁹⁷ Satellites have a predictable orbit in the earth’s atmosphere that makes it easy to track them and then to determine the approximate time it will be over the target area. This reduces their ability to provide intelligence on mobile targets or see activity that can be concealed. And with a limited onboard fuel supply it is not easy to redeploy a satellite multiple times.

IMINT has three principal weaknesses. First, overhead reconnaissance can be foiled. This was illustrated during the Balkans conflict in the 1990s when NATO aircraft attacked tanks made of plywood and brooms because they looked real from 30,000 feet. Second, pictures tell the analysts what is there, not what it means. A picture of a row of tents could be a military or terrorist camp or a UN refugee facility.¹⁹⁸ Mistaken identification can lead to difficulties, which underscores the most fundamental weakness: the need for highly trained photographic interpreters. The ability to ascertain what is on a particular photo is not easily acquired. When the public sees an overhead picture (such as the one Secretary of State Powell displayed to the United Nations on February 5, 2003) it has been analyzed, and enlarged, and individual characteristics and components have been labeled. The original picture was not. It took an accomplished individual to ferret out the important pictures from perhaps thousands of images taken of hundreds of thousands of square miles of territory. The third principal weakness in IMMINT is the inability to discern the intentions of an opponent. A picture of an Al-Qaeda camp, for example, provides few clues to the organization's intentions. A picture can show what type of training is in progress (the presence of an aircraft fuselage would indicate training for aircraft hijackings) but most terrorists conduct similar types of operations and hence training, so pictures of the camps themselves provide little information.

Communications Intelligence (COMINT) involves either the breaking of codes or the monitoring of communications traffic. The U.S. National Security Agency (NSA) is the primary COMINT agency; within its purview are code breaking and monitoring of unbroken communications, called traffic analysis. Its monitoring capabilities are very impressive: one quadrillion bits of information every three hours,

¹⁹⁸ Dino Brugino, "The Unidentifieds," in Inside the CIA's Private World, p. 23.

(equivalent to the entire collection of the Library of Congress),¹⁹⁹ from the world's phones, fax machines, computers, cell phones and any other means of electronic communication. In the mid 1990s guests touring the NSA headquarters at Fort Mead in Maryland could hear tapes of Osama bin Laden's satellite phone conversations with his mother.²⁰⁰

The NSA has two primary methods of communication monitoring: "tapping" and traffic analysis. Tapping involves either the breaking of secure communications codes or putting a listening device in place ("bugging"). The technique is familiar to the general public through its use in police dramas. The NSA however does not use its facilities to gather intelligence within the United States or against U.S. citizens abroad. Communications intercepts are a fundamental tool for intelligence in that conversations can give an indication that an event is likely to occur soon or in the ideal situation can give a warning regarding a pending attack. It is not publicly known if an attack has actually been prevented through a communications intercept, but there have been some notable successes against individual terrorists who are using telephones, such as the arrest of Ramzi Binalshibh, a senior Al-Qaeda, member after he used his satellite phone in Karachi, Pakistan, in 2002.²⁰¹

NSA also employs traffic analysis as a tool for indicator intelligence. Here the content of the communication is not known but the fact that there has been an increase in communications volume (traffic) allows analysts to speculate on the nature of the communications and what they may indicate. A sudden rise in communications volume ("chatter") on a suspected Al-Qaeda network may mean an operation is about

¹⁹⁹ Matthew Aid, "The Times of Troubles: The US National Security Agency in the Twenty First Century," *Intelligence and National Security*, 15:3, 2000, p.17.

²⁰⁰ James Bamford, *Body of Secrets*, p.410.

²⁰¹ Yasri Fouda and Mick Fielding, *Masterminds of Terror*, p. 163. The Israelis and Russians were able to kill noted terrorist leaders by using their mobile phones as a bomb in the Israeli case and as a homing device for a missile strike in the Russian case.

to be launched. The NSA was able to identify a spike prior to 9/11, but recognized its significance only in retrospect; it was able to identify communications spikes before the Bali bombing and in late January and early February of 2003, contributing to the increased alert status during that span.

Tapping and traffic analysis were honed during the Cold War. Many critics deemed them ill-suited against terrorists. But absent those techniques how could communications satellites intercept paper messages? How could the NSA break the commercially available Internet encryption codes? Could the NSA identify an individual computer user and his or her terminal? In many cases the answers are not encouraging.

The most serious weakness in COMINT is not lack of information but the inability to process information in a timely manner. During the 1990s the intelligence community was downsized by a significant amount; the NSA budget, for example, was cut by 35 percent between 1990 and 1995.²⁰² This contributed to a reduction of 50 percent in the number of listening posts and a community-wide reduction of one third of its personnel.²⁰³ The cuts hit NSA particularly hard in that it lost senior staff as well as the vital and always in short supply linguists. The vacancies led to a drastic drop in intelligence processing, from 20 percent in the late 1980s to roughly one percent in the mid 1990s.²⁰⁴ These circumstances crippled the NSA at a most critical time.

The final collection method is electronic intelligence, ELINT. This focuses on electronic emissions particularly from radars and weapons systems. Although there is some possibility that it could be employed against terrorists, such as in detecting

²⁰² Matthew Aid, "The Times of Troubles: The US National Security Agency in the Twenty First Century," *Intelligence and National Security*, 15:3, 2000, p. 6.

²⁰³ *Ibid.*, pp. 6-7. The signals intelligence community comprises the NSA as well as the military services signals elements.

²⁰⁴ *Ibid.*, p.18.

nuclear radiation or energy readings that could indicate the use of sophisticated computers for the manufacture of WMD, the method is generally of little direct usefulness for counter-terrorism.

Despite its not being part of the collection process, open source information is critical to the intelligence community. About 90 to 95 percent of the information collected by the intelligence community is not the fruit of secret collection but of public sources: media, court trials, academic conferences and publications are all useful means of collecting information, particularly but not exclusively for basic intelligence.

Analysis, the second stage of the intelligence cycle, is as important as the collection stage. Analysis tries to make sense of the various strands of diffuse and often contradictory information and puts a picture together. Only rarely is one person responsible for an analyzed product; it requires an entire team of linguists, photo interpreters, regional or perhaps topical trained/experienced experts (on weapons proliferation or terrorism), physiologists and other kinds of experts. It is a very time and labor intensive, costly process that cannot be handled by technology. The very skills involved in creating a good analysis for the intelligence community are the same skills that are much desired in the private sector, where the compensation package and work environment are considerably more attractive. This team effort assumes all the agencies in the community are cooperating, but as the various investigations into 9/11 and Iraqi intelligence have disclosed, this rarely happened.

The CIA was not spared the fate of the rest of the intelligence community: between 1993 and 1997 one-third of its analysts -- one thousand staff people -- retired. By 2005 40 percent of staff will have served in the CIA for less than five years.²⁰⁵

²⁰⁵ Loch Johnson, *op.cit.*, p.248.

One of the primary failures before 9/11 was not the lack of information but the inability to process the information and develop the necessary understanding of what the bits and pieces all meant. The weakness in this vital area of the intelligence cycle was devastating, but remedial measures have been introduced and bode well for the future of the U.S. intelligence community.²⁰⁶

The third phase of the intelligence cycle is processing, where the analyzed intelligence is turned into briefing-quality information. Current and basic intelligence are combined with overhead (aerial) reconnaissance photographs whose chief features are enlarged and labeled; photographs of key individuals or weapons systems mentioned in the briefing are located. The produced information is then disseminated to various consumers through such formats as The President's Daily Foreign Intelligence Briefing (PDFIB). The PDFIB is the premier document produced by the intelligence community; it contains information from all elements and sources of intelligence. The PDFIB has been produced in some fashion since at least the late 1940s; there is no similar document covering domestic security matters, although briefings take place.

The intelligence community also produces the National Intelligence Estimate (NIE), a collaborative document that focuses on trends in various countries or on other issues of national importance such as terrorism. The military and the Department of Justice have similar, but not as comprehensive, daily briefing materials. They are delivered to the Joint Chiefs of Staff (JCS) and the various regional commanders such as Central Command (CECOM) and the attorney general.

The U.S. Department of Transportation and the FAA also receive threat briefings as needed. The FAA security staff, before its 2002 transfer to the

²⁰⁶ www.cfrterrorism.org/security/law

Transportation Security Administration (TSA) (which was merged into the Department of Homeland Security), had its own intelligence division since 1986. The division was supposed to provide a conduit for threat information to flow from the intelligence community to the aviation community. The President's Commission on Aviation Security, convened in the aftermath of Lockerbie, provided the first public examination of aviation-related intelligence.

The mandate of the FAA's intelligence involved "determining and assessing current threats of criminal and/or terrorist nature against U.S. civil aviation, and where appropriate, disseminating that information in an unclassified form to airlines or airports affected by the threat."²⁰⁷ The division produces security bulletins and circulars. The former furnished information regarding a specific threat or type of threat to either the industry or a particular carrier. For example, in December 2001 the division issued a security bulletin warning of a "shoe bomb" that could be used to attack American aircraft during the last two weeks of the year.²⁰⁸ The recipient must acknowledge in writing, receipt of the bulletin within 24 hours, make specific references to its content, and give evidence of understanding the threat. Within 72 hours the recipient must describe in writing the precautions taken at all stations in relation to the threat. If no appropriate security measures can render the aircraft safe, the recipient or the FAA will cancel the flight.²⁰⁹

The division's other means of communicating is through security circulars that provide information of a more general nature. This could include increased terrorist activity in a particular country or region. Such information puts carriers serving destinations in that area on notice; they should take precautionary measures and

²⁰⁷ Report of The President's Commission on Aviation Security and Terrorism, p. 74.

²⁰⁸ There was discussion on the U.S. broadcast media of a specific warning of a shoe-based explosive being introduced into the aviation system during the last two weeks of 2001. There has never been any confirmation of this in other media sources.

²⁰⁹ *Ibid.*, pp. 78 and 87.

increase their readiness. The division's analysts were widely dismissed by the industry for the information provided. There is a widely quoted security circular that read "an American carrier operating in Europe, the Middle East, or Latin America, will be a target of either a bombing or hijacking during the next year." The industry found this vagueness unhelpful. Although the criticism has some validity, it fails to take into consideration the nature of the information available to the division. The intelligence division received information, often already analyzed, from other members of the intelligence community. The intelligence would be provided to the FAA on a tear sheet, classified information on the top half and, on the bottom half, unclassified material which was for dissemination. The industry would receive the unclassified information and then be expected to act. The FAA does have access to information that it passively receives from other sources, but it does not have collection assets. The FAA received 600 to 700 bomb threats per year during the 1980s, for a total of more than 6,000 during that decade;²¹⁰ and there is no indication of a decreased level in these calls. Because the threats have never been followed by actual attacks, the information derived from them is considered of little value. It should be stressed that all of these threats are examined and treated as real.

The FAA works closely with security and law enforcement agencies across the United States and in every country served by U.S. carriers, or serving the United States, to develop more credible and precise threat assessments and to assist in strengthening weaknesses in the system. During the 1990s a federal security manager (FSM) was assigned to each of the nineteen Category X airports in the United States and overseas to serve as the point of contact for all security and intelligence

²¹⁰ Ibid., pp 74-75 and 91.

questions.²¹¹ Since 9/11, each of the 459 airports regulated by the FAA has FSMs. The Transportation Security Administration has absorbed the FAA's security and intelligence functions and continues to maintain two security personnel on secondment to the ICAO to provide security training and assessment, as well as liaison with the international community.²¹² It is through this liaison process that the FAA/DHS supports the international civil aviation security regime.

The aviation regime as a body and security in particular, rest on knowledge. Regimes are instituted to reduce uncertainty among the regime actors. The development and transmission of knowledge through the regime helps to reduce uncertainty and reinforce the regime. On economic and technical issues the international civil aviation regime has achieved much. The establishment of air routes, communication standards and universal emergency procedures, has permitted the rapid, economical and efficient development of international aviation. One reason for this accomplishment is that a myriad of interested parties transmits information to the regime and receives information transmission from the regime. These actors form an epistemic community.²¹³ Bodies such as the aircraft manufacturers, pilots union and airports as well as the more formal participants in the regime, the IATA and ICAO, all use knowledge to advance the regime.

The foregoing is not to suggest an informal regime; the ICAO is still the only organization that has the authority to translate knowledge into conventions and other legally binding documents. It is the method of gaining and transmitting knowledge that is both formal and informal, not its deployment. For example, the ICAO did not

²¹¹ Airport Categories: Categories I-IV and X: airports as defined by the traffic volume and complexity of operations. Category X (19) are the most complex. Category I facilities are some of the busiest; the category number increases as the traffic volume decreases. Category X airports also have some of the highest security and are also known as extraordinary or special security airports. There are 459 airports regulated by FAA regulations codified at 14 CFR 107.

²¹² U.S Department of Homeland Security homepage.

²¹³ Andreas Hasenclever et al., *Theories of International Regimes*, pp 139 and 149-152.

define jurisdiction over hijacked aircraft until the Tokyo Convention in 1963, even though there were numerous hijackings from Eastern Europe in the late 1940s and later in the 1950s. The carriers were introducing jet aircraft to their fleets, so the problem of hijacking seemed to have disappeared without any need for the regime to change.²¹⁴ One of the assumptions in a knowledge-based regime is the reliance of decision makers on technical or scientific knowledge, because it is such knowledge that is supposed to reduce uncertainty.²¹⁵ This explains the emphasis on technical means to reduce the threat of aircraft hijackings or bombings; such as the so-called X-ray machines to detect carry-on weapons and the TNA machines to detect explosive devices in hold baggage. The weakness in the security field is the lack of sustained knowledge cooperation.

The intelligence community uses the term *liaison* to describe five ways in which it cooperates: (1) full liaison, (2) information sharing, (3) operations sharing, (4) intelligence support, and (5) crypto-diplomacy.²¹⁶

Full liaison is the formal, officially sanctioned activity between and among intelligence agencies. The relationship of the United States, the United Kingdom, Canada, Australia and New Zealand exemplifies this type of relationship, and is subsumable under regime theory because it has formal structures and is based on shared values and norms. Its five procedures are characteristic of a regime: (1) shared security procedures, (2) each participant country has a designated liaison officer at headquarters, (3) joint communications channels, (4) joint staffing of key facilities,

²¹⁴ Most of those individuals fleeing Eastern Europe at that time were former World War Two pilots who could fly the aircraft; once jets were introduced in the late 1950s those former pilots no longer had the skills to operate the aircraft so hijacking was thought to have lost its relevance.

²¹⁵ Andreas Hasenclever et al., op.cit., pp. 140-141.

²¹⁶ H. Bradford Westerfield, "America and the World of Intelligence Liaison," *Intelligence and National Security*, 11:3, pp. 529-539.

and (5) normal contacts and close personal relationships among senior personnel.²¹⁷ Although other forms of liaison exist among the Western allies, they do not in the aviation regime. In fact, although member states of the ICAO are required to submit reports to the Council about interference with civil aviation within their jurisdictions, few do, and when reports are filed they rarely go beyond a very limited description.

The second way to cooperate is *information sharing*, which takes the form of trading information for information, facilities access or influence.²¹⁸ An example is the cooperation between the United States and Morocco in connection with the interrogation of the detainees at Guantanamo Bay. By allowing Moroccan authorities in to interrogate detainees, the United States was able to develop information that helped prevent an attack against U.S. and British shipping in the Straits of Gibraltar in 2002. It also helped Moroccan authorities to discover and destroy several Al-Qaeda cells. There is no formal liaison between the two nations, but sharing has assisted in achieving a common goal. Another example: the United States operated a nuclear weapons monitoring facility in China during the Cold War, even during the period when there were no formal diplomatic relations between the two. Both shared the information produced, but the Chinese never provided personnel. This type of cooperation, though informal, could yield some advantages for the international civil aviation system, as was seen during the flight cancellations of late 2003 and early 2004. Despite these advantages, however, the U.S. needs to be aware that overreliance on cooperation can expose it to manipulation and a conflict between the agendas of its allies and itself.²¹⁹

²¹⁷ Ibid., p.529.

²¹⁸ Ibid., pp 529-530.

²¹⁹ Select Committee on Intelligence, The United States Senate, Report on the U.S. Intelligence Communities Pre-War Intelligence on Iraq, conclusion 10 page 15.

The third way to cooperate is *operations sharing*, which falls into three categories: parallel operations, allocation operations, and joint operations.²²⁰ In parallel operations two intelligence services are operating against the same target and agree to run independently of each other, but keep the other service informed. Israel and the United States may be interested in the PLO, but continue to maintain separate operations. Parallel cooperation is very common in American law enforcement; multiple agencies separately target the same criminal organization. In allocation operations, each participant takes different aspects of an operation; it was common in the Middle East during the Reagan administration.²²¹ In joint operations agencies are fully integrated. This was the case during the debriefing of Soviet defectors to the United States, which was carried out by teams comprising FBI and CIA agents. Because the ICAO does not engage in intelligence operations, it is unlikely that this way of cooperating -- operations sharing -- would benefit the international civil aviation regime.

Intelligence support is a fourth way to liaison. Here, items such as training, equipment and funds are provided by one service to another.²²² The U.S. military calls this way a force multiplier because the recipient is enabled to conduct better missions, e.g., missions that support U.S. interests without substantial use of U.S. personnel. Intelligence personnel can assist in teaching interrogation techniques, analysis or equipment use that would assist the host service in gathering information in places where it would otherwise be difficult to do so. This has happened domestically such as when CIA analysts were assigned to the FBI after 9/11, to assist it in developing better analytical skills. The United States has allowed intelligence

²²⁰ H. Bradford Westerfield, "America and the World of Intelligence Liaison," *Intelligence and National Security*, 11:3, pp. 530-535.

²²¹ *Ibid.*, p. 531.

²²² *Ibid.*, pp. 535-536.

services of Arab states access to detainees to help aid in interpretation, but also to learn culturally appropriate interrogation techniques.

The TSA is providing cooperation in a limited fashion to the ICAO through the secondment of security staff. The ICAO does not have an intelligence staff or analysts of its own, rendering it dependent upon its contract states to provide the information it requires. A formal analytical infrastructure or liaison person is currently lacking.

The fifth way to operate is crypto-diplomacy.²²³ Intelligence agents are used as conduits in conducting diplomatic negotiations. It is a means by which parties can undertake sensitive discussions without fear of public disclosure. If the contact is discovered, it can be disavowed. The costs and benefits of crypto-diplomacy are of minimal concern to the ICAO, because it is an international body and its proceedings and discussions are open to all members. The possibility of maintaining secrecy is virtually nil. Moreover, the ICAO does not have an intelligence capacity.

For the international civil aviation regime, then, the only way states can provide other actors with secret knowledge (intelligence) is through formal liaison or intelligence support. Formal liaison could never be achieved under the terms described above for one reason: many of the contracting members are providing support for the very terrorist groups targeting civil aviation. However, terrorists are able to circumvent the security measures developed by the international community, because they are well aware of the system's capabilities. States such as Libya, Syria, Iran and North Korea have provided logistical, material and informational support to terrorists. These nations are all contracting members of the ICAO, some have even been members of the Council, and are entitled to share in all information provided to

²²³ Ibid., pp. 536-539.

the ICAO. Absent a changed situation, few nations will be willing to share information, let alone establish a formal intelligence regime. Still, the situation should not rule out intelligence support or efforts to create a more formal liaison system. The ICAO could establish an intelligence analysis service, based on the array of open source material already available, to provide member states with strategic analysis and a formal point of contact for states to provide sanitized intelligence to the organization.

Conclusions

This chapter has elaborated on the concept that international civil aviation is a regime in which common values, principles and norms are formally enunciated and enforced. Aspects of the premise led to consideration of whether the regime's security components are as strong as its other components. The regime rests on its ability to reduce uncertainty through the development and transmission of knowledge. Although many of the regime's technical and economic components are sufficient to their tasks, security falls short.

The ICAO is the only body with the jurisdiction to develop and enforce conventions covering the entire range of international civil aviation issues, but this power is limited by the willingness of its members, states, to cede to it the necessary enforcement authority. The ICAO has at its core a contradiction; the ICAO recognizes states' absolute sovereignty over their airspace, while states recognize the ICAO's authority to regulate international civil aviation. The rigorous attention to technical issues and avoidance of international political controversies, such as the apartheid and the Iran/Iraq war, has limited the impact of this contradiction. No state denies the importance of aviation security issues, and the necessity of international cooperation, but because security issues are at their core questions of sovereignty, states are less

willing to have their response dedicated to by an international body. States are marginally more willing to cooperate on security technology and intelligence sharing, but until all states reject support for criminal interference with international civil aviation, full cooperation is unlikely,

There are two weaknesses evident in the security component of the regime: the lack of enforcement powers in the conventions and, equally important, the deficiencies in the ability to develop and transmit intelligence (knowledge) in a timely and secure fashion. The latter weakness had been generally understated or ignored, and will be covered in detail later, and in part because of over reliance on the host state's provisions of security for international civil aviation. If each state is required to provide security, it is assumed that each is in full compliance with Annex 17 and is relying on the best available intelligence. The ICAO's seeming stance is that it need not address the intelligence issues as they are beyond its purview. This approach, whether actual or just perceived, undermines the principle of regime-based security.

Because member states are unwilling to penalize states that fail to meet their obligations, the conventions provide little deterrent effect, let alone for the suppression of violations. Better utilization of open-source material, establishing procedures for penalizing states that support groups that commit crimes against civil aviation, and a more formalized security liaison structure, would enhance the existing components of the security regime and allow it to attain a level of effectiveness that would at least bear comparison with the other elements of the regime.

While the formal part of the security regime is lacking, the informal actors have demonstrated how the regime can work. As the representative of the international civil aviation industry, IATA has worked to develop sound security practices that balance the economic and security needs of the industry. It has managed

to achieve this while balancing the needs and sometimes-conflicting views of state, quasi-states, and private carriers from across the world. It has adroitly used its apolitical standing to highlight weaknesses in the security system and provide useful confidential advice in addressing weaknesses.

IATA and ICAO have worked closely in the past to develop security standards. While knowledge/intelligence cooperation has taken place in an informal fashion there needs to be a more directed relationship. The establishment of a joint intelligence and security center would be a helpful way of deploying the best practices of both organizations for the betterment of the regime. Having a common center for training both front line security staff and the analytical support, as well as providing the necessary information for the analysis, will assist in establishing a truly international civil aviation security regime.

Chapter 2

Approaches to Counterterrorism

A state can take four approaches to counter terrorists: international, military, criminal justice, and political. None is tried in isolation, and these should not be deemed mutually exclusive. Each has its own strengths and weaknesses, and is attempted in some form or another. This chapter examines the approaches generally and then as used in practice relative to aviation terrorism.

Why do some turn to violence? The author makes reference to two broad theoretical categories, physiological and instrumental. The physiological school sees terrorists as driven by a need to belong. Repeated failure in life, alienation from traditional anchors in society and an externalized victimology, coalesce to form a person out for revenge. Such a person may be susceptible to the persuasion of a charismatic individual who easily explains repeated failure and offers a quick redress. Many of the same formative elements are also found in members of criminal gangs or cults. The physiological school of thought is not wholly satisfactory. Yes, there are clearly physiological motivations to join a terrorist organization, and even larger ones to remain in one, but the motivations are common to many people and groups. One can gain the benefits provided by the terrorist organization in other groupings, and at a greatly reduced cost. Self-justification or not, the member believes in the goals of the struggle. He or she is taking part in a political act and may- and most likely does- personally benefit from participation, but the cost-benefit ratio is not favourable.

The writer tends to be more satisfied with the instrumental, or rational choice theory, where the terrorist has identified a critical issue, is unable or unwilling to work for its overturn or mitigation within the existing political system and turns to violence. The tactics utilized by the group of choice directly correlate with its resources and

those of the state. All organizations will explore the use of and even use terrorism as a tool in armed political struggle. If the group is small and weak, it is more likely to engage in terrorism because its limited resources are thereby maximized. The smaller the group, the less able it is to establish territorial control and to engage the security forces in even guerrilla attacks. Hence it attacks where the state is weakest: the civilian population. Groups deciding to engage in armed political struggle are attempting to create or exploit fissures in the existing political and social system to gain operational space. Here the author is adopting Thomas Marks's notion of a physical and political space.²²⁴

According to Marks, a guerrilla or terrorist organization needs the ability to both develop its base (physical space) and its ideology (political space). The state can deny the latter by allowing open discussion on issues and legitimate peaceful expression of views. Physical space is more difficult to deny; dense jungles and remote mountains are ideal for concealment. Even some urban ghettos are places where government officials fear to tread. These hidden areas of society are becoming more difficult for disaffected groups to maintain, because modern technology has provided states with a vast array of tools to discover and track individuals and groups. The two notions of space are combined in the idea of government penetration of society. If the state is able to be present and deliver services to the population, and provide legitimate avenues for dissent, there is little chance for political violence. If the state cannot deliver or provide, there is room for violent opposition to make itself known.

An example is the Palestine Liberation Organization (PLO), which was denied the physical space to operate against its enemy (Israel and the occupied territories).

²²⁴ Thomas Marks, Maoist Insurgency since Vietnam, Frank Cass, 1996.

The guerrilla raids mounted from neighbouring states were ineffective and conventional military invasions were disastrous. Other avenues were needed. One characteristic that made the PLO effective was its ability to create the political space (international standing) and the physical operational space (international operations) to maintain its struggle and perhaps achieve its eventual goal. Al-Qaeda has been the most creative group in identifying and exploiting space. Politically it has infiltrated Mosques and the internet to develop and spread its ideology globally. It has used three types of physical space: It has cooperated with states to gain physical space (Sudan and Afghanistan), it has exploited weak states through operating in areas beyond state control (Afghan/Pakistani border region), and it has exploited diaspora communities and recent converts (Richard Reid and Jose Padilla) to create the ability to attack their enemies from within.

The preceding considerations are important, because they can shape a state's approach to counter terrorism. If the terrorist's motive or motives are of the rational choice model, negotiations are more likely to be fruitful than not. A peaceful settlement of not only an individual event, but perhaps the campaign can be reached. Political inducements may not provide much of an incentive to the terrorist who perceives personal identity as intertwined with the group identity or cause. If the terrorist is motivated by grievance, he or she can be convinced that the conflict can be through a political process. If the terrorist is a "true believer" or revolutionary, nothing short of complete victory will do: this, perhaps, leaves only security measures available to the state. Clearly, the hijackers on 9/11 planned to die for their cause, so negotiations would have been futile. Such may not be the case with future hijackings, which means that accurate information about a particular hijacking is more vital than ever.

Irrespective of the group's goals, tactics, or motivations, the fact that it is using violence indicates a political failure by the state. Some segment of the society believes its grievances are real; the society is either unable or unwilling to address the alleged conditions, and that segment resorts to violence. Some issues (e.g. racial extermination or Armageddon) cannot be negotiated; most can. It can be argued that liberal democracies have had limited and usually short experiences with political violence because of the vast political space allowed to citizens.

The Role of the International Community

While not commonly seen as an approach to counter-terrorism, the international community is emerging as an independent and vital actor in dealing with terrorism. The United Nations has treaties criminalizing many terrorist tactics, addressing financing and other actions, some of which will be covered in detail below. The threat posed by the old terrorism was more national, or at least among a small group of nations, so international coordination or cooperation was of little value. Few groups had the intention or capabilities of achieving "global reach," so individual states could develop independent approaches. Using the United Nations was not an option, as it was engaged in a divisive debate over how to define the phenomena of terrorism. The emergence of a truly globalized world, one being exploited by criminal and terrorist gangs, required a globalized response.

The international approach is essentially a political one and has many of the strengths and weakness common to the political approach covered below. Some of the unique strengths to this approach are: (1) it places the threat in its proper context, as a threat to world peace and security, (2) it provides political cover for cooperation

among states that may not want to be seen to be cooperating otherwise, (3) it legitimizes the counter-terrorism approaches taken by the state or states involved, and (4) it can provide an avenue to identify and address legitimate grievances and aspirations of parties involved in a conflict. Its weaknesses are really three: First, no state, even one that acknowledges the global nature of the current threat posed by Al-Qaeda, wants to limit its sovereign ability to respond how it sees fit. Second, states are reluctant to cooperate with others who support terrorism. Few are prepared to exchange intelligence or other operational information with a state that may provide it to the terrorists. Finally, international cooperation is still a new and relatively untried method for a new threat. States, like terrorists, are more comfortable in using tools and approaches that they know work.

The Military Approach

The most dramatic approach a democratic government can take to countering terrorism is to deploy the military. The sight of armed soldiers patrolling the streets of a community is unnerving to many. The deployment indicates that: (1) civil government has lost control, (2) civil liberties have been suppressed, and (3) the senior military officer is now in command of the situation. Elected officials do not use deployment lightly, but the political pressure is such that the consequences of not acting are frequently worse than that of reaction or non-action. The deployment can have benefits, however, in that the government is seen as decisive and proactive. Well trained and equipped soldiers can restore order rapidly.²²⁵

The benefits are obvious but also temporary, and the costs of using the military in the domestic arena are enormous. The loss of civil liberties, perhaps only

²²⁵ Lecture notes from Professor Paul Wilkinson's course on Terrorism and Liberal Democracy, St. Andrews University, 2000.

briefly, is a price a democratic state may not be able to bear. The military is being asked to solve a political problem, which it is not trained to do. A terrorist campaign is a political battle being fought by a nebulous enemy, who wants to elicit overreaction, and the use of the military hands the terrorists this propaganda victory. Use of the military also serves to legitimize the terrorists, because if indeed they are criminals as the government declares, why not have the police arrested them? The biggest drawback, however, is that once the troops are deployed, how and when does the government declare victory? Terrorist campaigns ebb and flow, depending in part on the government response. If the military is utilized, the terrorists can disappear into society or to foreign safe havens, to wait for a more opportune environment. It may be bold to use the military, but it is a courageous and perhaps too hopeful a leader who claims victory and sends the troops back to the barracks.²²⁶ If the leader is wrong, many lives are going to be lost. On the international stage, military strikes are more frequent but no less controversial. It is uncertain whether the reprisal raids by Israel and the United States had an impact on their intended targets, but the raids did help Israelis and Americans sense that some retaliation had taken place.

The military has been used around the world to end various aircraft hijackings, but with mixed results. The first instance was perhaps the most complex. On June 26, 1976 Air France Airbus Flight 139 with 246 passengers and a crew of 12 was hijacked by 4 (3 others joined later) members of the Popular Front for the Liberation of Palestine (PFLP). (The group could be said to have ushered in the modern age of terrorism with an El Al hijacking in 1968.) The aircraft was eventually flown to Entebbe International Airport in Uganda. The hijackers' prime demand was the

²²⁶ Federal Bureau of Investigation publication Terrorism in the United States, 1997, p.3.

release of 53 PFLP members from jails in Israel, West Germany, France, Switzerland and Kenya.²²⁷ The passengers were taken to the former international terminal and after the release of several, the tensions mounted. On July 1, Israel deployed commandos to effect a rescue of the remaining 109 passengers and crew. In a daring mission that benefited from extraordinary intelligence,²²⁸ the commandos rescued 105 of the hostages,²²⁹ killed 7 hijackers and 20 Ugandan soldiers and lost only one of their group.²³⁰ The outcome helped ensure the world would see similar rescues, but not all attempts had similar outcomes.

On November 26, 1985, Egypt Air MS 68, a Boeing 727, was hijacked en route from Athens to Cairo. The four hijackers, members of the Egyptian Liberation Organization, an alias of the Abu Nidal Organization, were forced to divert the aircraft to Malta after a shootout with an on board-guard. Shortly after landing, the hijackers began to murder their hostages. Egyptian commandos embarked upon a rescue operation during which sixty-one people, including the hijackers, died in a fierce firefight. The Egyptian troops had been ill trained for such an operation and the deaths were the result.²³¹ Storming an aircraft is an enormously dangerous undertaking. The confined, often dark space and terrified passengers are ingredients for disaster. Only Singapore,²³² Saudi Arabia²³³ (the hijackers there were armed with

²²⁷ Yehoda Ofer, Operation Thunder: The Entebbe Raid, pp. 28.

²²⁸ The intelligence included an exact floor plan of the terminal building where the hostages were held, and a replica of the car Uganda leader Idi Amin used on his frequent visits to the airport. This allowed commandos to approach the terminal without raising alarm.

²²⁹ Three were killed as a result of the mission and one was moved to a hospital prior to the raid and has never been seen again.

²³⁰ Mission commander Jonathan "Yoni" Netanyahu, brother of Benjamin, the future Prime Minister of Israel.

²³¹ Rodney Wallis, Combating Air Terrorism, p. 9.

²³² The Fight Against Terror: Singapore's National Security Strategy, 2004, pp.20-.21 On March 26, 1991, 4 members of the Pakistani Peoples Party hijacked Singapore Airlines Flight SQ 117 after it departed Kuala Lumpur with 118 passengers and 9 crew. The hijackers demanded the Pakistani government free former Prime Minister Bhutto and others from prison. In the early hours of March 27 Singaporean Special Forces stormed the aircraft killing all 4 hijackers and rescuing unharmed all the hostages.

knives), France²³⁴ and Germany²³⁵ have successfully stormed an aircraft (the last two using special police forces); Egypt²³⁶ tried and failed. Most nations now have military or police special units trained to rescue hostages by force. It is an option resorted to with reluctance and great care.

The Criminal Justice Approach

The criminal justice approach is discussed here: first, as a policing matter and second, as a judicial/detention matter. The policing aspects include the security enforcement at airports, because it involves the implementing of aviation security legislation. The term judicial/detention refer to court procedures and any incarceration procedures relative to terrorists.

Most democracies choose to view terrorism as did former Prime Minister Margaret Thatcher: “Crime is crime is crime,”²³⁷ a view that appeals to democratic states because it keeps the decisions in the hands of the civilian authorities. To fight terrorism as a crime requires the system to be part of a unified command, and high-quality intelligence, and is a more moderate approach for democracies. The criminal justice approach also helps achieve two of the principal elements of an effective counterterrorism policy: it increases public support for the state by reinforcing the assertion that the system works, and it requires the state to produce evidence of a crime, that is, it requires not only evidence admissible in the judicial sense, but intelligence to prove it. The difference between the two terms is discussed below.

²³³ Associated Press, “Hijack Ends”, AP in the Russian Journal Monthly Magazine, March 17, 2001. www.therussianjournal.com. The Vnukovo Air flight with 160 passengers and crew was hijacked on its flight from Istanbul, Turkey Moscow on March 15, 2001 by 3-4 individuals claiming to be Chechens. They demanded an end to the Russian occupation of Chechnya. The plane was directed to fly to Medina in Saudi Arabia., where the plane was stormed and the hijackers were killed.

²³⁴ A full discussion occurs later in this chapter.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Jack Holland, *Hope Against History The Ulster Conflict*, p. 155.

Criminal procedures also serve to delegitimize the political claims of the terrorists in that they are being prosecuted for actual crimes (robbery, kidnapping, murder), not some special category of “ideological” crime. Additionally, in open court procedures, terrorists’ claims of coercion are less likely to be validated.

The criminal justice system is not without its problems. There is a basic question of whether current laws are applicable to the crime. For instance, is killing for personal gain or protection the same as killing for a political gain? The process is slow: the crime has to have been committed (or at least planned); evidence has to be gathered; witnesses interviewed; a suspect or suspects apprehended and arrested. These steps can take months; the trial can be just as long. There is no guarantee of a conviction, yet the terrorist has the guarantee of a public forum to air grievances. The trial also provides the opportunity for terrorists to argue that their due process rights have been violated. Moreover, trials expose the sources and methods security forces use to investigate and apprehend terrorists, which severely compromises their future effectiveness. The judicial process raises logistical questions about the protection of witnesses, judges and jurors. How does a court deal with an accused who refuses to recognize its authority, e.g., the Irish Republican Army contesting the jurisdiction of the UK courts? If a terrorist is convicted, what is the nature of the incarceration -in a separate cellblock and a different status from the general prison population?²³⁸

The war on terrorism has raised two other questions. The U.S. has defined those captured in connection with the struggle against Al-Qaeda as illegal combatants thereby neither Prisoners of War nor criminals. Military Tribunals have been constituted to try these suspects. These tribunals are not new, but rare in democracies, and they blur the distinction between criminal justice and the military approach. In a

²³⁸ Lecture notes from Professor Paul Wilkinson’s course on Terrorism and Liberal Democracy, St. Andrews University, 2000.

series of rulings in the Summer of 2004 the U.S. Supreme Court seemed to support the legality of the tribunals, as well as the President's authority to use them, at least in the case of foreigners captured outside the U.S.²³⁹ An American's status before the tribunals is still open to question.²⁴⁰ The Court also gave detainees the right to challenge their status as illegal combatants, but it is up to the detainee to disprove the government's assertion that they are illegal combatants.²⁴¹ The tribunals have the power to rule on this determination.²⁴² The second issue is the length of detention. How long is a suspect to be held? If tried and convicted, how long is the sentence? And what happens when a convicted illegal combatant completes his sentence? Many of the core Al-Qaeda members are still highly dangerous even in detention; would they still pose a threat if released after their sentence? Does that mean permanent incarceration for these individuals? This is a new legal area for a new type of threat; for which it requires time to adequately develop procedures.

The central problem involves the evidence-versus-intelligence issue. The criminal justice approach rests on the premise that the prosecution has access to high quality intelligence and evidence that can lead to convictions. But, not only is the necessary cooperation not always present, it often does not produce legally admissible evidence. The author uses the word *evidence* to mean facts that tie a person to an event. Thus if a bomb has been detonated in a park and an individual in custody is suspected of being the bomber, the state needs to link the suspect to the crime. DNA testing, fingerprints, witnesses, explosive residue, and even confidential sources are employed to establish the link of the suspect to the crime. The suspect has the right to cross-examine witnesses, challenge the evidence, and present alternative explanations.

²³⁹ Cnn.com, "A mixed verdict on the terror war," July 6,2004

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² And have in the case of four illegal combatants in August 2004.

The judicial premise is that information developed for use in open court is supportable. Intelligence information, however, is often gossip, rumour, and innuendo or even facts illegally gained; its purpose is not to win a criminal conviction but to stop terrorist operations.

Sources and methods are never intended to be exposed. This tension between the rights of the accused and the need to protect sources and methods can undermine, if not destroy, criminal prosecutions. The intelligence problem also works in the other direction: sometimes information gained by a U.S. attorney during an investigation cannot be shared with other federal agencies. Rule 6(c) of the Federal Rules of Evidence stipulates that any evidence gained during a grand jury investigation cannot be disseminated to any other government agency. Thus, once a grand jury has been empanelled, any information it gains is considered secret, whereby the prosecutor is presented with one more variable to take into consideration when deciding whether to empanel a grand jury. If the information developed thus far in an investigation is sufficient to call a grand jury, doing so will prevent its use by the security and intelligence forces to prevent future actions. However, if the prosecutor waits too long, the defendant can ask for a dismissal of the case as a violation of the defendants' Fourth Amendment right to a speedy trial.

The United States has used the criminal justice approach to both domestic and foreign terrorism. Extra-territorial rights were granted in the Omnibus Crime Bill of 1986,²⁴³ popularly known as the "long arm of the law." The United States has engaged in the apprehension²⁴⁴ of terrorists unilaterally and through cooperative efforts.²⁴⁵ It has also worked through various international bodies to criminalize

²⁴³ David Charters (ed.), *The Deadly Sin of Terrorism*, p. 187.

²⁴⁴ Ibid.

²⁴⁵ Simon Reeve, *The New Jackals*, pp. 103-105.

particular acts of terrorism and the support of terrorists.²⁴⁶ This aspect of the criminal justice approach will be discussed later, but first the more militarised form, the criminal justice system has begun to exhibit will be examined.

The militarised form of criminal justice comprises two elements: SWAT/HRT²⁴⁷ teams and sky marshals. The former is an overall trend in law enforcement and is an outgrowth of the violence of the late 1960s and early 1970s. Police departments were facing situations such as barricading and hostage taking for which regular patrol officers were neither trained nor equipped. In consequence, they established elite units to deal with these situations. Law enforcement agencies at all levels, including the FBI and Bureau of Alcohol, Tobacco, and Firearms (ATF), soon adopted the SWAT team structure for raids and other special situations. The FBI's HRT teams are the *crème de la crème* and are reserved for extreme situations. The success of various special units around the world justified their establishment within federal, state and local law enforcement. The difficulty with having these special forces in a law enforcement environment is the conflicting psychologies of law enforcement and the military. The military teaches its troops, including members of elite units, to use overwhelming firepower to destroy an enemy. Law enforcement is required to use the minimum force necessary in any situation, and lethal force only as a last resort. SWAT and HRT personnel are trained and staffed by former members of the military and particularly of elite units. They bring with them the more-aggressive military, combat-oriented-approach and there are occasions when a more tempered approach might be more appropriate, and indeed, the only legal one. This approach has led to some spectacular failures, such as the raid on the Branch Davidian compound and subsequent standoff near Waco, Texas in 1995. The ability to deploy

²⁴⁶ Christopher C. Harmon, Terrorism Today, pp. 248-249.

²⁴⁷ SWAT- (Special Weapons and Tactics Teams), HRT- (Hostage Rescue Teams). The FBI uses both teams while most other law enforcement bodies use only some form of SWAT.

trained personnel to conduct raids and hostage rescues is a vital tool in responding to a terrorist incident. American law enforcement has yet to deploy against terrorists in a successful rescue mission as two U.S. allies have demonstrated.

Perhaps the most spectacular hostage rescue mission carried out by law enforcement was the storming of Lufthansa LH 181 in Mogadishu, Somalia, by German Federal Border Police Counter-Terrorism officers, (GSG 9), after the Boeing 737 had been hijacked on October 13, 1977; four members of the PFLP wanted to show support for the kidnapping in Germany of Hans Martin Schleyer by the Red Army Faction (RAF). The RAF was demanding that the German government release eleven RAF members being held, particularly one of its founders, Andreas Baader.²⁴⁸ The eighty-six passengers and five crew were en route to Germany from Palma, Spain, and the hijackers threatened their deaths if the RAF demands were not met. (The RAF and PFLP had worked together on operations before). In the early hours of October 18, thirty members of GSG 9 stormed the aircraft killing three of the four hijackers and wounding the other; one commando and four passengers were also wounded, none seriously. The only fatality was the pilot, Captain Jurgen Schumann, who was murdered by one of the hijackers before the rescue.

The French police (GIGN) were faced with a mission of a different sort when on December 26 1994; four Algerian hijackers from the Armed Islamic Group (GIA) seized an Air France Airbus, Flight 8969, with 150 passengers. The hijackers intended to destroy the aircraft over Paris, thereby turning it into a weapon of mass destruction. The GIGN stormed the aircraft on the ground at Marseilles-Margnane Airport; all passengers and crew escaped safely, the hijackers were killed, and ten GIGN

²⁴⁸ Peter Koch and Kai Hermann, Assault at Mogadishu, pp. 14-51

members were wounded (four seriously and one was permanently disabled).²⁴⁹ The German and French missions were both successful and shared a characteristic: both were ground-based post-hijacking events.

An earlier generalized effort was made to prevent hijackings before they occurred with armed in-flight guards, sky marshals. Many nations began providing armed security personnel called Federal Air Marshals [FAMs] in the United States. The term is used here for all armed security personnel, irrespective of the nationality of the force, on selected flights in order to prevent hijackings. Section 108.14 of the Federal Air Regulations authorizes the program.²⁵⁰ It is highly controversial because carriers and flight crews are concerned about the consequences of an in-flight gun battle. Since 9/11, the idea has now been more widely accepted. In fact, the Airline Pilots Association, the union representing pilots, has convinced the U.S. government to train and arm a small number of its members.²⁵¹

The primary concern with armed security in a plane's cabin is the type of ammunition provided to an air marshal. A high-calibre round travels at supersonic speeds making it highly likely that the round will penetrate not only the target but a passenger or, more critically, a vital system of the aircraft. Commando units choose their weapons with this situation in mind: the U.S. Delta Force uses the sub-sonic .45 calibre round to avoid it.²⁵² The FAMs provided U.S. carriers with armed security from eighty-two cities in over fifty countries²⁵³ in 1997. No U.S. agent has been involved in an armed confrontation with a terrorist during the program;²⁵⁴ other countries' agents have with mixed results.

²⁴⁹ Martin C. Arostegui, *Twilight Warriors Inside The Worlds' Special Forces*, pp. 298-308.

²⁵⁰ Federal Air Regulation 108.14, pp. 12 from FAA web site.

²⁵¹ Sally Donnelly, "More Guns in the Air," *Time Magazine* February 14, 2005, p.13.

²⁵² Martian Arostegui, *Twilight Warriors Inside the Worlds Special Forces*, p. 140

²⁵³ *Annual Report to Congress on Civil Aviation Security*, January 1-December 31 1997.

²⁵⁴ L.A Times online, "Air Marshals future full of Questions," January 14, 2002.

On September 6, 1970 an Israeli air marshal prevented the hijacking of El Al Flight 219 en route from Tel Aviv to New York with a stop in Amsterdam. The guard fatally wounded PFLP hijacker Patrick Arguello. His accomplice, veteran PLFP hijacker Leila Khaled, was arrested. Only one of the 145 aboard was wounded, a member of the cabin crew shot by Arguello.²⁵⁵ The grenades carried by both hijackers were primed but failed to explode when thrown.²⁵⁶ All were lucky on two counts, no one was hurt and the attempt was part of the larger Dawson Field mass hijacking whose victims were held for almost three weeks.

The most serious incident involving marshals and hijackers occurred on December 26, 1986 when four armed men tried to hijack an Iraqi airliner en route from Baghdad to Amman. A fierce firefight involving grenades caused the crash that killed 62 of the 107 passengers and 2 of the hijackers.²⁵⁷ The above incidents illustrate the extremes of the security/law enforcement component of the criminal justice approach; most incidents are more mundane.

The best way to approach terrorism is to prevent an incident before it happens. This requires cooperation among law enforcement and intelligence entities, but short of that, attentive police officers can save lives. It was an alert U.S. Border Patrol agent who arrested Ahmed Ressam as he attempted to smuggle explosives into the United States from Canada to bomb Los Angeles International Airport during the Millennium celebrations. And it was New York City police who were provided information by an informant that led to the arrest of Gazi Abu Mezer and Lafi Khalil, who were planning to bomb the subway system. In March 1999, Mezer received a life sentence;

²⁵⁵ David Phillips, *Skyjack The Story of Air Piracy*, pp. 140-141. Patrick Arguello was a member of the Sandinista National Liberation Front, then the opposition guerrilla movement in Nicaragua. He is considered an honoured martyr to the revolution. Antokot and Nudell, *No One Neutral Political Hostage-Taking in the Modern World*, p. 62 note.

²⁵⁶ Ibid.

²⁵⁷ Jay M. Shafritz et al, *Almanac of Modern Terrorism*, p. 38.

his accomplice was sentenced to 3 years and subsequent deportation in November 1998.²⁵⁸

There is reliance on and need for technology, but human agents are the best weapon against terrorism. For instance, on April 17, 1986, Israeli agents prevented a bomb from being introduced onto an El Al flight from London when the guard had suspicions about the reason for a pregnant Irish woman to travel to Israel. A bomb was found in her bag; she was an unwitting accomplice of her boyfriend, a Palestinian terrorist working for Syria. The U.S. Federal Aviation Administration reported that security and law enforcement officials detected more than two thousand weapons and made more than one thousand arrests for security related offences in 1997.²⁵⁹ Not all of the weapons would have been used for criminal or terrorist acts, but agents want to err on the side of caution.

It is more convenient to accomplish counterterrorism's goal of prevention if the subject can be apprehended in the territory of the intended or actual incident. In the absent that circumstance, failure to achieve the goal does not imply the terrorist suspect has escaped the possibility of prosecution. Most states have extradition treaties, and in the Tokyo and Hague Conventions, the international community has clearly spelled out the jurisdictional and legal obligations of a state in regard to aviation incidents. However, most states allow "political" exemptions, a loophole that has caused problems even among states that shared a strong stance against terrorism. Recall the protracted dispute between the United States and the UK over the extradition of Joe Doherty, a suspected IRA terrorist in the 1980s. Although both countries disallowed this exemption, a U.S. Federal judge was able to prevent the deportation.

²⁵⁸ FBI, Terrorism in the United States 1999, p. 12.

²⁵⁹ U.S. Department of Transportation, Annual Report to Congress on Civil Aviation Security January-December 1997, p. 11

The United States has given the FBI authority to investigate crimes anywhere in the world against American citizens and asserts jurisdiction over the accused. Although this is extra-territoriality, the assertion has sound legal underpinnings. Customary international law allows jurisdiction as long as (1) the statute applies to the state's own nationals; (2) the "protective principle" is applied because the security of the state is threatened; and (3) the universal nature of the alleged crime is so threatening to international order that the offence could be tried anywhere.²⁶⁰ It could be argued that few if any modern democracies are actually threatened by terrorism, but clearly the right of self-protection and the nature of the acts in question meet the second and third conditions. The United States has used its legal authority worldwide to capture alleged terrorists, most of whom have been involved in aviation incidents.

The U.S. government would prefer to work cooperatively with friendly governments. Thus, it worked with Pakistan to arrest Ramzi Yousef in February 1995, on charges relating to the 1993 World Trade Centre bombing and the Bojinka Plot²⁶¹ intended for January 1995.²⁶² One of the first uses of the "long arm of the law" powers was the "irregular rendition"²⁶³ of Fawaz Younis off the coast of Cyprus in September 1987. Younis was wanted for his participation in the June 1985 hijacking of a Royal Jordanian flight that carried an American passenger. Younis was lured into international waters by a ruse that he would be taking part in a drug deal. He was arrested, tried and convicted in the United States.

²⁶⁰ Philip Heymann, *Terrorism and America*, p 52.

²⁶¹ The Bojinka plot was a conspiracy to bomb 12 American air carriers simultaneously over the Pacific Ocean. If the attacks on these flights had been executed, as many as five thousand people could have been killed. Several of the bombers were arrested attempting to board the targeted flights. They had intended to place the bombs in the cabin and leave the aircraft at a stopover point, and board another flight to escape. It should also be noted that this was not a suicide mission.

²⁶² FBI, *Terrorism in the United States 1999*, p 52.

²⁶³ FBI term defined as an informal rendering of a suspect to the United States; *ibid.* p. 52.

Once a terrorist is captured, trial and possible detention present special concerns. Most countries attempt to use their existing criminal justice system for the trials. Doing so has worked in many cases; but nations facing a sustained campaign, such as the UK, Peru and recently the United States, have had to establish special courts and prisons to detain, try and punish convicted terrorists. One of the more interesting developments in the last few years has been the trial of the accused Lockerbie bombers; Al Mohamed Ali Megrahi and Amin Khalifa al-Fhimah, Libyan intelligence officers who were being shielded by Libyan leader Muammar Qadhafi. He was refusing to turn them over for trial in either the United States or Scotland. After years of wrangling the UN Security Council took an unprecedented step: it passed Resolution 731 in January 1992, which demanded the Libyan government surrender the suspects in the PAM 103 and UTA 772 bombings. The Libyans objected, asserting that their investigation had produced no evidence that their citizens were complicit in the attacks. Libya also stated that it had met its obligations under the Montreal Convention and until the U.S., UK, and France provided evidence to the contrary, there were no grounds for extradition. The Libyan government also attempted to get the ICAO Council and the International Court of Justice (ICJ) to rule in its favour. The allies were conscious of the limitations in the Montreal Convention and also understood that irrespective of any evidence provided to Libya, no justice would be rendered. The international community lost patience with Libya's obstinacy and passed UN Security Council Resolution 748 in March 1992, which provide for a total ban on Libyan airlines flights and technical support, as well as an arms embargo and a reduction of Libyan diplomatic staff. The Security Council forced the ICAO to comply, under the South African precedent,²⁶⁴ and rendered moot any ICJ decision.

²⁶⁴ See page 53-54 for a full discussion on this issue.

Libya was still refusing the international community's demands, forcing the Security Council to pass Resolution 883 in November 1993. This resolution further tightened aviation restrictions, but also froze Libyan funds and prohibited international technical support for the Libyan oil industry. Libya could still export its oil, but production would become increasingly difficult as the infrastructure wore out and was not replaceable.

After more than 12 years of diplomacy and Libyan civil aviation isolation, the Lockerbie suspects were turned over to a Scottish court convening on a former U.S. air base in the Netherlands, Camp Ziest. Ali Megrahi was convicted in March 2001 of all charges related to the bombing; his appeal was denied in March 2002. Al-Fhimah was acquitted. The Libyan government has yet to turn over the six Libyan suspects convicted in absentia in France for the UTA bombing which killed 171 people over the Niger Desert in 1989 (intelligence agents Abdallah Senousi- Gaddafi's brother in law-, Abdesslam Issa Shibani, Abdesslam Hamouda, Ibrahim Naeli, and Musbah Arbas and diplomat Abdullah Elazragh have been convicted in absentia for participating in the attack).²⁶⁵ In early 2004 the Libyan Government began to pay compensation to the parties involved, and accepted responsibility for the actions of its citizens, but fell short of acknowledging involvement in, or the renunciation of, terrorism as a state policy. After more than 15 years of struggle these are positive steps.

The unique element in the two attacks is the response of the international community; when it decides to, it can take a strong and coordinated stand against terrorism. The response shows, too, that devising a creative solution to what seemed

²⁶⁵ Paul Reynolds, "UTA 772: The forgotten flight" *BBC News Online* Tuesday, 19 August, 2003, 13:18 GMT 14:18 UK

to be intractable problems is possible. It should be noted that the court in the Netherlands was not a special terrorism court. The court was unique in its locale and establishment, but not in special legal procedures. All the rules and procedures governing an ordinary criminal case in Scotland were strictly followed, except that there was no jury. Two other legal tools are now available to the United States for use against terrorism. First, the Federal Courts Administration Act of 1992 granted U.S. courts jurisdiction over cases brought by U.S. nationals or their survivors for civil damages consequent to acts of international terrorism.²⁶⁶ The 1996 Antiterrorism and Effective Death Penalty Act prohibited fundraising by and financial transactions with foreign terrorist organizations and required the Secretary of State to compile a list of these organizations. Neither statute is strictly criminal, but both offer new legal tools for combating terrorism. The very controversial Patriot Act, passed in the wake of 9/11, has expanded law enforcement's ability to monitor activities of suspect individuals. One of the more controversial sections of the law allows for "roving" wiretaps. This allows security officials to continue to monitor cell phones, pay-phones or any other communications devices a suspect is using, even if the existing court order does not cover the particular item. Previous law limited government monitoring to specifically identified communications devices that allowed suspects to change phones or computers and escape surveillance. The Patriot Act does not allow for random searches, it only expands existing search powers to all communications devices used by a suspect. This seems to be a sensible power.

Security, particularly aviation security, is an element of law enforcement. Law enforcement officers and private security personnel are tasked with enforcing local, state and FAA security regulations. Before 9/11 multiple actors had responsibilities

²⁶⁶ GAO, Combating Terrorism Federal Agencies Efforts to Implement National Security Policy , p. 76

connected with aviation security in the United States: the carriers, who provided passenger and baggage screening; the airport authorities, who provided law enforcement; and the federal agencies that regulate and audit the system and provide threat assessments. This much-criticized system remained in place as long as it had because “it is well understood and accepted by most participants.”²⁶⁷ The tragedy of 9/11 was not that the system failed, but that the terrorists exploited its loopholes. For example, none of the weapons alleged to have been used by the hijackers was illegal; hence box cutters and other blades of less than four inches were not prohibited. Even though several of the hijackers went through additional screening, if the screeners had identified the weapons, security could not have confiscated them. Why not reform the current structure or even introduce a new system? Although there are many alternative systems being considered, the primary criterion that a replacement be “effective and efficient”²⁶⁸ may not be the most appropriate.

The Political Approach

The third counter-terrorism approach is political. It is the most effective, because terrorism is a political act (except for groups seeking religious Armageddon) attempting to bring about political change. That characterization does not serve to justify terrorism, particularly in a liberal democracy in which legitimate nonviolent means to express displeasure with policies exist. Neither does calling terrorism a political act render it any less criminal; rather it places the act in context and allows attempts at conflict resolution.

The most important elements of the political approach are the maintenance of civilian control and the primacy given to negotiation. Democratic states are more

²⁶⁷ Study and Report to Congress on Civil Aviation Security Responsibilities and Funding, United States Department of Transportation, Federal Aviation Administration, December 1998, p. 61.

²⁶⁸ *Ibid.* p. 62.

comfortable with utilizing this approach than other states, because it most resembles the existing system. The benefits are clear: it deals with the underlying causes of the turmoil, and elevates moderates, while isolating the violent segment of the opposition. The drawback is that the process is slow and reactive. Terrorists can gain legitimacy by forcing the government to the negotiating table, which validates violence as a political tool and undermines the government's attempt to criminalize its use. Negotiating also gives terrorists time to refine tactics and become stronger. The United States has never faced a sustained domestic terrorist campaign that made necessary a negotiated settlement. In fact, much of the terrorist violence, particularly domestic terrorists, which the country has faced to date, has often been seen as the last gasp of an extremist opposition.²⁶⁹ Many countries have negotiated an end to terrorist events and some to campaigns, such as the UK and the IRA; the U.S. government has, however, used negotiations to end particular terrorist events with mixed results.

The United States has negotiated with terrorists many times. The most interesting involved Iran, TWA 847, Lebanon and the "Unabomber". In the first instance, the government attempted to end the Iranian takeover of the U.S. embassy in Tehran by negotiating with the Islamic revolutionary regime. Iranian "students" had seized the embassy on November 4, 1979, pursuant to the desire to bring its former leader and long time U.S. ally Shah Muhammad Reza Pahlavi back to Iran to stand trial for crimes against his people. The United States had refused to hand over the Shah and tried to help him find a place of exile. Battling cancer, the Shah requested and gained admission to the United States for medical treatment, which touched off the attack. As the crisis continued, the United States froze Iran's assets, refused to ship arms and spare parts that Iran had already paid for, and did not accede to added

²⁶⁹ Fredrick Homer, The Politics of Terrorism, pp. 380-381.

demands on the list. After the hostage crisis began, the Shah left the United States for a Cairo hospital where he died on July 27, 1980. His death and a failed U.S. rescue attempt did not end the crisis. Finally, 444 days after it began, and after the return of many of Iran's frozen assets,²⁷⁰ newly inaugurated President Reagan announced on January 20, 1981 that the hostages had been released and had cleared Iranian airspace.

The Reagan administration was faced with a similar long term Middle East hostage crisis, a situation that led to the Iran-Contra scandal. The first event was the hijacking of TWA Flight 847 en route from Athens to Rome on June 14, 1985. The 145 passengers and 8 crewmembers on the Boeing 727 were diverted to Beirut. The two hijackers, members of Hezbollah, demanded that Israel release 766 Shiite prisoners it held in exchange for the hostages. Refuelled, the plane flew to Algiers, where it spent five hours and again returned to Beirut. In Beirut the hijackers demanded the plane be refuelled and the airport darkened. To underscore their determination they killed U.S. Navy diver Robert Stethem whom they had tortured. The demands were met, the hijackers boarded a relief crew of 12 additional hijackers at the airport under cover of darkness.²⁷¹ The plane once again left for Algiers, where the hijackers demanded and received from Greek authorities, release of a fellow member who was being held in Greece after having been arrested while attempting to take part in the original mission.²⁷² Refuelled again, the plane returned to Beirut. The hijackers conducted the shuttle service to prevent an anticipated rescue mission that actually was planned, but was held up by various diplomatic and bureaucratic squabbles.²⁷³ The crisis ended when Israel acquiesced to U.S. pressure and released the Shiite prisoners several months later and when the United States agreed not to

²⁷⁰ Antokol and Nudell, No One Neutral, Political Hostage-Taking in the Modern World, pp. 110-116

²⁷¹ Rodney Wallis, Combating Air Terrorism, p. 3.

²⁷² *Ibid.* p. 4.

²⁷³ Martin Arostegui, Twilight Warriors Inside the Worlds Special Forces, pp. 138-139.

retaliate against the terrorists. Despite its stated position of no negotiation with terrorists, Israel and the United States actually did negotiate in this situation.

A hostage crisis involving Lebanon would return to centre stage in the United States with the revelation that the government was involved in an arms-for-hostage swap with Iran. The United States had been attempting to gain the release of several Americans who were being held by Hezbollah. After the kidnapping and brutal murder of CIA Beirut Chief of Station William Buckley, President Reagan is alleged to have said, "I will go to Leavenworth in order to get them out."²⁷⁴ It appears that some of his advisers took him up on the spirit of his offer. The complex and politically charged scandal involved selling U.S. arms and spare parts from Israel to Iran in exchange for the freeing of the Western hostages in Lebanon. Profits from the sale (Lt. Col. Oliver North, the National Security Council staffer in charge of the operation, was proud of having overcharged the Iranians for the weapons), were said to have been diverted to the Nicaraguan Democratic Forces (Spanish acronym, FDN) fighting the Sandinistas in Nicaragua. Though no one mentioned it, an interesting circle was closed here: the Sandinistas were proud of their participation in the Dawson Field incident in support of Middle Eastern revolutionaries and now Middle Eastern terrorism was supporting counter-revolutionaries fighting the Sandinistas. The entire operation could have brought down the president if, indeed, he had authorized it. The sale of arms with Iran violated U.S. law prohibiting arms trade to Iran and the diversion of funds, which was never proved, would have violated legislation prohibiting U.S. funding of the FDN and the trade itself violated longstanding U.S. policy. In any event, the questionable actions did nothing to end the hostage taking, which lends credence to the stance of not negotiating in the first place. Even though it

²⁷⁴ Leavenworth is a federal prison in Kansas. The President suggested he was willing to break the law to end the hostage situation. It was a widely spread statement within the American Military. It has never been officially discussed.

could be said that negotiations ended the embassy hostage-taking and the TWA hijacking, the Lebanon crisis was exacerbated by talks.

The one successful negotiated ending to a terrorist campaign in the U.S experience was the “Unabomber” case. After several decades of terrorizing university research the elusive bomber was apprehended when the *New York Times* agreed to publish his dense manifesto in May 1995. Ted Kaczynski threatened to attack the U.S. civil aviation system unless it was published. The FBI agreed in the hope of protecting aviation and capturing the bomber. Fortunately both worked. This mixed record of ending individual events is mirrored in the results of terrorist campaigns.

The United States has viewed terrorism as a crime and tends to rely on the criminal justice approach as its primary response. Many have argued that domestic counter-terrorism is being increasingly militarised, but the military is still only a supporting player and only in extraordinary situations. The scale of the attack on 9/11 and the continuing threat posed by Al-Qaeda, have brought about the visible and perhaps sustained deployment of military personnel in places such as airports, bus and train stations. All this is on a smaller scale than in countries such as Northern Ireland and Israel, but it is a major shift in U.S. perception and policy. In the past, a perceived serious threat has caused the United States to tolerate the abuse of dissident groups’ civil liberties while at the same time expanding civil rights for others. Thus the record is at best spotty.

The other element of the political approach is legislation and treaties. Many nations such as Israel, the United Kingdom, Canada and Ireland have specific laws targeting terrorism. At the federal level, the U.S. does not have specific anti-terrorism

laws, but many states have developed “terrorism” legislation.²⁷⁵ Federal agencies use various definitions of terrorism depending on the agency, but the crime exists. The domestic approach has been to criminalize specific activities of terrorists. Thus, the Federal Code criminalizes conspiring to use and the use of a weapon of mass destruction (either WMD or conventional explosive) and actions such as hijacking and sabotage. The possession of material for bomb making or of fully automatic weapons (for which the Branch Davidians were being investigated) is a crime irrespective of motivation. As mentioned earlier, crimes against Americans abroad are considered federal crimes and are thus under the jurisdiction of the FBI.

The U.S. government has followed a similar approach on the international level, avoiding the politically problematic overarching crime of terrorism, but criminalizing specific actions of terrorists. Thus the United States has been instrumental in passing the Tokyo, Hague and Montreal Conventions involving aviation security and strongly supports the Crimes-Against-Internationally-Protected Persons and other anti-terrorism conventions. It has been spearheading efforts to have more international action to cut the supply of funds to terrorism, by persuading allies to implement laws similar to the asset forfeiture laws the United States has used against drug smugglers.

The attack-the-actions approach makes consensus easier to reach, avoids arguing terrorism v. freedom fighter foolishness and builds a definition by implication. The drawback is that the legislative element in the political approach is reactive and lays down too many conflicting rules for the security forces. But legislators by definition need to legislate and show constituents they are doing something about problems, in this case the latest terrorist atrocity. Passing new laws is

²⁷⁵ Brent Smith, “State Anti-Terrorism Legislation in the United States: A Review of Statutory Utilization” *Conflict Quarterly* 8:1 pp.29-49.

more visible than the shadow world of the terrorist and security forces, but in the end it is in the shadows where most of the important work gets done. Sometimes creative or at least vigorous enforcement of existing laws is more effective than rushing to pass new ones.

The Role of Intelligence

The best means of tying these approaches together is through the most fundamental element of all: intelligence. The authors' view of intelligence is rather broad, namely: all information gathered for use in policy making. The gathering and use of information is called the intelligence cycle; it comprises the collection, analysis, production and dissemination of information from all sources.²⁷⁶ Intelligence synthesizes the information for the policy maker. If information is poor, the military cannot deploy effectively, the criminal justice system cannot apprehend and prosecute effectively, politicians cannot develop a policy and the aviation system cannot adequately prepare for the threat environment. The limited role of intelligence is to the liking of the professionals: "Counterterror is a police or special military function that an intelligence agency can usefully and effectively support."²⁷⁷ The analysis community fears doing more because it would result in "a change of character."²⁷⁸ The debate surrounding terrorism and counterterrorism underscores the overall debate on intelligence itself, but suffice it to say that all parties agree on the singular importance of information.

The public seems to believe that most of the information comes to intelligence professionals through secret means (spying, wiretapping and other electronic surveillance) but the intelligence professionals say that 80 to 95 percent is gained through open sources (interviews, the media, conferences and so on) to which

²⁷⁶ Please see p 63.

²⁷⁷ John Ranelagh, The Agency The Rise and Decline of the CIA, p.699.

²⁷⁸ Ibid, 700.

the public has access --clearly not as glamorous as James Bond territory, but perhaps much more useful.

Correctly used, intelligence can prevent a terrorist action. Even better, it can likely foreclose an entire campaign. A democracy's elected officials are essentially intelligence officers; they monitor the mood of a constituency and its concerns. If they acknowledge and deal with the concerns, they are conscientious officials. The abundant sophisticated technology and research in the political realm today means there are a multitude of sources to develop information and a tremendous flow of data. None of this involves the more unsavoury aspects of intelligence; it simply requires an interested politician with the will to hear and see what the information is saying. Imagine how different the past thirty years in Northern Ireland would have been had the political class in both communities been willing to reform a system that in the 1950s and 1960s was showing signs of needing a major overhaul. When there is a failure of conventional politics and violence emerges, then intelligence needs to assess the strategic environment and the tactical situation to assist with policy development and save lives.

On the strategic level, the intelligence community needs to identify the real objectives and capabilities of the group in question and not just uncritically absorb its pronouncements or ignore legitimate grievances. The intelligence community should help set a framework for the government to develop and implement a policy that will contain and then end the violence. It needs to develop sources and methods for gaining this information; many of the sources will be human and perhaps have unsavoury backgrounds. The source may have to commit a criminal or violent act, or perhaps be an active member of a group, to establish bona fides. Either way, the individual is at risk. Democracies are rightly uncomfortable with using what could be

seen as agents provocateurs, but doing so may be necessary in what is war by other means.

Policy makers have to accept this fact. They also need to continue to monitor and challenge intelligence information they receive. It was clear from the evaluation by the U.S. Senate that where policy makers challenged the assumptions and cross-examined analysts, the analysis improved. On issues where policy makers felt they were out of their depth, they accepted on face value the conclusions of the intelligence community. Policy makers did not seem to understand, perhaps because they didn't, the intelligence on WMD and Iraq, so they relied on weak intelligence and spotty analysis. Policy makers praised the intelligence work on Al-Qaeda's links to Iraq as sounder judgments due to better probing of the information. It is this interaction that improves both intelligence and policy. Intelligence does not determine the outcome of a policy, but it does contribute positively or negatively to its development.

If a society has decided on the military approach to counter-terrorism, then intelligence is used to support deployment. The intelligence analyst identifies the leaders, structures, capabilities and tactics of the group in question. The internment fiasco in Northern Ireland is an example of what can go awry if the intelligence is poor or wrong. Intelligence is used to try to prevent terrorist operations and to disrupt the support and logistics networks, both during and after military operations. None is meant for public disclosure; hence the conflict between the criminal justice and intelligence communities.

The criminal justice system needs information it can use in a court proceeding. Secret information is helpful, but cannot replace good investigative work, because the investigator develops information that can be used in open court. An interesting example of good cooperation between the intelligence and the criminal justice

community is the capture of Abimael Guzman, the founder and caudillo of Shining Path, a terrorist group in Peru. The CIA trained and funded an elite unit of Peruvian police to track down and capture Guzman. The officers were to act as Western police act and not use torture. They collected evidence concerning suspected safe houses, operated stakeouts and developed unconventional leads. The investigation not only netted Guzman but also his financial manager and most of the Shining Path upper-level leadership. The capture of Guzman, coupled with the earlier decimation through arrest and combat of the mid-level leaders, left the Shining Path much diminished. It was not a conventional intelligence operation but it was a proper means of cooperation.²⁷⁹ It was good timely intelligence that enabled the U.S. Navy to intercept and capture the *Achille Lauro* hijackers in 1985.

Another dramatic success of intelligence was the Israel's Mossad's effort to prevent the assassination of Golda Meir in Rome in 1973. The prime minister was en route for a meeting there, when Mossad agents discovered a plot to shoot down her aircraft. The agents learned that one of the two missile teams lived in an apartment in Rome and had the Italian police conduct a raid. Mossad agents searched the airport and its environs and discovered a roofless van, ramming it just as the prime minister's plane landed. One terrorist was killed the other was arrested. Italian police were called and told simply that there had been an accident.²⁸⁰ Israel has a large and active network of agents around the Middle East who have a good understanding of the strategic positions, capabilities and tactical abilities of their opponents. Such attention to detail allows Israeli security forces to routinely appear to be conducting miraculous operations. It is not denigrating their skills to say operations are due more to good intelligence, with some earned luck, than magical powers.

²⁷⁹ Charles Lane, "Superman' Meets Shinning Path: A Story of CIA Success," *Washington Post*, December 7, 2000, A 01.

²⁸⁰ Gordon Thomas, *Gideon's Spies*, pp. 207-219.

The other important aspect of intelligence is national technical means, which is bureaucratese for signals and other electronic intelligence methods mentioned above. The Russians were able to identify the cell phone of a principal Chechen leader and then use a guided missile to kill him; Osama bin Laden stopped using his phone shortly thereafter. The National Security Agency (NSA), America's communications intelligence agency, has intercepted enormous amounts of communications and has deciphered coded communications. For example, it was communications intercepts of Libyan diplomatic traffic that provided evidence of Libyan involvement in the bombing of La Belle Disco in West Berlin in 1986; of the four killed, two were American servicemen. For all the success of intelligence, there is a problem at the very core of the field: the hows and whens of dissemination--a problem particularly affecting counterterrorism.

What good is intelligence if it is not provided in a clear and timely fashion to its consumers? The tragic events of 9/11 encapsulated the inherent vexations in interpreting intelligence and the high costs of failure. The attack began with the hijacking of four aircraft to be used as weapons of mass destruction. Two were crashed into the World Trade Centre in New York; a third into the Pentagon, near Washington, D.C.; and the fourth, bound for the capital area, perhaps the White House, crashed in Pennsylvania as its passengers attempted to retake the hijacked aircraft. The sophisticated nature of the attack led many to ask how could the intelligence community not have known anything about it? The global scale and the planning time span (perhaps as long as five years) would suggest that at least one of the thirty U.S intelligence agencies should have known something. The short answer is that the United States did know something, but not the scale or targets of the attack.

What emerges, then, is a picture of misdirection, poor coordination, bureaucratic inefficiency and overconfidence: the “it can’t happen here syndrome.” Early in the summer of 2001, the U.S State Department issued a worldwide travel warning to Americans travelling and living abroad: although no specific target was identified, the Department believed that there was a credible threat and that people should be on their guard. In early August, Mossad briefed the CIA about a threat from bin Laden that included an attack within the United States. The Mossad also asserted it had passed the information to the FBI which had lost it. The FBI denies this.

The CIA contacted the Immigration and Naturalization Service (INS), which maintains a “watch list” of people who are not allowed entry into the U.S. The CIA wanted particularly to interdict Khalid al-Mihdhar from entering the country because of his alleged links to bin Laden’s Al-Qaeda network. The INS informed the CIA that Mihdar and another man entered the country through Canada two weeks earlier. Both the INS and CIA so informed the FBI, and a search for their whereabouts began. It was not news to the Bureau because Al- Qaeda had almost a dozen cells present in the United States for several years. Three weeks before the attack, an interview was published in an Arab newspaper in which bin Laden promised a spectacular attack where America would least expect it. Most analysts believed the interview was bluster and that he had already had his spectacular attack in East Africa in 1998. The United States was also aware that Al-Qaeda had been attempting to recruit pilots for several years, but had no information as to motivation.

Included in the U.S. body of knowledge about bin Laden was his attempt to launch spectacular attacks against the United States and its interests abroad during the Millennium celebrations. Extraordinary international cooperation prevented an attack against unspecified U.S. military personnel and tourist targets at that time. Jordanian

authorities foiled the plot there with the arrest of Khalid Sa'id Deek and fourteen others.²⁸¹ An alert U.S. Customs officer foiled Ahmed Ressay's (a member of the GIA but working for bin Laden) attempt to enter the United States from Canada to conduct an attack on Los Angeles International Airport during the Millennium. Six years earlier, Ramzi Yousef organized a cell which car bombed the World Trade Centre Tower, killing six and wounding five thousand. Yousef, as mentioned above, was intending to sabotage eleven or twelve American aircraft in flight over the Pacific in 1995. He had actually bombed a Philippine airliner in a trial run. Had his attack been successful, as many as five thousand people may have met their deaths.

The intelligence community knew all of the foregoing about bin Laden and his organization, and knew as well that Al-Qaeda was also infiltrating its members into the United States and was looking for pilots. Still, when all of this information was added to the briefing by Israel's Mossad, U.S. analysts did not draw any conclusions about what might be about to occur. Why?

On one level, bin Laden masked his intentions very well. The State Department and CIA were receiving information, much from reliable informants, that an attack was being planned against the United States' interests overseas. Neither entity, nor the Department of Defence, has any legal remit to defend against such an attack within U.S. borders, and because information on a foreign attack was credible, most within the intelligence community were looking elsewhere. As the lead intelligence agency, the CIA was hampered by its lack of linguists, and more important, human agents within Al-Qaeda. A former CIA case officer lamented recently that the risk-averse bureaucratic management style now -- and then -- pervasive within the CIA, rules out any penetration by recruited human agents for fear

²⁸¹ Yonah Alexander and Michael Swetnam, Usama bin Laden's al-Qaida: Profile of a Terrorist Network, pp. 34-35.

of making a career-ending mistake.²⁸² No case officer wants to deal with, say, a criminal who may be publicly exposed at a later time. Because the Agency is unable to penetrate, it adopts a reactive stance: waiting for a member of a terrorist organization to defect and walk-in to the nearest embassy or allied security service. It is reasonable to speculate that many such “walk-ins” were intentionally sent by the terrorists to “throw-off” the security services. The practice was common during the Cold War and bin Laden may have learned from history. Jamal Ahmed al-Fadi,²⁸³ the key witness in the East Africa embassy bombing trial, was a walk-in defector, but defection usually takes place after an attack. The CIA’s reactive stance also fits nicely with the reliance of U.S. intelligence on technological problem solving.

The National Security Agency (NSA) is responsible for communications and other technological intelligence. It excels at code breaking and communications monitoring. Its personnel have discovered bin Laden’s satellite phone and happily played recordings of his calls to his mother, for visitors.²⁸⁴ Bin Laden is aware of the NSA’s access, but does not seem bothered by it. He probably doesn’t make many clandestine arrangements over the phone in any case. The NSA did intercept a call from one Al-Qaeda member to a close associate of bin Laden letting the network know that 9/11 had occurred. This intercept may be important evidence in a trial, but an intercept of the attack plan itself would have been a coup. The problem in that regard stems from the enormous amount of electronic information the NSA monitors. Even with sophisticated filtering equipment that searches out key words, phrases, names and numbers, some items are inevitably going to be missed. Even if the

²⁸² Reuel March Gerecht, “The Counterterror Myth” *The Atlantic Monthly* July/August 2001, online.

²⁸³ Yonah Alexander and Michael Swetnam, Usama bin Laden’s al-Qaida: Profile of a Terrorist Network, pp 13.

²⁸⁴ James Bamford, Body of Secrets, p. 410.

information is intercepted and understood, it must pass through the intelligence cycle in a timely fashion to be useful.

Timeliness is a knotty and troublesome element for a government that has more than thirty agencies involved in some aspect of counter-terrorism. The United States has no central coordinating body with any real power over the independent “feeder” agencies (this may be changing with the creation of the Department of Homeland Security, Homeland Security Council and the Director of National Intelligence). The State Department and CIA concentrate on a wide range of international issues. The Department of Defence also looks at the international arena, but in terms of threats to its mission and personnel. All three bodies deal with terrorism as a political/security issue. The FBI deals with domestic security and all terrorism investigations of terrorism against Americans anywhere. Terrorism is a law enforcement issue that necessitates the gathering of evidence for a possible trial. Rules governing terrorism investigations have been loosened since the mid 1970s but are still restrictive. The Department of Treasury deals with terrorism financing and other currency matters. The Department of Transportation dealt with threats to transportation and specifically with threats to aviation through the FAA. DOT analysts are held in such poor regard that they are rarely provided with much useful aviation intelligence even if any exists.

With so many agencies “having a finger in the pie,” the tendency of each is to fight for the lion’s share of information and resources and then to protect its share. Cooperation is not a priority. The bureaucratic battles are not confined to the federal agencies: they occur among the federal, state and local authorities involved with a domestic incident. There have been multitudinous commissions, legislative actions

and think-tank proposals to coordinate federal domestic efforts.²⁸⁵ Until 9/11 none had moved beyond the discussion stage because there is “no consensus either in Congress, the Executive branch, the various commissions or the organizations representing first responders as to whether the focal point should be in the Executive Office of the President or a Lead Executive Agency.”²⁸⁶ Throughout the 1990s, counter-terrorism seems to have been viewed by many agencies as a tool in budget battles rather than as a national security priority. The President’s announcement on September 23, 2001 of the formation of the Department of Homeland Security (DHS) is the first visible sign that the world did perhaps change on 9/11. Even in the winter of 2005 the associated details of DHS and ancillary agencies are still vague, such as who has control of the Terrorism Threat Integration Centre (TTIC), but it is encouraging that the government moved so quickly to create a Homeland Security Council and a new cabinet department with more than 175,000 employees. There will at least be a coordinator at the federal level for responding to domestic terrorism. Cabinet rank is at least symbolically important when the inevitable bureaucratic battles develop over resource and authority allocation.

This reorganization is helpful but it leaves open the question of how to use intelligence. The U.S. government was highly criticized for not disclosing the “Helsinki Warning” to the general public prior to Lockerbie, but it has been lambasted on both sides of the Atlantic for the August 2004 disclosing of intelligence relating to a suspected Al-Qaeda attack against specific U.S. financial institutions. If an attack had happened, the failure to publish the credible and specific information regarding these targets would have been unforgivable. Disclosure may have delayed

²⁸⁵ Raymond Decker, “Comments on H.R.525 Create a President’s Council on Domestic Terrorism,” written testimony, May 9, 2001, p. 7.

²⁸⁶ *Ibid.*, pp. 7-8.

or prevented an attack, but it underscored the difficult decisions involved in having and utilizing intelligence.

No approach to counter-terrorism, no matter how organized, is effective without the will to implement the necessary tools. In 1996 the Clinton administration was presented with an opportunity to have Osama bin Laden, then in Sudan, arrested and handed over to the United States. The Sudanese government was under tremendous U.S and international pressure to get him out. The pressure appeared to pay dividends when the Sudanese government made an extraordinary offer: it would provide the U.S. government with bin Laden as well as access to all its surveillance records on him. The offer seemed to justify the patient U.S diplomacy and legalistic approach.

The offer was turned down; in an extraordinary statement Steve Simon, Director of Counterterrorism on President Clinton's National Security Council, told the *Washington Post*: "I really cared about one thing, and that was getting him out of Sudan."²⁸⁷ Ignoring the fact that a U.S. federal prison is not in Sudan, he seemed to reason that as long as bin Laden was out of Sudan he had done his job. The strategy was not to defeat the network but to weaken it for a time. If bin Laden was forced to move, it would take some time to re-establish his network and thus he would be out of operation for a time. There was also a hope on the part of some in the Clinton administration that Saudi Arabia would arrest and try bin Laden, manifestly a shocking failure to understand internal Saudi politics. But more important, why would the Saudis do what the United States refused to do? The world's only superpower, with the strongest legal and political system, the country that wanted bin Laden in the first place, was refusing to prosecute him. Why would any other country prosecute

²⁸⁷ Richard Minter, "Sudan's Angle," How Clinton passed up an opportunity to stop Osama bin Laden", *Opinionjournal.com*, Monday, October 8, 2001.

him? This entire affair demonstrated the true weakness in any system designed to stop a terrorist campaign or any particular event: lack of political will.

Ultimately, each of the three approaches discussed, requires public support. It is citizens who will have to endure the loss of liberties that increased security entail. They will also have to bear the burden of higher taxes and prices to pay for the increased security. Air travellers will have to spend more time at checkpoints and face greater restrictions regarding carry-on baggage. A number of flights may be cancelled or eliminated and services may be cut as the public become accustomed to terrorism. In a democracy, it is the people who decide how much sacrifice they are willing to endure. The carnage of September 11th has created the environment for a much wider discussion of terrorism and counter-terrorism. The delicate calibration between security and convenience will swing in proportion to the threat environment. The hope is that while the pendulum will swing between security and openness, the range will narrow so there is at least a consistent minimum level of security.

Chapter 3 The Threats to International Civil Aviation

. Why target international civil aviation?

The most important question facing international civil aviation is “why has it been a terrorist target for the last three decades?” The primary reason is that terrorists are always looking for ways to inflict damage on their opponents far beyond the cost to themselves. Interfering with international civil aviation permits this and has the added benefit of allowing them to appear to be David in a David and Goliath match-up, with a slingshot whose ammunition travels at hundreds of miles per hour at 35,000 feet.

The reasons are multiple and roughly classifiable:

- (1) Aviation provides a powerful symbolic target.
- (2) It provides a unique multinational stage.
- (3) It offers an unrivalled media exposure.
- (4) Operations against it are relatively simple.
- (5) It has enormous economic consequences for both the carrier and the targeted nation.
- (6) It can create political embarrassment for the intended targets.
- (7) It is a useful tool for revenge.
- (8) It is effective.

Reason 1. One of the most powerful stand-ins for a state is its national carrier or what is perceived as a national carrier. For example, El Al (Israel’s state-owned national carrier) is not just an airline, but also a demonstration that the state of Israel exists. Terrorist violence, at its root, is symbolic; until the last decade targets were selected not for the actual damage that could be inflicted, but for the message the attack sent. Terrorist hijacking or sabotage, even if not entirely successful, underscore the state’s inability to keep its citizens secure. Air France, Egypt Air, Kuwaiti Air, Air Canada, and Swiss Air are just a few of the state-owned carriers that have been similarly objectified. Likewise, private carriers are vulnerable to this type of action

because, for the terrorist, they serve as a nation's proxy. Some of their names illustrate this point: Japan Airlines, British Air, American Airlines, and even Trans World Airlines (TWA) are/were all targets, not because of any particular business decision they have made, but because they carry the name and flag of the nation they serve. In the last decade, the desire of groups such as Al Qaeda to inflict massive loss of life, as well as having a cascading effect on the larger economy of the target state, has magnified the threat to international civil aviation.

Reason 2. The multinational stage offered by international civil aviation yields particular benefits for terrorists in enlarging the bull's eye. The 1985 Hezbollah hijacking of TWA flight 847 en route from Athens to Rome is representative. Israeli, American, Greek and German passengers were on board. The terrorists were attempting to pressure Israel to release the seven-hundred plus members of Hezbollah being held captive. They had assumed there would be Americans and Israelis, but the Greeks and Germans provided added leverage against the Israeli government. Another example is the so-called Dawson's Field hijacking in 1970, discussed below, which was designed to bring as many nations as possible into the crisis.

Reason 3. As Brian Jenkins famously said, "Terrorists want a lot of people watching not a lot of people dead." International civil aviation provides the window for the actualisation of the desire for their "fifteen minutes of fame." Hijackings are the most "media friendly" incident imaginable because hijackers hold hostages and provide deadlines that amplify the unfolding drama. During the TWA flight 847 hijacking, the National Broadcasting Company, (NBC), one of the three major U.S. television networks, dedicated two thirds of its half-hour nightly news broadcast to it.²⁸⁸ *The New York Times*, *Washington Post* and *Los Angeles Times* ran a combined

²⁸⁸ Paul Wilkinson, Terrorism versus Democracy: The Liberal State Response, pp. 180-181.

629 stories on the almost three-week hijacking.²⁸⁹ Terrorists, however, do not always handle the news media deftly. They cancelled one press conference during that hijacking because of the media “near-riot” during what was supposed to have been a carefully staged event.²⁹⁰ Aircraft sabotage has had similar coverage, where the media interviewed the grieving relatives rather than the hostages.

The December 1988 Lockerbie disaster was accorded saturation coverage. Few will forget the wrenching images of Susan Cohen being met at John F. Kennedy International Airport by a phalanx of media personnel as she collapsed, crying, “Not my baby.” Although no terrorist group ever claimed responsibility, the message was stark: another aircraft had been destroyed to achieve a political purpose, and during the immediate aftermath this elevated various Middle East conflicts to be major news stories.

Reason 4. For all the devastation wrought by and media attention given to interference with international civil aviation, it can be accomplished with a rather simple operation. A hijacking does not require special training or substantial personnel; most use two to four persons armed with easily obtained small arms and explosives. A small cell can control a multi-million-dollar aircraft, several hundred lives and the agendas of governments and the media, because it is in possession of the aircraft. Two young men hijacked TWA flight 847.

Sabotaging an aircraft requires, perhaps, at minimum of one person can fashion the device, but does not require the perpetrator(s) board the plane before takeoff. The Lockerbie bombing used two Libyan government intelligence agents; the November 1987 destruction of Korean Airlines (KAL) 858 used two North Korean intelligence agents. Even the 9/11 multiple hijackings involved only twenty terrorists,

²⁸⁹ Brigitte Nacos et.al, “Terrorism and the Print Media: The 1985 TWA Hostage Crisis”, *Terrorism and International Journal* Vol. 12 page 109.

²⁹⁰ Capt. John Tetrake and David Wimbush, Triumph over Terror on Flight 847, pp. 137-138.

about five per aircraft. None of these operations strained the disaffected organizations, yet all achieved major gains.

Reason 5. Terrorists want to make an economic impact on the target. The Popular Front for the Liberation of Palestine (PFLP) sought to undermine the Israeli economy in order that Israel could not afford the cost of its security services. Although damage to the Greek economy was not the purpose of the TWA flight 847 hijacking in June 1985 or the TWA flight 840 bombing in April 1986, the Greek economy suffered a major downturn when, after the two incidents, the Reagan administration announced that the Greek government was failing to meet its international security obligations and advised travellers to avoid Greece. The naming and shaming by the U.S. cost the Greek economy more than \$ 400 million.²⁹¹

Reason 6. Attacks on international civil aviation embarrass opponents. This is one reason the armed forces of the Colombian Revolution (known by its Spanish acronym FARC) began aviation hijackings in the late 1990s.²⁹² And the Liberation Tigers of the Tamil Eelam (LTTE), the Sri Lankan terrorist group, attacked the Colombo International Airport in 2000 to put pressure on the Sri Lankan government to negotiate. The government had declared the airport one of the nation's most secure facilities, but the LTTE team infiltrated the perimeter easily and launched an attack that destroyed one quarter of the Sri Lankan Air force fixed wing fleet and one third of Air Lankan aircraft.²⁹³ The message here was the same: an embarrassingly ineffective government.

²⁹¹ Spiros Ch Kaminaris, "Greece and Middle Eastern Terrorism" June 28, 1999
<http://www.ict.org.il/articles/articleDet.cfm?articleid=403>

²⁹² FARC was well organized and rather than return any of the hostages, it landed the aircraft in a remote landing strip and marched the hostages into the jungle, from which they were ransomed back to their families.

²⁹³ Dr. Rohan Gunaratna, "Intelligence failures exposed by Tamil Tiger Airport attack" *Jane's Intelligence Review*, September 1, 2001. On line copy.

Terrorists also use attacks to embarrass other factions in the struggle, to gain predominance within the larger movement. A classic illustration of this is the Abu Nidal Organization's (ABO, named for its leader) December 1985 attacks against the Rome and Vienna Airports. Abu Nidal wanted to derail the growing movement toward peace between the mainstream Palestine Liberation Organization (PLO) and Israel. The Italian and Austrian governments supported the PLO and the emerging peace.²⁹⁴ The December 27, 1985 raids killed 18 people and achieved what Abu Nidal had hoped; the peace process became moribund and remained so for many years.²⁹⁵

Reason 7. Terrorists employ attacks on international civil aviation as a retaliatory measure for perceived slights or interference in sensitive policy matters. Libya presents the classic example of this tactic; the state intelligence service is believed to have been behind the bombing of TWA 840 in retaliation for the U.S. raid on its compound earlier that same month. Still after revenge, Libyan agents placed a bomb on Pam Am 103 on December 21, 1988, killing all 259 people on board and 11 people in Lockerbie, Scotland, - deaths that provided unintended revenge for the UK's having supported the earlier U.S. raid. Some observers believe, that Iran was behind the bombing because of the accidental shooting down of an Iranian civil jetliner by the United States on July 3, 1988 killing all 290 people on board. Iran had announced that it would retaliate, and it appears to have done so five months later.

Irrespective of one's position on the actors involved in the attack on Pan Am 103, revenge was clearly their motivation. Libya, and perhaps Syria, struck again in September 1989 when agents destroyed an aircraft of the French carrier UTA flight 772 over the Niger desert, sending the 170 on board to their deaths. The Libyan

²⁹⁴ Patrick Seale, Abu Nidal, A Gun for Hire, pp. 243-247.

²⁹⁵ *Ibid.*, p. 243.

motivation was the French interference in Libyan interests in Chad during the early 1980s; the Syrian motivation was French involvement with anti-Syrian forces in Lebanon. Neither Libya nor Syria claimed responsibility for that attack, but the French courts eventually convicted Libyan intelligence agents for the bombing and exposed a possible Syrian connection.²⁹⁶

Reason 8. The terrorist targeting of international civil aviation began and continues because it is effective, although not in the original strategic capacity for which it was developed. The PFLP tried to use attacks on civil aviation to undermine Israel's economy, Al-Qaeda is attempting the same strategy by attacking American aviation both domestically and internationally. The strategic use of international civil aviation attacks has failed up to this point; the tactical use of the aviation weapon has achieved notable success. Terrorists hijack aircraft to gain media exposure, (as was the case with TWA 847). They use the lives of innocent civilians as chips in bargaining for the release of comrades, (TWA 847 or the October 29, 1972, hijacking, of a Lufthansa flight by Black September that led to the release of the three surviving members of the Munich Olympic Games Massacre).²⁹⁷ Their actions can be used to reveal a government's shortcomings vis-à-vis opponents, as with the FARC or LTTE, or to bring about change in government policy, as Pablo Escobar tried when he bombed a Colombia Airlines (AVIANCA) flight, that was supposed to be carrying a presidential candidate advocating a strong position against the Escobar-led Medellin cartel.²⁹⁸

Terrorists can also gain influence by threatening actions against international civil aviation. Many experts believe that some terrorists and some states make mutual

²⁹⁶ Syria may have been seeking revenge for what it perceived to be French interference in Syrian objectives in Lebanon.

²⁹⁷ Simon Reeve, One Day In September, pp. 128-132.

²⁹⁸ Mark Bowden, Killing Pablo, p. 80.

non-interference agreements that free each party to function independently and safely. Terrorists may extort money from the carrier or carriers of a nation in exchange for a hands-off stance. These are understandably controversial subjects that cannot sustain the light of investigation; hence little is publicly available to corroborate the above beliefs. Even so they are probably accurate.

The Tactical Environment

Four terrorist tactics have been actualised against international civil aviation over the past three decades: hijackings; sabotage; shooting down aircraft; and assaults on airports and related ground facilities. Each has led to a response by the international civil aviation regime.

The most common terrorist tactic is hijacking, in which one person but usually between two and five take control of an aircraft in flight by brandishing real or what they assert to be real, weapons. Hijackers have a political agenda and, at least prior to the early 1990s, wanted to survive the action. People were killed during some hijackings and U.S. Navy diver Robert Stethem was murdered by the hijackers of TWA flight 847, but a captive has greater chances of being killed in a rescue mission. On November 23, 1985 one such instance occurred during a rescue mission conducted by Egyptian commandos to rescue the 98 hostages (including four security personnel) on Egypt Air flight 648. The Cairo scheduled Athens flight was diverted to Malta. The Elite Group 777 of Egyptian commandos were sent in to conduct this complex and dangerous rescue. A U.S. Army Delta Force operator was sent in to observe and support the commandos whom he had trained. The American-trained commandos had

been replaced by an untrained group that was considered more politically reliable,²⁹⁹ a decision that contributed to the death of 68 people on the aircraft.

Terrorists' next-most-common tactic is the use of explosives against civil aviation, a tactic that 'came of age' in connection with bombings during the post 1968 period.³⁰⁰ Between 1967 and 2004, terrorists perpetrated 88 of 95 sabotage bombings.³⁰¹ Non-state groups were predominant in the cohort, but three of the most notorious attacks were carried out by states. In 1987 North Korean intelligence agents placed a bomb aboard KAL flight 858, killing all 115 passengers and crew. Libya conducted two attacks; the December 1988 bombing over Lockerbie caused a total of 270 deaths, and the September 1989 attack over the Niger desert on UTA flight 772 killed all 184 on board.

Political protest and retaliation seem to be the most common motivation for these kinds of attacks. Libya was protesting the dealings of the United States and France with Libya; North Korea was protesting the awarding of the 1988 Olympic games to South Korea. Non-state terrorists also make retaliatory use of explosives, such as the June 1985 destruction of Air India flight 182 off the Irish coast by Sikh extremists. They were attempting to avenge the Indian government's 1984 raid on the Golden Temple, the holiest Sikh shrine, which was occupied by heavily armed terrorists, whose cause was an independent homeland for the Sikh faithful. Upwards of a thousand people (mainly Sikhs) were killed by the Indian government in the raid.

Terrorists have found the use of explosives against carriers to be an effective way to make their political points. They are able to call attention to their grievances

²⁹⁹ Eric Haney, *Inside Delta Force*, p. 277.

³⁰⁰ One of the earliest examples involved a woman in Canada who planted a bomb on a Canadian domestic flight in order to kill her husband in an attempted insurance scam. She succeeded in killing her husband and several others on board, but not with the fraud. See David Gero, *Flights of Terror*, p.12.

³⁰¹ Ariel Merari, "Attacks on Civil Aviation: Trends and Lessons," in *Aviation Terrorism and Security*, ed. Paul Wilkinson and Brian Jenkins, p. 12, 13. And see the Aviation Safety Network, safety issues page, security, sabotage bombing link. Aviation-safety.net.

without risking their lives. Very small numbers of people, sometimes as few as two, have a limited likelihood of being stopped in the attempt or captured later. (Only 17 percent of attempts are halted prior the bomb's introduction into the aircraft.³⁰² Even when the accused bomber is identified, it can take years to bring him or her to justice.³⁰³

Legal and technical tools are already in place to prevent the introduction of explosives into an aircraft, but they are frequently ignored. The 1985 Air India bombing occurred because Air Canada ground staff allowed a bag with no confirmed seat holder to be checked through to its final destination.³⁰⁴ It appears that a clerical error in Malta opened the door for a bomb to enter the aviation system and ultimately end up on Pan Am 103.³⁰⁵ Pan Am was supposed to hand-check all inter-line transfer bags rather than use an x-ray machine. Its failure to follow FAA regulations very likely contributed to the subsequent destruction of the aircraft.

The bombings of KAL flight 858 and Philippines Airlines flight 434 could have been prevented if personnel had been alert to the empty seats of passengers who failed to reboard after a layover.³⁰⁶ Still, the KAL bombers were almost detected in Baghdad while passing through security; the Iraqi security officer was suspicious of the radio in the carry-on baggage. When asked to remove it, the male North Korean

³⁰² Ariel Merari, "Attacks on Civil Aviation: Trends and Lessons", in Aviation Terrorism and Security, (eds.) Paul Wilkinson and Brian Jenkins, p. 22.

³⁰³ It took more than a decade for the Pan Am 103 bombers to be brought to court; the bombers of UTA 772 have been found guilty *in absentia* by a French court, but still have not been remanded to French custody.

³⁰⁴ Rodney Wallis, Combating Air Terrorism, p.7. Air Canada was serving as a feeder for Air India flying from Montreal to India with a stop in London. The Sikh passenger wanted his bag checked to India even though he did not have a reserved seat on the Air India flight. The agent knew this was not allowed, but was bullied into consenting due to the large crowd waiting to check in for the Montreal leg. Further compounding the error, Air Canada did not offload the bag even though the passenger never boarded. See Salim Jiwa, Death of Air India Flight 182 for a full discussion.

³⁰⁵ Rodney Wallis, Lockerbie: The Story and the Lessons, pp. 74-79.

³⁰⁶ The Philippines Airline flight miraculously suffered only one loss of life; as the skill of the flight crew allowed for a safe landing. Ramzi Yousef was the no-return passenger in this case; he was engaged in a practice run for the Bojinka Plot, which would have used the same type liquid nitrogen explosive hidden in contact solution bottles.

agent raised a ruckus and thereby avoided the search. Available technical counter-measures, such as the Thermal neutron accelerator (TNA) are said to be a reliable detector of the presence of explosives, but as long as humans are involved in securing the aviation system, lapses are inevitable. Security could be avoided altogether if a terrorist were to smuggle weapons onboard an aircraft waiting on the taxiway. British Airways (BA) has been concerned about illegal immigrants (primarily Africans leaving Kenya) 'hitchhiking' in the wheel wells of its aircraft. who position themselves while the aircraft is waiting to take off only to freeze to death in flight in the pressurized but unheated wheel wells.³⁰⁷ It is not beyond imagining that a suicide bomber might adopt the paratactic. The possibility could become reality by virtue of the presence of active Al-Qaeda cells in Kenya.

A third tactical tool available to terrorists is man-portable air defence systems (MANPADS). Before November, 2002 the threat of MANPADS in the hands of a terrorist group against a civil jet was only a spot on a distant horizon. Ever the innovators, Al-Qaeda, attempted then to bring down an Israeli airliner departing from Mombassa, Kenya using a MANPAD in November of that year. It was a Soviet manufactured SA-7 and depending on the model, entered service in 1967 (SA-7A) or 1972 (SA-7B). It has a range of 14,000 to 16,000 feet and an operational altitude of 9,000 to 14,000 feet.³⁰⁸ The Soviets exported more than 100,000 of the SA-7s and a later model SA-14. Many were supplied to Somalia, where, since the collapse of the government in the early 1990s, they are easily available to the militias that now

³⁰⁷ David Sterland, "Stowaways a journey in the wheel bay" *Aviation Security International* June 2001, pp. 6-8.

³⁰⁸ Marvin Schaffer, "The Missile Threat to Civil Aviation," in *Aviation Terrorism and Security*, (eds.) Paul Wilkinson and Brian Jenkins, p. 71.

control the country and where Al-Qaeda has connections.³⁰⁹ The United States exported 9,000 of the highly capable Stinger MANPADS to the Afghan rebels during their war against the Soviet Union and despite the U.S. effort to buy them back, not all were returned. Some may be in Al-Qaeda's arsenal. It is unclear how well maintained the missiles used in the Mombassa assault were, but they engage the target from the side and not from the tail which they are designed to do, which rendered them ineffective.³¹⁰ A terrorist organization need not actually use a missile, but merely threaten to do so in order to create potential havoc; witness the threat directed at London's Heathrow Airport in February 2003. The availability and dispersion of these weapons, (at least 27 terrorist and insurgent groups has access to MANPADS), makes them dangerous. Yet it is difficult to determine how many have been used against international civil aviation.

The rush to mitigate this undeniable threat has obscured the actual threat. There are some who have rushed to adapt and deploy systems from the military to protect civilian aircraft from attack. The fact that there have been 30 attempts to shoot down civilian aircraft, with 24 successes, over the last 30 years, causing 500 deaths starkly, illustrates the threat.³¹¹ These numbers are not clear, however, and even if they are accurate, why had this long-standing real threat not impacted international civil aviation yet? Some argue the low probability of a missile attack because of the

³⁰⁹ In June of 1989 a Somali militia shot down a Somali Air flight killing all thirty persons a board. See David Gero, *Flights of Terror*, p. 116. The launcher used in the Mombassa attack was traced to Saudi Arabia. The launcher, and possibly the missiles, was traced to a cache that had been used in an unsuccessful and little noticed attack against an American military transport aircraft landing at a Saudi Airbase.

³¹⁰ Federation of American Scientists web page www.fas.org/asmp/campaigns/MANPADS/MANPADS.html, Issue Brief 1 MANPADS Proliferation.

³¹¹ Fred Bayles, "Threat is 'no longer theoretical'" *US Today* August 13, 2003.

difficulty of effective operation³¹² and maintenance which makes justifying the expense of installing defensive systems difficult, others argue the opposite.³¹³ The disputed nature of the threat should not be taken as an excuse for doing nothing. Placing monetary value on human life is a problematic undertaking, but the civil aviation industry has to account for its security expenditures based on the probability of potential threats. Unless a nation is willing to underwrite the costs, the costs are prohibitively out of bounds for the industry.³¹⁴ Depending on many variables, twenty billion dollars is not an excessive estimate. If the terrorists increase this activity the equation will undergo revision.

The fourth terrorist tactic exercised against civil aviation has to do with ground facilities and can take two forms: terrorist attacks and insurgent attacks. The former specifically targets non-combatants at the airport and other ground facilities; the latter, military or government operations likewise situated.

Attacks by the Japanese Red Army (JRA), the Abu Nidal Organization (ANO), and the IRA, are examples of terrorist attacks. The JRA attacked Israel's Lod Airport in 1972 killing twenty-seven (including six Puerto Rican pilgrims) and wounding seventy-six. JRA members working for the PLFP had smuggled weapons in their hold luggage and then later fired on passengers who were retrieving luggage. The incident at Lod was an attempt to undermine Israel's tourist economy. The ANO's most infamous attacks were on the Rome and Vienna airports in December 1985 (discussed above). The IRA fired mortars at London's Heathrow Airport's

³¹² The US Army anticipates that a fully trained operator will only achieve a hit about a 30% of the time. Peter Harclerode, *Fighting Dirty*, p. 564. It's not clear how effective a poorly trained terrorist would be against an unprotected civil aircraft.

³¹³ Thomas Hunter, "The proliferation of MANPADS" *Janes Intelligence Review*, 28 November 2002. www.janes.com

³¹⁴ El AL has just introduced a flare counter-measures system which will cost about 600,000 pounds (sterling) per aircraft. The United States FAA will not allow the system to be used in the United States for fear of starting ground fires. *Sunday Times*,

runways in two March 1994 attacks. The mortars failed to explode, but disrupted the operations at the world's busiest international airport for several hours each time. Although suicide-bombing inside crowded terminals, or even vehicle bombings, clearly have not occurred, yet the impact of a suicide bomber attacking Chicago O'Hare International Airport on a busy Friday, or on the Sunday after the Thanksgiving holiday in the United States, the busiest travel day of the year, is almost beyond imagination. The devastation wrought by a bus full of explosives or a small, coordinated suicide attack, would bring the international civil aviation system to its knees and leave a nation substantially altered. Terrorists, chief among them Al-Qaeda, are acutely aware of this.

Insurgents have targeted civil aviation throughout the developing world, primarily to assist in the isolating of sections of the population from government control. Guerrillas are attempting to develop both political and physical space in which to operate (see chapter 2). Many developing regions lack sufficient roads to link hinterlands to the metropole, and where roads exist, they are frequently ambush sites. Governments are forced to rely on air transport to reach outlying areas that render airstrips primary targets.³¹⁵ Maoist insurgents in Nepal began to lay siege to remote airstrips in their struggle against the government in 2002³¹⁶ in an attempt to isolate the communities from the government.

Another Asian conflict provides the best example of targeting civil aviation's infrastructure: the LTTE assault on the Colombo airport in 2001. A team of LTTE suicide 'commandos' infiltrated the Sri Lankan government's self-declared most-

³¹⁵ Fr. O'Riely S.J recounted his experience while on missionary assignment during 1987-1988 in Southern Sudan, where the Jesuit order ran a school and airstrip in the town of Wau. Both the insurgents of the Sudanese Peoples Liberation Army (SPLA) and government wanted control of this vital location. Each side shelled the facility and adjacent school regularly, eventually driving the school out.

³¹⁶ St. Andrews Domestic Terrorism Data base.

secure facility and destroyed most of the Sri Lankan air force on the ground as well as several civil aircraft belonging to the state carrier Air Lanka.³¹⁷ The infiltrators were detected at least twice. First, when perimeter security personnel discovered bags of discarded Sri Lankan security uniforms close to a breached perimeter fence, but failed to notify anyone. Second, when control tower personnel caught sight of armed men in the area between two runways, but assumed they were participating in a security drill and did not notify anyone. The LTTE's immediate military agenda was to destroy the air force aircraft on the ground, but the primary agenda was political. If the LTTE could infiltrate the facility undetected--at least that's what the 'commandos' thought--how could the government protect any other location, let alone be able to defeat the LTTE militarily? The LTTE scored a second unanticipated propaganda coup as well: just as the attack began, a planeload of UK tourists arrived from Mauritius. None were hurt, and all used their camcorders and provided incredible on-the-scene-footage to the BBC. This attack seems to have had the desired political impact, in light of the 2002 cease-fire.

The Three Phases of the Political Threat

The terrorist threat to international civil aviation has gone through three phases during the past eighty years. The first, 1948 to 1968, was characterized by flight from persecution or prosecution. The second, 1968 to 1994, was political. The third began in 1994 and is on going: the weapon or warfare stage. Each is marked by singular, defining, traces that can be found in others. This section will discuss only the political threats, while recognizing the importance of criminal interference with

³¹⁷ Op.Cit number 5. Air Lanka had 3 Airbus destroyed and another 3 damaged. The air force had 3 fighter and 3 training aircraft and two helicopter gunships destroyed. The air force also had 6 fighter aircraft and six helicopters damaged. Two of those were gunships.

international civil aviation, terrorism is a political activity and as it is this threat that is the focus of the work, it will be the focus of this section.

The first phase is the flight from persecution or prosecution phase, (1948 to the early 1968) when people attempting to leave their home countries hijacked aircraft for fast and convenient get aways. The first hijacking occurred on April 6, 1948 when the three-crew members (including the pilot) and twenty-one of the twenty-six passengers hijacked a Ceskoslovenske Aerolinie (CSA) internal flight from Prague to Bratislava and landed in the U.S. Occupation Zone in Munich. All twenty-one were seeking political asylum.³¹⁸ This type of escape was appealing because many of the hijackers were former military pilots familiar with the aircraft. The defectors were greeted as heroes who had made a dramatic dash for freedom. Even when a Soviet pilot was killed resisting a take-over of his flight, few in the West viewed this as a criminal act. From then through the late 1950s, asylum was a fairly common goal (twenty out of thirty-seven hijackings).³¹⁹ The escape from persecution or prosecution phase waned from the late 1950s onward as the jet aircraft became more wide spread and the focus shifted to the United States from Eastern Europe.

The revolution in Cuba led by Fidel Castro overthrew the pro-U.S. dictatorship of Fulgencio Batista in January 1959, and Castro began to consolidate his hold on power. A hijacker “highway” between the United States and the island soon appeared. Cubans who had been associated with the Batista regime or disliked the drift toward communism, devised ways to get to the United States, just ninety miles away. From 1960 to 1969 there were forty-nine hijackings or attempted hijackings

³¹⁸ David Gero, *Flights of Terror: Aerial hijack and sabotage since 1930*, p. 10.

³¹⁹ *Ibid.*, pp. 10-17, for the motivations and see Jin-Tai Choi, *Aviation Terrorism: Historical Survey, Perspectives and Responses*, p.6, for the total numbers for the period.

between Cuba and its neighbour out of a world wide total of ninety-one.³²⁰ From 1961 some of the traffic went in the opposite direction; those wishing to make a quick exit from U.S. jurisdiction--criminals, the mentally unbalanced, and some self-described revolutionaries--escaped to Cuba. Almost all ended up serving time in Cuban jails, although a few 'revolutionaries' managed to escape that fate.

There may have been political motivations in escaping from Eastern Europe or Cuba, but aircraft were not viewed as the means of delivering the message. There was no effort to use the aircraft for anything other than a vehicle for escape; individuals fleeing communist countries were manifesting a desire to flee that repressive system, but they were not seizing aircraft to call attention to the broader political questions, only their individual desire for a better life. Those fleeing to Cuba were attempting to escape justice, or in the case of homesick Cubans return home; they had no broader political agenda. People still use aircraft as a means of escape; there were several hijackings attempted in China during early 2003 which were initiated by persons trying to reach Taiwan. But as a primary means of escape, hijacking was rarely used.

Phase two wedded politics to interference with international civil aviation and began in 1968.³²¹ The Popular Front for the Liberation of Palestine (PFLP) hijacked Israeli State airline El Al flight 426 bound for Tel Aviv from Rome on July 23. The three hijackers diverted the Boeing 707 and its thirty-eight passengers and ten crew to Algiers. For some of the victims, the ordeal lasted five weeks, the longest hijacking on record. Many terrorism experts date the age of modern terrorism from the incident. The PFLP also introduced mass hijackings as a tactic when from September 6 to 12,

³²⁰ Ibid., Gero, pp. 17-31, and Choi p.6. A total of 80 of the 91 hijackings or attempted hijackings had as a destination Cuba.

³²¹ There were politically motivated interferences before 1968, The hijacking of a PAN AM flight during the 1931 coup in Peru is the first example, while others argue the hijacking of a Cuban internal flight by Raul Castro in 1959 as the first political hijacking.

1970, the PFLP and its allies hijacked four aircraft, a total of 577 passengers and 39 crewmembers. Only two of the four aircraft arrived at the PFLP-occupied Dawson's Field in Jordan (a former British military field and the name given to the hijacking incident). The hijackers demanded that the Swiss, German, UK and Israeli governments release the Arabs they were holding. The hijacking ended with the destruction of three aircraft (two in Jordan and one that landed in Egypt) but no passengers were lost. During this incident the PFLP had attempted to hijack an El Al flight departing from Amsterdam, but was foiled by an in-flight security officer. The flight landed safely in London.³²²

Dr. George Habash, a Marxist-leaning Palestinian Christian who was attempting to establish a Palestinian state on Israeli territory, founded and led the PFLP. Dr. Habash had witnessed the Israelis inflict three conventional defeats on Arab forces since 1948. He understood that Israel's military might was underpinned by a strong economy, and that its body losses in battle could be replenished through immigration. Essentially an island, lacking political and economic ties to neighbours, Israel was dependent on more distant nations for trade by sea and air. Its immigrants and tourists, an important source of foreign currency, arrived primarily by air; hence international civil aviation was a natural terrorist target. The PFLP used its attacks as a strategic weapon in Habash's effort to destroy the state of Israel. Despite its failure as a strategic weapon, attacks on international civil aviation remain an important tactical tool that was quickly adopted by terrorists groups elsewhere, such as the Japanese Red Army and Black September (a Palestinian group linked to Yasser Arafat).³²³ A terrorist organization utilizes hijackings and bombings as a way of calling attention to its cause, embarrassing its opponents (government and other

³²² See Chapter 3, page 14.

³²³ Simon Reeve, *One Day in September*, pp. 21, 27-29.

terrorist organizations), damaging the economy of the target nation, and, more important using it as a tool of extortion, either for the release of interned colleagues or money for not attacking particular airlines. The aircraft is seen as a proxy for the state, the terrorist was attempting to utilize the tremendous media potential of a hijacking or bombing to exert pressure on the state to change its policy or policies.

Hijackings were the most popular tactic for many kinds of individuals. Between 1967 and 2004 there were about 942 hijackings (a number that includes those carried out for political and criminal purposes) out of around 1,107 total incidents against airlines, that is 85 percent of the total.³²⁴ 189 of the hijackings were conducted by terrorists.³²⁵ The international civil aviation regime began to respond to the menace, deploying the so-called X-ray machines, for example. That measure was only partially effective as it foiled on average 19 percent of terrorist hijackings at the time.³²⁶ It did cause the terrorists to switch to other tactics.

Terrorists switched from hijackings to sabotage bombing, partially as a result of increased security. Terrorists, during this phase were looking for the drama of armed propaganda, while limiting the risk of casualties, but sabotage bombing presented a greater risk for the terrorists because of the large numbers of casualties created by such an attack,³²⁷ but was still deployed frequently to convey a message, usually retaliatory. The bombing of Pan Am flight 103 was one such bombing; it was targeted in response to U.S raids on the Libyan military and terrorist infrastructure. It was not intended to 'instruct' the public, no official claim of responsibility was

³²⁴ Ariel Merari, "Attacks on Civil Aviation: Trends and Lessons", in *Aviation Terrorism and Security*, (eds.) Paul Wilkinson and Brian Jenkins, p. 12. The statistics from 1997-2004 are augmented with those from the FAA and Aviation Safety network. The numbers are estimates as neither definitions of hijackings or reporting of them are standard.

³²⁵ Ibid., p.13 and above note.

³²⁶ Ibid., p.20 and above note.

³²⁷ For an excellent debate on the subject of when and why to claim credit for attacks see "Terrorism and Claiming Credit: The Debate" in *Terrorism and Political Violence* 9:1 Spring 1997, pp.1-19.

issued. The United States didn't require a claim of responsibility to know where responsibility lay. This attack also illustrates the risks inherent in such operations. Because the aircraft exploded over land, rather than the ocean as planned, it provided gruesome images that enraged the public. Any intended message was drowned out by the grief and cries for retaliation. The image of the nose section of the Boeing 747 resting in the Scottish field became the enduring symbol of international terrorism until 9/11.

It is critical to remember that the casualty figures are not vital to the terrorist; in fact, the fewer the better. The propaganda value of an attack is more important than the lives lost; the brutal calculus of terrorism allows for only so much death.

The third phase, which began in 1994 and is ongoing, is characterized by the use of aircraft not as a means of delivering a message but as an instrument to inflict massive casualties. Terrorism experts had begun to detect a trend in the late 1980s toward an extremist's interpretation of religion by terrorist groups. Islamic groups' interpretations were the most sophisticated, but extremist violence also emerged in the Sikh, Christian, Jewish and Hindu religions, as well as so called new religions also known as cults. While much of the cult violence was directed inward³²⁸ with the notable exception of Aum Shinrikyo,³²⁹ the traditional religions oriented violence outward. This externally focused violence sought to justify extreme violence against non-coreligionists through demonization of 'the other' and rationalizing wanton destruction through making violence a sacred duty.

³²⁸ See chapter 1 page 31 note 76.

³²⁹ The 1995 sarin gas attack on the Tokyo subway by the Aum Shinrikyo cult seemed to confirm all the trends identified by terrorism experts. A religious group used a weapon of mass destruction (WMD) in this case a gas, against a civilian target in order to inflict massive casualties. While most commentators point to this attack as the first example of the trend, I think the GIA attack covered in this section is actually the first.

International civil aviation concerns about religiously-motivated terrorism characterised phase three. On December 24, 1994 Air France flight 8969 bound for Paris from Algiers was hijacked by the Algerian terrorist organization Armed Islamic Group (GIA). Four hijackers boarded the aircraft disguised as Air Algerie security staff.³³⁰ Authorities delayed departure, but were intimidated into giving the go-ahead when two of the 227 persons on board met their deaths at the hands of the hijackers. The French government decided not to allow the aircraft to approach Paris because its consulate in Oran, Algeria had received an intelligence warning that the hijackers intended to blow up the aircraft over the capital.³³¹ The flight crew convinced the hijackers that refuelling in Marseille was a must. After the aircraft touched down, hours of fruitless negotiations ensued, whereupon the terrorists demanded fuel on pain of destruction of the aircraft. French police commandos (GIGN) stormed the aircraft and, after a twenty-minute firefight, rescued the 161 remaining passengers (some had been released during the negotiations) and 3 members of the flight crew.³³² The melee ended with the deaths of the hijackers and 9 GIGN commandos were injured, some seriously. The terrorists had not revealed their exact target, but it was Paris, and the aircraft was their weapon. This change in tactics ushered in a new era for international civil aviation. No longer was civil aviation a political stage for terrorists; it was their weapon and battleground.

The GIA, a radical Islamic terrorist organization, had been attempting to establish an Islamic state in Algeria. Its brutal tactics contributed to more than 100,000 deaths during the civil war fought there throughout the 1990s. France was a particular target because of its support for the military government that denied the radicals an election victory in 1991. The suicide hijacking was the GIA's revenge.

³³⁰ Peter Harclerode, *Secret Soldiers*, p. 507.

³³¹ *Ibid.*, p. 510.

³³² *Ibid.*, pp. 509-515.

Using civil aviation as an instrument of revenge is not new, using it to target an entire city is.

It could be said, that while the GIA brought the third phase to public attention, Islamic radicals began targeting international civil aviation in the mid 1980s. The chaos of the then civil war in Lebanon had developed into a larger regional conflict, after Israel invaded Lebanon in 1982. The operation was to drive the PLO and its factions out of Lebanon. The international community condemned the invasion, and in an effort to prevent a wider regional war, as Syria was also occupying Lebanon, an international peacekeeping force comprising American, French, and Italian troops deployed to Beirut. At first the peacekeepers had the limited mission to oversee the retreat of the PLOs forces then surrounded in Beirut.³³³ The mission was quickly expanded to include establishing order and stability in the devastated city. It would end in tragic consequences for the American and French serviceman in October of 1983. The organization behind these attacks was Hizbollah, the Shia terrorist group founded in 1982, with the objective of establishing an Islamic state, modelled on Iran, in Lebanon. The architect of the attack was the leader of the organizations Special Security Apparatus, headed by Abd al-Hadi Hamadi and Imad Mughniya.³³⁴

Imad Mugniyeh's early history is obscure. He was born in Lebanon in 1962 to a middle class Shia family³³⁵ and joined the Fatah faction of the PLO. He clearly displayed talent, as he would eventually become a member of Amn al-Ri'asah, popularly known as Force 17, the personal security force for Yasir Arafat and other senior PLO leaders³³⁶. This force evolved into an operational arm directly responsible to Arafat, but it is not clear if Imad Mugniyeh had any operational role. He joined

³³³ Peter Calvocoressi, *World Politics 1945-2000*, p 429.

³³⁴ Magnus Ranstorp, "*Hizbollah's Command Leadership*" *Terrorism and Political Violence* 6:3 Autumn 1994 pp 308-309.

³³⁵ Peter Harcloerode, *Secret Soldiers*, p.458.

³³⁶ Magnus Ranstdorp, *Op. Cit.* p. 309.

Hizbollah after the PLOs departure from Beirut in 1982, and served as personal bodyguard for Sheikh Fadlallah prior to taking command of the Special Security Apparatus.³³⁷ Mughniya was the architect of the attacks against the US Embassy in 1983 and 1984, as well as the coordinated bomb attacks against the US and French forces in Beirut that killed 299 people between the two attacks. He was also instrumental in the prolonged hostage crisis that plagued Lebanon during the middle to late 1980s, and would lead to the Iran-Contra Scandal in the United States, that severely damaged the then Reagan Administration. He would become one of the few terrorists with global reach in the early 1990s with attacks in Europe and Argentina.³³⁸

It would be in the international civil aviation environment that Mugniyeh would raise to international prominence. On December 12, 1983 a Shia terrorist group. Al-Dawa Islamiya (Islamic Call) launched a series of bomb attacks in Kuwait. The twenty-one members of cell, three of whom were members of Hizbollah, was quickly identified and arrested. Six were sentenced to death, three of which were fugitives, the rest were sentenced to long terms of incarnation.³³⁹ One of the Hizbollah prisoners was Mustafa Youssef Badreddin, one of Imad Mughniya's brothers in law.³⁴⁰ One of Mugniyeh early attempts at freeing his brother in law, and others, occurred on December 4th 1984, when he supported Al Dawa's hijacking of Kuwait Airlines Flight 221 enroute from Dubai to Karachi Pakistan. The 161 passengers and crew were diverted to the Iranian capital of Teheran.³⁴¹ The hijackers were demanding the release of all 17 terrorists held by the Kuwaitis. Between arriving in Tehran on December 4th and the storming of the aircraft on December 8th around 60

³³⁷ Ibid

³³⁸ Ibid., p 324.

³³⁹ Peter Harclerode op cit, pp. 158-159.

³⁴⁰ Michael B. Kraft, "Jill Carroll's Release: Echoes of The Past" counterterrorismblog, April 4,2006

³⁴¹ David Gero, op. cite, p.83

hostages were released, but two American passengers were murdered.³⁴² The failure did not deter Mugniyeh, who would launch his most famous operation in June of 1985 against TWA 847 (which is covered in detail elsewhere). Mugniyeh operations failed to gain the release of his brother in law. Ultimately it was the Iraqi invasion of Kuwait the achieved his objective. Mygnyeh's operational vision and skill is undeniable, but what is more interesting is his shift from the secular Palestinian cause to the more religious Hizbollah one. Whether this was a pragmatic shift or an ideological reorientation remains a interesting, and open, question.

Al-Qaeda is in a class by itself in conceiving and, in some cases executing, terrorist spectaculars. The first was Ramzi Yousef's attack on New York's World Trade Center in February, 1993. Yousef and his co-conspirators had planned to topple one tower into the other potentially causing 250,000 casualties. The 1993 incident killed six and wounded thousands. The failure of the ground based attack lead the cell to consider an aviation attack.

The most audacious plan, the Bojinka Plot, was an operation designed by Khaled Sheik Mohamed, Yousef's uncle. Yousef and five co-conspirators would place bombs on eleven or twelve U.S. transpacific carriers during a 48-hour span that would have killed as many as 5,000 people.³⁴³ The explosive was to have been liquid nitrogen concealed in contact solution bottles that, in the opinion of most experts, even the most highly skilled and motivated security screener would not have been able to detect. It was to have been part of a larger operation that included an aviation suicide attack against the Central Intelligence Agency headquarters. It remains

³⁴² Ibid.

³⁴³ Simon Reeve, *The New Jackals*, pp. 90-91. Bojinka is Croatian for explosion, an apt name for this plan. Not only did the plotters intend to attack 11/12 American airliners, but also attempt to assassinate Pope John Paul II and President Clinton on each man's visit to the Philippines. Each attempt would use aircraft to attack the site of the Pope's open air mass, and to drop bombs on President Clinton's motorcade. There was also a preliminary plan for the 9/11 attacks.

publicly unclear if the operation was to have involved a general aviation aircraft, such as the one that was crashed into the White House in February 1993 by a man (not a terrorist) committing suicide, or an attack similar to those that were to occur on 9/11.³⁴⁴ Yousef was captured before the Bojinka Plot was carried out.

. Al-Qaeda demonstrated its creativity on 9/11 when its operatives turned four jumbo jets into a quartet of poor-man's cruise missiles. These events, and the case of Richard Reid and the missile attack in Mombassa (see chapter 4) were devised to inflict enormous casualties, any political message aside. The perpetrators' willingness- -even eagerness- - to die makes Phase 3 of the threat the most dangerous and certainly the most difficult to defend against.

International Civil Aviation Responds

The international civil aviation regime is sometimes slow and reactive in dealing with a dynamic security environment. Prior to the 1963 Tokyo Convention, the International Civil Aviation Organization (ICAO) had not yet determined who had legal jurisdiction over criminal matters involving aircraft. The issue came to a head during the early 1960s when Cubans fled the new Castro government in stolen aircraft. U.S. citizens, whose property had been expropriated, wanted compensation and saw an opportunity to acquire collateral against their losses through court-ordered impounding of Cuban government property. The Cuban government responded by impounding U.S. aircraft making unscheduled landings on the island.³⁴⁵ The impasse was eventually resolved bilaterally, an agreement that laid the foundation for the

³⁴⁴ Rohan Gunaratna, *Inside Al-Qaeda*, p.6.

³⁴⁵ David Phillips, *Skyjack*, pp.48-64.

Tokyo Convention. Much of Phase one's terrorist threat against civil aviation was perpetrated in the absence of international security standards and there was little discussion about creating standards. Although communist countries designated as criminals, citizens who escaped by hijacking, assigning criminality was a "non-starter" for the West. Any passenger on a hijacked plane not wishing to remain in the West after arrival was returned, as was the aircraft. The international civil aviation regime did not formally respond to the threat posed, apparently because no one viewed it as a lasting threat.

Once the second phase opened, the regime reacted. The ICAO drafted and members ratified, The Hague and Montreal Conventions establishing the criminality of aircraft hijacking and sabotage, as well as the so-called prosecute-or-extradite provisions for dealing with violators. Later conventions covered interference with airports and other ground facilities, and the controlling of plastic explosives through tagging. Together, the conventions and Annex 17 security provisions were important international statements of concerns and obligations. However, implementation was left to individual signatories. The delegating of security authority to the host state seemed logical, but it built into the international regime an inherent weakness. Because individual states were given wide latitude in interpreting the conventions and other security requirements, little universality characterizes the arrangements.

The United States, on the other hand, acted quickly. In a model that would be repeated throughout its approach to counter-terrorism, it relied heavily on science and technology. The FAA was one of the first aviation bodies to introduce psychological profiling. Although it was effective against the intended targets,³⁴⁶ non-ideological

³⁴⁶ Kenneth Moore, *Airport, Aircraft, and Airline Security*, pp. 7-8.

terrorists; there was considerable question as to its usefulness against the politically and religiously motivated hijackers of later phases.³⁴⁷

The United States views many problems as technical in nature, security issues among them. Hence, the FAA introduced X-ray machines (1972) during threat phase one and Thermal Neutron Accelerator (TNA) and other explosive detection systems in phases two and three. The United States followed the Israeli example and deployed armed security during the Federal Air Marshal (FAM) program which authorized 1,500 airborne and 230 ground based staff by August 1971,³⁴⁸ thirty years later it had fallen to 33,³⁴⁹ all on international routes. As tactics changed, governments' requirements changed, such as requiring airline ticket staff to ask the passenger "baggage question"³⁵⁰ in response to sabotage bombings. FAA requires carriers, domestic and foreign, to have an Air Carrier Standard Security Program (ACSSP) before they can operate in the United States, and required airports to provide law enforcement and security at their facilities; each requirement met with resistance.³⁵¹ The carriers deemed some of these proposals vague and costly, airports wanted the carriers to provide and fund security. A compromise was reached when the federal government imposed a surcharge on tickets to fund both airline and airport security costs. The emphasis on security mirrored the waxing and waning of the perceived threat, and arguments over costs delayed deployment of many security technologies.

³⁴⁷ According to Moore, 80 to 90 percent of hijackers appeared to fit the developed profile. While there seems to be little doubt that the profile was accurate in identifying Cubans wishing to return home, or criminals trying to escape justice, it is unclear if it would work against a trained terrorist. The profile assumed that nonprofessional, nervous, and edgy individuals by such behaviour would indicate that they were possibly up to no good. The assumption is that someone motivated by ideological commitment would be less likely to appear nervous or exhibit other telltale signs of his or her intentions. The early profiles were limited because of this underlying assumption.

³⁴⁸ Kenneth Moore, *Airport, Aircraft, and Airline Security*, pp. 8-9.

³⁴⁹ U.S. Immigration and Customs Enforcement web page, www.ICE.gov, 2004

³⁵⁰ This is the question asked about packing your own bag and carrying items for anyone else. It is designed to catch unwitting bombers. These are individuals who are carrying bombs in their baggage and are unaware of it.

³⁵¹ *Ibid.*, pp. 10-19.

The United States also undertook a reorganization of the associated counter-terrorism bureaucratic structure, designed to simplify the structure and thereby achieve greater coordination of resources and better information on the terrorism threat. The simplification process became too unwieldy and was scrapped in the mid-70s (see Chapter 4). One positive outcome was the military's development of dedicated counter-terrorism strike forces, such as the Army's Delta Force. This top-secret unit, modelled on the UK's Special Air Service (SAS) unit, was formed subsequent to the wave of hijackings and embassy sieges during that decade.

Delta Force and the U.S. Navy's counter part SEAL Team 6³⁵² are responsible for counterterrorism response actions outside the United States. Delta Force not only conducts rescue missions (such as Rice Bowl, the Iranian rescue mission) but also assists in providing security for U.S. embassies,³⁵³ as well as training counter-terrorism forces around the world. Delta Force and Seal Team 6 are both dedicated to the counter-terrorism task; neither military unit has legal authority to operate domestically.

The Federal Bureau of Investigation (FBI) established its elite Hostage Rescue Team (HRT) to be responsible for counter-terrorism operations among other things. Many federal agencies, and state and local governments established Special Weapons and Tactics (SWAT) units to provide similar coverage. The proliferation of special units has given the United States perhaps one of the world's largest counter-terrorism establishments, and while this allows for a rapid and flexible response, it also presents troublesome coordination issues.

³⁵² This unit (Sea, Air, and Land), is one of four other seal units that provide the special operations component of the U.S. navy. Seal Team 6 is the only dedicated counter-terrorism unit in the navy and, like Delta, is under the command of the Joint Special Operations Command (JSOC) it controls all dedicated military counter terrorism units.

³⁵³ Eric Haney, Inside Delta Force, pp. 213-261.

The FBI has attempted to alleviate the coordination problem through the Joint Terrorism Task Force (JTTF). Originally created in 1979 to coordinate security efforts in New York, they are currently established in all major FBI field offices such as New York, Los Angeles and Washington D.C. The JTTFs are responsible for coordinating all federal, state and local law enforcement and other emergency resources relative to a terrorist incident and its aftermath. It is also tasked with coordinating available intelligence on terrorist activities in their jurisdiction. This structure has had mixed results in practice, e.g., rapid and ultimately successful investigation of the World Trade Centre Attack in 1993, but it proved ineffective in the Olympic Park bombing investigation in 1996.

The salient weakness in the U.S. approach to counter-terrorism has been the lack of coordination at the federal level. As many as forty cabinet departments, sub-departments and independent agencies were involved in some aspect of counter-terrorism. The most recent effort to alleviate the weakness is the Bush administration's establishment of the cabinet level Department of Homeland Security (DHS) in the aftermath of 9/11. It now controls agencies ranging from food inspectors in the Department of Agriculture to the Transportation Security Administration (TSA) to the Coast Guard. The DHS's sole mission is to protect the United States from terrorism. DHS is supposed to share intelligence gathered by the CIA and FBI through the Homeland Security Council (the DHS, FBI, CIA and DOJ are currently members). Because it is a new agency it is difficult to evaluate its effectiveness. Its largest shortcoming is its lack of an independent intelligence gathering function. The CIA and FBI were not merged into the DHS despite many calls for a merger.

The CIA and FBI have attempted to cooperate in counter-terrorism through the establishment in January 1986 of the Joint Counter-Terrorism Centre (CTC) and

has had some notable success. Contrasting views of what the endeavour is supposed to achieve, as well as longstanding institutional conflicts, have served to hamper the CTC's effectiveness.³⁵⁴ The continuing battles over location and control of the new Terrorist Threat Integration Centre (TTIC) indicate that old bureaucratic battles have not receded with the new threat. Relative to an aviation incident, the FAA and FBI would be the two primary agencies but the CIA, Department of State and even the Department of Commerce could be involved. The "Helsinki Warning" in connection with the Lockerbie bombing is instructive here.

The U.S. embassy in Helsinki, Finland received a phone call on December 5, 1988 threatening an American carrier flying from Frankfurt, Germany to the United States during the middle two weeks of the month. The embassy staff speculated about a Pan Am fit. The security officer evaluated the call, and in cooperation with the Finnish security services, described it as a hoax. It is not clear exactly with whom else the embassy security staff checked. Perhaps the CIA station chief, for one. The embassy security staff did inform the U.S. embassy in Moscow that a flight its personnel and other Americans living and working in Moscow might take, was under threat (and that U.S and Finnish security officials viewed the threat as a hoax) and should make travel arrangements with this background information in mind.

The Helsinki embassy was aware of several other threats made against American carriers during the fall of 1988, but all had been viewed as false. It was unaware of arrests in Germany of terrorists with bombs designed to explode on aircraft, although the FAA and Pan Am were. The ICAO was concerned about Iranian anger and resentment at the international indifference in regard to the downing of an

³⁵⁴ Mark Riebling, *Wedge*, pp 368-369 and 386-387. The CTC was able to score a notable success with the arrest of Fawaz Younis a hijacker of a Royal Jordanian aircraft in which he beat an American passenger.

Iranian civilian aircraft over the Persian Gulf in July 1988, which the United States asserted was accidental. The ICAO had informed its members, as well as the FAA about the need for heightened vigilance.³⁵⁵ In the Lockerbie case the ICAO, State Department, FAA and Pan Am each had part of the information; Pan Am and the FAA had perhaps the most complete picture. But there was no individual or institution that put all the intelligence together. Pan Am, a for-profit company, should not be expected to provide intelligence analysis; the FAA should have had intelligence support available within the agency; while State and CIA had the ability to analyse the intelligence, but the intelligence was made available to neither.

Until late 2001 the airports and airlines handled security. An airport's governing body (local, county, state, or special governing unit) provided law enforcement and passenger and baggage screening was subcontracted by the airlines to private security companies. The system functioned but did it actually work. Screeners were usually poorly trained and underpaid, and had limited opportunities to advance, conditions that led to high turnover³⁵⁶ and generally poor and inattentive attitudes. Because it was highly unlikely that a screener had ever seen an actual explosive device (even in training) it was also highly unlikely that he or she could recognize the "real thing" if it showed up in a bag during screening.³⁵⁷ Pay and

³⁵⁵ Rodney Wallis, *Combating Air Terrorism*, pp. 27-28.

³⁵⁶ Aviation Security: Long-Standing Problems Impair Airport Screeners' Performance, *RCED-00-75*, June 28, 2000. Between April 1998 and May 1999 screening staff turnover was 125 percent at the 19 largest airports in the U.S.

³⁵⁷ It should be noted that the United States was not the only nation with a poor approach to security. Canada used the same security model. During the investigation into the Air India and Naritua Airport bombings in 1985 it was discovered that the bomb on the flight may have been detected. When the main-explosive screening machine broke down, a portable device was brought in as a replacement; neither screener on duty had ever used one before. The only on-site training consisted of the security supervisor's lighting a cigarette under the portable, thereby setting off the alarm so the staff operating it would know how it sounded. Shortly after that brief session, the alarm did sound, but instead of hand searching the bag it was allowed to proceed into the hold. The operator later testified that he did not take any additional action since the portable alarm was always sounding, and he was not sure if he had the authority to open the bag in the first place. The gentleman was the senior person there at the time, but he had never worked in the airport before, only in shopping- mall security. See *Death of Air India flight 182*.

conditions have improved since the federal take-over of passenger and baggage screening.

Most airlines carry cargo as well as passengers, and cargo, too, is supposed to be screened. If cargo has been routed through a known shipper, it is presumed to have been screened and need not be screened again at the airport. But an airline may not be certain of the cargo's origins and how many shippers it has passed through prior to its arrival at the known target shipper. It is possible that cargo is not screened by any shipper in the chain, if each shipper it passed through is "known" to the previous one. Take the example of shippers A, B, and C and one carrier; shipper C is a known to the airline so its cargo is not checked because C is presumed to have done so. C didn't check the cargo from B because B is known to C and B is presumed to have checked the cargo, and so on down to A because B knows A and A is presumed to have checked the cargo. Of course, A may or may not have been checked in the first place, depending on whether A had a known shipper arrangement with the shipper of origin.

It is entirely possible that an explosive device could enter the hold of a passenger aircraft and never have been screened. This, in fact, happened with the United States Postal Service (USPS). Before 9/11, the USPS position was that any screening of mail in its possession without a court order was unconstitutional; thus no USPS item shipped by air was screened. We now know that Theodore 'Ted' Kaczynski, the so-called Unabomber, sent his letter bombs via airmail. Although it is unlikely that his bombs would have detonated en route, he explicitly threatened the aviation industry and perhaps unintentionally exploited a weakness in the system. The USPS has been willing since 9/11 to discuss modifying its stance.

Another shortcoming in the international civil aviation system has to do with intelligence sharing. The ICAO does not have the facilities to analyze or distribute

open-source, let alone secret, intelligence to its member states. Some of this state of affairs is because some member states support terrorists or engage in aviation-related terrorism themselves, a fact that works against the very idea of the international aviation security regime. A regime is predicated on shared values and norms; if the values and norms are being violated, the regime is rendered deficient. This issue goes beyond interpretation and resource availability to the heart of the existence of the regime. The second phase of the terrorism threat was closely connected to states and sponsorship. There seemed to be little appetite within the regime to impose sanctions on miscreants. North Korean intelligence agents were directly tied to the destruction of KAL flight 858, yet there was no effort made to suspend air links, limited as they were, or to suspend North Korea from any other international body. Libya's involvement in the Lockerbie and UTA bombings is a similar case. Sanctions were imposed through the UN Security Council, not the ICAO, even though the latter has jurisdiction in such matters. This weakness in the exercise of jurisdiction is exacerbated when the assailants are not state actors or even state-supported.

Phase three of the threat to civil aviation began in 1994 and a decade later is still unfolding. The Christmas hijacking of Air France flight 8969 introduced the possibility of suicide attacks. It is admittedly unclear what the international civil aviation regime can do practically about them. If a terrorist is willing to die during an operation, punishment by the civil aviation regime becomes moot. The regime can deal with some threats -- through buying back MANPADS, for example -- but conventions in and of themselves are unlikely to reduce suicide hijackings.

The events of 9/11 underscore the fragmentary nature of the security regime. The hijackers weapons -- box cutters and razor blades -- were not airline contraband because no one had foreseen their inherent threat. Although several of the hijackers

encountered additional security when they entered the aviation system, the security staff would have had no reason to confiscate the items, even if they had found them. American carriers have now banned box cutters from aircraft and mandated that cockpit doors be locked and reinforced, but many other international carriers have not followed suit; those measures are a matter of carrier choice. The international civil aviation regime has not dealt with any of the regulatory issues emanating from the changes in the security environment. The threat is transnational; responses are national; e.g., many carriers do not close, let alone lock their cockpit doors.

The main problem with the regional response is that it has been haphazard. Individual nations have taken the initiative in closing gaps in security, but the regime has been slow to systematize improvements. The United States has increased in-flight security by reinforcing cockpit doors, increasing the number of sky marshals, and arming of pilots but has reduced security by ending the mandatory questioning of passengers relative to security, because the questions were irrelevant to 9/11. The FBI in 1999 had assigned almost one thousand additional agents to counter-terrorism duties bringing to fourteen hundred the number of agents deployed against terrorism,³⁵⁸ and increased the security budget by 10 percent. In 2000 the FBI created the Counter-Terrorism division,³⁵⁹ but none of these steps changed the cultural problems at the Bureau..

The establishment of the Department of Homeland Security (DHS) and the Homeland Security Council (HSC) entailed significant restructuring of the executive branch. The DHS includes the Transportation Security Administration (TSA), which has jurisdiction over all domestic transportation. Its largest and most public function is passenger and baggage screening, a major change after the government had resisted

³⁵⁸ Paul Pillar, Terrorism and U.S. Foreign Policy, p. 80.

³⁵⁹ *Ibid.*

such a role for decades. The trauma of the suicide hijackings of 9/11 required a rapid federal response so as to save the civil aviation industry. It remains to be seen if federalization was the right *practical* reaction, but *symbolically* it was the only response. There may still be a role for the government in other sectors of aviation security; cargo and general aviation issues are now being addressed. But it is manifest that if the ICAO is going to develop systemic improvements through conventions, resource sharing, or intelligence cooperation, it will only come through the prodding of its member states.

Conclusions

This chapter has discussed the tactical threats faced by the international civil aviation, during the three phases, and it briefly highlights the responses of the international regime and of the United States during each phase. What is striking about the tactics and phases is their innovation and the slow response by the U.S. civil aviation industry, and by extension, of the international civil aviation regime.

The element that links innovation and response is intelligence sharing. Terrorist groups closely observe and learn from one another's operations -- successes and failures -- and may share training camps and even sponsors, be they states or individuals. Terrorists see, communicate, and adapt much more quickly than do their potential targets. The private sector, the brunt of most attacks, is reluctant to devote resources to security, and in any case does not have access to information precedent to planning and to the allocation of resources. Governments are constrained by bureaucratic conflict, jurisdictional ambiguity, and often legal barriers to sharing information among involved parties. The international community faces all of these

conditions and is burdened by the endemic mistrust of many actors in the system for other actors.

The ICAO and particularly its security regime furnish an example. All member states agree that safe and efficient air travel contributes positively to their economies. They are also outspoken about their desire to suppress criminal activity against aviation. Yet at the same time, many signatories to the aviation conventions support the very groups that are assaulting aviation. Libya, North Korea, and Syria are culprits in this regard. Because some member states are actively sabotaging the regime they profess to support, the resolve of other member states to strengthen the security regime, particularly relative to the vital need to cooperate on intelligence, is diminished. September 11 and its aftermath may have caused some states that support terrorism to rethink their actions and policies, but it is unclear what impact that will have on the likes of Al-Qaeda.

Chapter 4 The Structure of U.S. Domestic Counter-Terrorism

The attacks on the World Trade Centre and the Pentagon transformed the debate on how internal security in the United States should be thought about and organized. The debate cuts to the heart of the American view of national governance: the federal role should be minimal and the people have primacy. The federal government is constitutionally limited to providing for the common defence, ensuring domestic tranquillity,³⁶⁰ and “guaranteeing a Republican form of government for the states.”³⁶¹ Fear of a tyrannical central government underlies the Second Amendment’s guarantee of the right of the individual to bear arms and the right of the state to maintain militias. The Founders’ experience with England also influenced their views against maintaining a standing army and the use of the military in law enforcement. Thus, throughout much of U.S. history there has been little federal law enforcement and a minuscule standing army.

Law enforcement has been consistently viewed as a local responsibility; even in the current age of increasing federalization, more than 38,000 of the 40,000 American law enforcement agencies are local (municipality and county). This means that 82 percent of all sworn personnel are local.³⁶² If state police agencies are included, perhaps 1,000 in all,³⁶³ 92 percent of law enforcement officers in the United States are non-federal.³⁶⁴ These figures do not include the private security industry,

³⁶⁰ U.S. Constitution. Preamble.

³⁶¹ U.S. Constitution, Art. IV, Sec. 4.

³⁶² F. Verbrugger, “Euro Cops? Just Say Maybe, European Lessons from the 1993 Reshuffle of US Drug Enforcement,” *European Journal of Crime, Criminal Law and Criminal Justice* 1995:2 p. 153.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

which has more officers than any level of government, and is responsible for providing security for many prestigious targets including the aviation industry.

It was not until the early twentieth century that states began to develop their own enforcement capabilities, and hence, up to that time, local law officers were the first, and in most cases the only, effective police presence. If a serious civil disturbance occurred, the state militia was deployed to restore order. The limited scope of federal law and the lack of a federal justice agency (the U.S. Justice Department was not established until 1870) dictated ad hoc federal enforcement. The small and fragmented law enforcement/security establishment may have been deemed the most appropriate way to maximize liberty and security, but its weaknesses were dramatically highlighted in the fall of 2001.

Three primary federal entities are dedicated to internal security/counterterrorism: the Federal Bureau of Investigation (FBI), the military and the intelligence community. The historical development of each is briefly recounted below.

The Federal Bureau of Investigation

In 1908 the Bureau of Investigation (later to be called the Federal Bureau of Investigation, FBI) was founded as an investigative arm for the U.S. Department of Justice. Until then, investigations had been contracted out to private firms, such as the Pinkerton Agency, or to another federal agency, the Secret Service.³⁶⁵ The FBI had limited criminal jurisdiction and was not initially involved in internal security.

³⁶⁵ The Secret Service is an arm of the U.S. Treasury Department. Founded in 1865 to combat forgeries, it did not assume the full-time role of protecting the President until 1902.

With the adoption of increased security measures during World War I, especially the Espionage Act, the FBI began to enter the security area.³⁶⁶ In the aftermath of the war, the Bureau was used against domestic subversive organizations such as the Communist Party and the Ku Klux Klan (KKK). During the 1920s and 1930s, its activities centred on criminal matters, but continued against the Communist Party and the German-American Bund (pro-Nazi Americans). By then, the FBI had also gained a limited foreign intelligence role by means of its agents in Latin America. As World War II approached, the Bureau was firmly established as the principal domestic intelligence/security agency and as one of four foreign intelligence gathering bodies.

The Military

Before the Civil War there was very little in terms of a permanent U.S. military structure. With a generalized national aversion to a permanent standing army, the U.S. Navy was relied on to provide the first line of defence against invasion. The few internal uprisings that did occur, such as Shay's Rebellion (1786-1787) and the Whiskey Rebellion (1794), were quelled by state militia or a display of federal force. Once these and the two foreign wars (the War of 1812 and the Mexican American War 1848) were things of the past, the federal army was reduced, and the federalized militia were demobilized. The Indian wars of the period did not require a major force.

The Civil War and particularly its aftermath formalized many of the policies regarding internal security that exist currently. It was a time of "firsts" for the United States, primarily the use of the military in civil affairs during Reconstruction. During

³⁶⁶ FBI home page.

the war, the regular military had been used to suppress draft riots in the North, and to administer occupied territory in the South. Both initiatives were understandable but disquieting to much of the populace. Upon the war's end, civilians took over administering the occupied south, but the military remained to ensure civil authority. The army had some notable achievements, such as suppressing the KKK, but the corrupt civil administration of the occupation was such an abuse that Congress ended by separating civil and military law enforcement.

The Posse Comitatus Act of 1878 prohibits any person from "wilfully" using any part of the military services as a posse comitatus or to otherwise execute the laws of the United States.³⁶⁷ The penalty for doing so is a fine of not more than \$10,000 or imprisonment for not more than two years, or both.³⁶⁸ Exceptions to the ban are possible only if Congress acts or the Constitution expressly authorizes such use.³⁶⁹ In effect, the military is not prohibited from civilian law enforcement, but it must have specific authorization to engage in it. The federal military has been used in such a fashion, in the school desegregation disturbances in Arkansas in 1957 and in support of local law enforcement during urban riots like those in Los Angeles in 1992. Soldiers are used frequently for these types of missions, but they are usually supplied by the state-controlled National Guards and not by the U.S. Army. Nothing in the Posse Comitatus Act prohibits the use of the military in foreign arrests; thus in Operation Just Cause (the 1989 invasion of Panama), military forces were used to serve an arrest warrant on General Manuel Noriega.

³⁶⁷ Geoffrey B. Demarest, "The Overlap of Military and Police Responsibilities in Latin America," *Low Intensity Conflict and Law Enforcement*, 4:2 1995, p. 238.

³⁶⁸ *Ibid.*

³⁶⁹ *Ibid.*

Until World War II, there were two military intelligence agencies: the Office of Naval Intelligence (ONI)³⁷⁰ and the Military Intelligence Division (MID)³⁷¹ of the army. ONI, founded in 1882, focused on naval adversaries, especially in the Pacific; MID, founded in 1885, focused on military threats to the United States, mainly in Europe. The tools used for this intelligence included Human Intelligence (HUMINT) provided by Defence Attaches and Signals Intelligence (SIGINT), or code breaking.

The Intelligence Community

The State Department had a SIGINT operation (focusing on diplomatic codes) called the “black chamber”³⁷² into the 1920s, but Secretary of State Henry Stimson ordered it closed with the famous line “Gentlemen do not read each other’s mail.” The black chamber would return just before the World War II and scored some major coups. By the 1940s the United States had four foreign intelligence agencies-- the FBI, ONI, MID and State’s, -- and one domestic agency, the FBI. Confusion and overlap would bedevil U.S. intelligence throughout the war. The Office of Strategic Services (OSS) was established to coordinate intelligence and the special operations against the Axis powers throughout enemy territory. It did have some success, particularly in Western Europe.³⁷³ Its overall value in the war effort was limited. International civil aviation was in an embryonic stage prior to World War II and was not viewed as a target for political subversion or sabotage, and accordingly, none of the above security services paid it any attention.

³⁷⁰ Christopher Andrew, For the President’s Eyes Only, p. 25.

³⁷¹ Ibid.

³⁷² Ibid. p. 29.

³⁷³ Tom Mangold, Cold Warrior James Jesus Angleton, pp. 21-22.

The Intelligence System From 1945 to September 11, 2001

The end of World War II established the United States as the leader of the free world in the bi-polar struggle against Soviet Communism. In contrast to the post-World War I period, the United States recognized the nature of the strategic threat to itself and its allies, and embraced its new role. The unfamiliar world circumstances required a systematic rethinking and reorganization of the available national security structure. The seminal document of the Cold War era is the National Security Act of 1947. It did not deal specifically with terrorism or even subversion, but established the first centralized security structure. Its authors recognized that the security structure of the isolationist pre-war period was no longer sustainable, and wanted to put a strong, centralized structure in place without creating a police state.

The National Security Act of 1947 established a formal intelligence community: the National Security Council (NSC), the Central Intelligence Agency (CIA), and the unified Department of Defence in which the Joints Chiefs of Staff are the principal military committee. The statutory voting members of the NSC are the president, vice president, and secretaries of state and defence; statutory non-voting members are the director of the CIA and the chairman of the Joint Chiefs of Staff and the NSC advisor.

The importance of the NSC cannot be overstated: it is the centre of security policy making. The NSC structure is imperfect because staff is assigned from various federal agencies, and the span of its authority is not always clear. Even so, it was a major step forward in addressing the pre-World War II deficiencies. The special assistant to the President for national security is the President's primary advisor on all security matters. NSC does not deal with domestic aspects of national security. Prior to September 11 there was no corresponding domestic body. President Bush changed

this with his address to Congress on September 20, 2001 establishing the Homeland Security Council, but there is still no statutory authority for the Homeland Security Council and there remains no domestic intelligence service. The CIA is under the “direction”³⁷⁴ of the NSC and the NSC provides the focus that was lacking during World War II.

The 1947 National Security Act also created a civilian intelligence agency, for the first time in U.S. history, which was an emblematic bureaucratic compromise. The new CIA would combine the gathering, production, and dissemination of foreign intelligence gathered by the Central Intelligence Group (the intelligence-gathering successor to the OSS) with the operational capability of the remnants of the OSS. In addition it would “coordinate the intelligence activities of the several government departments and agencies. . . .”³⁷⁵ Its director would serve as the titular head of the entire intelligence community as well. To overcome objections of the military, the new agency was limited to gathering intelligence not already being carried out for military purposes. The FBI was concerned that the CIA would compete with it in matters of domestic security³⁷⁶ and a trade off was arranged: the FBI ceded its Latin American operations to the CIA in exchange for certain language in the act: “the Agency shall have no police, subpoena, or law enforcement powers or functions, nor shall it have any functions concerning the internal security of the United States except as specifically authorized by Secs. 4 (a) (8) (9) and (10) of this Act.”³⁷⁷

The authority of the CIA goes beyond collection of information; it can “perform such other functions and duties relating to foreign intelligence as the

³⁷⁴ Christopher Andrew, op.cit. 169.

³⁷⁵ Ibid., pp. 169-170.

³⁷⁶ Mark Riebling, Wedge The Secret War Between The FBI and CIA, pp. 76-77.

³⁷⁷ The National Security Act of 1947, from Cold War Documents web page.

President or the Authority may direct.” Wrongdoing that has occurred over the years had been “justified” on the basis of this section.

The third component of the intelligence structure was a unified cabinet-rank Department of Defence. Its Joint Chiefs of Staff is composed of the highest ranking officers of each service and whose chairman is the president’s senior military advisor. The goal of the set-up was to overcome inter-service rivalries and enable a broad strategic view.

The National Security act of 1947 has two key shortcomings: its failure to focus on domestic subversion (although there is no legal prohibition), and when viewed through the lens of counter-terrorism principles of coordination of command, control and intelligence, it actually fails to coordinate any of these functions. But for a nation with an abiding distrust of an overweening state and reservations about the centralization of security powers within the national government, this was a major shift. The oft-quoted answer of U.S. Senator Arthur Vandenberg, who, when asked by President Truman how to sell the public on taking up the leadership of the free world replied, “you have to scare them to death,” helped to shift opinion.

The United States had until September 11, 2001 faced the same kind of threat from the Soviet Union, so its policy on terrorism had always been reactive. Its laws and structures were responsive, not forward looking. Hence, when the United States faced the implications of Israeli athletes murdered in the Munich Massacre in 1972, it had in place no policy and no dedicated structure. Despite the many metamorphoses of the counter-terrorism effort during the past three decades, two principles endure: the United States does not negotiate with terrorists, and terrorism is a criminal act. These principles, articulated by the Nixon administration (1969-1974), have since been honoured more in the breach. The primary difficulty facing the United States in

the late 1960s and early 1970s was its lack of experience in dealing with terrorism both in the domestic and international arenas; there was little precedent to draw upon.

The United States had not dealt with a sustained, armed domestic threat since the end of the American Indian wars in the late 1800s. Law enforcement or the military handled political violence that did arise if the local authorities lost control. Agitation was tackled as a foreign-inspired problem and assigned to the counter-intelligence section of the FBI. Since the 1920s the FBI had been operating against communists and other enemy groups; during World War II it had used infiltration, break-ins, misinformation and other tactics customarily followed by a foreign counter-intelligence operation. With the outbreak of political violence in the 1960s this program was enlarged and became the infamous Counterintelligence program (COINTELPRO). The large-scale operation ran until the early 1970s and targeted communists, socialists, student groups, civil rights groups, the KKK and armed organizations such as the Black Panthers and the Puerto Rican groups.³⁷⁸

The CIA (in violation of its charter), the military (without authorization), the FBI, and agencies such as the Internal Revenue Service (IRS), were also involved in domestic intelligence operations, largely against the so-called New Left -- using legal, quasi-legal, and illegal methods. The government perceived the threat to be much larger than it actually was, which led to many abuses. The CIA violated explicit prohibitions against domestic operations and the military, at the very least, flirted with violating the Posse Comitatus Act. The gathering of intelligence in and of itself was not covered; but its distribution to law enforcement agencies could be seen as assisting law enforcement without explicit authorization and it was thus illegal.³⁷⁹ Many argue that the overreaction provided the terrorists with the propaganda victory

³⁷⁸ The CIA and the Security Debate: 1971-1975, pp. 194-195.

³⁷⁹ *Ibid.* pp. 137-140.

they needed, by showing the government to be oppressive. But the very fact that citizens, using the Freedom of Information Act and congressional hearings, exposed the abuses, assured the public that the system, however flawed and slow, still worked.

The primary outcome of the congressional hearings into the political abuses of the 1960s and 1970s was the introduction of the “Levi” and later “Smith” guidelines for domestic security operations. The key element in both guidelines is stages of operations and the tools available at each stage. The Levi guidelines prohibited infiltration and the use of informants until a formal investigation was opened; the Smith guidelines relaxed the prohibition. Both sets of guidelines rest on the need for a criminal predicate before a formal investigation can begin. Neither set prohibits gathering public information on a particular group, but both prohibit open-ended maintenance of information if there is no criminal investigation. The federal role was not always detrimental: through the Law Enforcement Assistance Agency (LEAA) federal funds are distributed to support research and training for local and state law enforcement.³⁸⁰

Although the domestic political scene was unstable, it had little impact on the structure of the domestic security apparatus. International terrorism had the opposite effect. The Nixon administration was the first to face international terrorism and it developed many of the policies and tools still in use today. The key points were no negotiation with terrorists, classification of terrorism as a criminal activity, and the need for multilateral solutions.

The administration established the ten-member Cabinet Committee to Combat Terrorism during the Munich Crisis.³⁸¹ It served as the lead body in coordinating and evaluating the U.S. responses to terrorism, as well as evaluating the funding and

³⁸⁰ Marc Celmer, *Terrorism, US Strategy and Reagan Policies*, p. 43.

³⁸¹ *Ibid.*

merits of various programs. By the time the committee was replaced in 1977, it had expanded to 21 members and its working groups had 101 attendees.³⁸² In evaluating the first counter-terrorism effort, analyst Brian Jenkins told a Senate subcommittee hearing that the Cabinet Committee was too weak and inexperienced and suffered from a general lack of governmental interest in its effectiveness.³⁸³ However, the administration had enhanced aviation security by instituting both metal detectors and a passenger-profiling system in response to the wave of hijackings between the United States and Cuba during the early 1970s.

The Carter administration (1977-1981) ordered a review of all counter-terrorism structures, which led to the disbanding of the Cabinet Committee and the transfer of its responsibilities to the NSC and its new Special Coordinating Committee (SCC).³⁸⁴ The SCC had three tasks: to supervise and coordinate the interagency group, to resolve jurisdictional conflicts and to ensure that decisions were taken at the highest levels of government.³⁸⁵ The administration also adopted the lead-agency concept, which gave jurisdiction over a terrorist event to the agency or department most involved-- for example, the Justice Department/FBI had the lead relative to domestic terrorism, the State Department over international terrorism, and the Transportation Department/FAA over aviation incidents.³⁸⁶

Despite the administration's effort to clarify lines of authority over terrorism, it created more confusion in aviation incidents, in which the FAA had responsibility over aircraft when they were in operation, (i.e., when an aircraft is using its own power and is no longer connected to the terminal) but the FBI had responsibility at other times. The confusion lay in the fact that the FAA did not have its own

³⁸² Ibid.

³⁸³ Ibid. pp. 18-19.

³⁸⁴ Ibid. p. 19.

³⁸⁵ Ibid.

³⁸⁶ Ibid. p. 20.

negotiators and had to rely on the FBI, so irrespective of an aircraft's operational status, FBI personnel conducted negotiations and were in *de facto* charge of a situation. The ambiguity was corrected and minor modifications were made, but the overall structure is still in place. The administration also cooperated with its G-7 partners in the Bonn Declaration (named after the capital of then West Germany, site of the summit) in 1978, which committed its members:

in cases where a country refuses (to) extradite or prosecute those who have hijacked an aircraft and /or do not return such aircraft, the Heads of State and Government are jointly resolved that their governments should take immediate action to cease all flights to that country.

At the same time, their governments will initiate action to halt all incoming flights from that country or from any country by the airline concerned.³⁸⁷

The Bonn Declaration and the 1987 Vienna Annex to Bonn (imposing sanctions on states that participate in acts of sabotage) provide the framework for international cooperation. Both documents illustrate the increasing frustration caused by hijacking and aircraft sabotage. They also underscore the weakness of the ICAO security regime, which does not require that a suspected hijacker be "prosecuted or extradited," only that a case be sent to the appropriate authorities for determination. Hijackings often ended in states sympathetic to the hijacker's cause, thus enabling an accused to escape prosecution or to be prosecuted for minor offences and serve only a minimal prison sentence. The goals of the declarations and annex are reasonable and desirable, but the declaration is from outside the ICAO and UN regime and of dubious legality.³⁸⁸

The Reagan administration redesigned the organizational flow chart -- replacing the SCC with the Interagency Group on Terrorism (IG/T), and adding the Office of the Vice President and the DEA (Drug Enforcement Administration) to the

³⁸⁷ Ruwantissa I.R. Abeyratne, *Aviation Security*, p. 174.

³⁸⁸ *Ibid.* pp. 174-182.

IG/T, but instituted no substantive changes. The administration did create the Public Diplomacy Group to make the public aware of the threat and coordinate the actions of various agencies that were already involved in public outreach.³⁸⁹ The United States has maintained that terrorism is a criminal activity, one that should be fought by all nations. It has avoided the problems of defining terrorism, but has sought to punish the tactics of terrorists. It has supported international treaties criminalizing aircraft hijacking and obligating states to extradite or prosecute hijackers (Tokyo Convention of 1963, Hague Convention of 1970, and Montreal Convention of 1971).³⁹⁰ The UN adopted and the United States has signed and ratified the 1973 Convention on Crimes against Internationally Protected Persons (1973)(i.e., diplomats and heads of state.)³⁹¹ After the *Achille Lauro* hijacking and the attacks on the Rome and Vienna airports, the UN enacted conventions protecting marine vessels and international airports.³⁹² The Reagan administration was instrumental in the passage of these conventions. Congress authorized the State Department's Anti-Terrorism Assistance Program (ATAP) to "help friendly governments counter terrorism, specifically [to] enhance the skills of relatively inexperienced governments."³⁹³

The Omnibus Anti-Terrorism Act of 1986 designated terrorism against U.S. nationals abroad a federal crime. It not only made the FBI's role in investigating these crimes explicit, but also gave the U.S. agents extraterritorial arrest authority. The so-called long-arm-of-the-law statute has been used both unilaterally and in cooperation with foreign governments.³⁹⁴

³⁸⁹ Ibid. p. 23.

³⁹⁰ Valentin A Romanov, "The United Nations and the Problem of Combating International Terrorism," *Terrorism and Political Violence*, p. 293.

³⁹¹ Ibid.

³⁹² Ibid.

³⁹³ Marc Celmer, *Terrorism, US Strategy and Regan Policies*, p. 31.

³⁹⁴ Ian O. Lesser, *Countering the New Terrorism*, p. 113.

The CIA and the military were also given enhanced capabilities. The CIA established a Counter-Terrorism Centre (CTC) within the Directorate of Operations to collect, analyze, produce, and disseminate information on terrorists and their organizations in cooperation with the FBI.³⁹⁵ The CTC was viewed as merely a switching centre³⁹⁶ for the exchange of information. Although it did take on some operational roles, it does not seem to have provided any strategic threat assessment. The CIA's loss of "human intelligence assets" during the 1970s and its change to high-tech intelligence gathering crippled its ability to gather information on terrorists. The agency also reflected the general perception within the government that terrorism was a low priority, so resource tasking was limited. The Reagan administration attempted to reverse this passive role with National Security Decision Directive 138 (NSDD 138) on April 3, 1984 that called for more active measures against terrorists.³⁹⁷

The directive also applied to the military and its various elite forces. Since the mid 1970s the United States had been attempting to develop elite counter-terrorism units. After considerable bureaucratic struggle, the 1st Special Forces Operational Detachment Delta (Delta Force) was activated in 1977 and became operational in 1979.³⁹⁸ Delta Force and the navy's Seal Team Six are charged with counter-terrorism operations and were part of the larger special operations forces. By the mid-1980s the elite units were all under the jurisdiction of the assistant secretary of defence for low-intensity conflict, and were operating through the Joint Special

³⁹⁵ Mark Riebling, *op.cit.*, p. 368.

³⁹⁶ *Ibid.* p. 369.

³⁹⁷ Marc Celmer, *op.cit.*, p. 3.

³⁹⁸ *Ibid.* p .67.

Operations Agency (JSOA).³⁹⁹ This unified structure was recommended for the entire counter-terrorism establishment, but only the Pentagon has adopted it thus far.⁴⁰⁰

Law enforcement agencies at all levels have also established elite units, basically special weapons and tactics (SWAT) teams. The FBI established its crack Hostage Rescue Team (HRT) to avoid the legal quagmires of the military's conducting counter-terrorism operations within the United States.⁴⁰¹ All domestic units are modelled on the Delta Force and Seal Team 6 and are responsible for hostage rescue and siege and other highly sensitive security operations. The development and use of these teams are controversial aspects and are discussed later.

Beyond the aforementioned treaties, laws, and special units, the government has employed other tools to deal with terrorism, such as metal detectors at airports and other public buildings, parking restrictions at most government facilities, increased uniformed security at major buildings and public events, and bomb-detecting dogs -- all to protect people from a highly structured identifiable threat. The terrorists were deemed to be fighting for an identifiable goal, to have an identifiable range of targets, and endeavoured to limit casualties because they thought mass casualties were counter-productive. Terrorism was viewed at this time as a tactical threat: an attempt to topple the government so as to take control of a state, not to destroy the state system.

Blurring the Lines: The New Structures of U.S. Counter-Terrorism

The end of the Cold War brought a rethinking of the U.S. national security structure. There were calls to downsize the military, to move the CIA into the State

³⁹⁹ Ibid. p. 71.

⁴⁰⁰ Ibid. p. 53.

⁴⁰¹ Danny Coulson and Elaine Shannon, No Heroes, Inside the FBI's Secret Counter Terrorism Force, pp. 134-135.

Department, and to retask the counterintelligence forces of the FBI with anti-crime activities. The George H. W. Bush administration (1989-1993) began the rethinking process, and it gained important momentum during the Clinton administration (1993-2001) whose expressed desire was to “reinvent government.” Counter-terrorism policy was also reviewed, but the fundamental principles did not change: no negotiations, terrorism is a crime, and the United States will cooperate with other nations to prevent and punish terrorists and their crimes.

The downing of Pan Am flight 103 over Lockerbie, Scotland on December 21, 1988 was the first time the United States had faced a major aviation sabotage incident. Months of painstaking international investigations implicated the government of Libya. Nine months later, Libya was implicated in an attack on the French aircraft UTA flight 772 over the Niger desert. The Libyans denied responsibility, but the UK, the United States, and France produced sufficient evidence to indict Libyan officials. The first Bush administration was multilateralist to its core and immediately began to implement a strategy that placed international institutions at the heart of the response. The administration attempted to get the world community to force Libya to comply with the spirit of the Hague Convention and render its accused citizens to Scotland for prosecution. They did not want to permit the Libyan government to escape its responsibility by strictly complying with their international obligations (the so called prosecute or extradite provision), so the allies would try to force the Libyans to extradite the accused.⁴⁰²

None of the victim states was willing to permit the Libyans to escape justice by resort to the convention, because they knew that the suspects would never face either prosecution or extradition. Accordingly, the three states developed a strategy to

⁴⁰² Please see chapter 1 for a full discussion on the Hague Convention.

isolate Libya. First, they jointly demanded of Libya: (1) that it render the named suspects to the United States or the UK; (2) that it provide all information it had with respect to the Lockerbie bombing; and (3) that it compensate the victims.⁴⁰³ The UK, U.S. and France then used their positions on the United Nations Security Council to begin to isolate Libya. The allies officially informed the president of the Council of the issues and asked for assistance. On January 21, 1992, the Security Council adopted Resolution 731, which asserted that it was “*deeply concerned*, over the results of the investigations which implicated Libyan officials”⁴⁰⁴ and “*strongly deplored*” Libya’s ineffective response to the requests of the three victim states, and demanded immediate compliance with the above requests.⁴⁰⁵ Libya claimed that it had no evidence to connect the named suspects to either bombing and that the Western evidence was “less than a laughable piece of fingernail.”⁴⁰⁶ Because of Libya’s isolation in the United Nations it was unable to stop the adoption of the resolution.⁴⁰⁷ Libya countered the resolution by bringing suit against the United States in the International Court of Justice (ICJ) in March 1992, in an attempt to get the ICJ to prevent the Security Council’s ordering Libya, in a pending second resolution, to extradite the Pan Am suspects to the United States or UK.⁴⁰⁸ Libya had argued before the Council that because it did not have an extradition treaty with either country and because the Montreal Convention allowed nations to try their own citizens, it was under no obligation to extradite the accused.⁴⁰⁹ It asked the ICJ to decide if the Council or the Montreal Convention served as the basis of international law. The

⁴⁰³ Ruwantissa Abeyratne op cite p. 117

⁴⁰⁴ United Nations Security Council Resolution 731 p. 51.

⁴⁰⁵ Ibid., p. 52.

⁴⁰⁶ Allan Gerson and Jerry Adler, op. cit, p. 101.

⁴⁰⁷ Ibid., p.103.

⁴⁰⁸ Ruwantissa I.R. Abeyratne, *Aviation Security*, p. 117.

⁴⁰⁹ Allan Gerson and Jerry Adler, op. cit., p.102.

court ruled for the U.S./UK position, that the Council had the authority to override provisions of international conventions, and in this case Libya had to comply.⁴¹⁰

The ICJ hearing proceeded despite the passage of Council Resolution 748 on March 31, 1992. As the Libyans had feared, the resolution “strongly deplored”⁴¹¹ the lack of cooperation, demanded immediate compliance with Resolution 731 and imposed an air and arms embargo on Libya, until among other things, it extradited the attackers (the six suspects in the UTA bombing, one of whom was Qaddafi’s brother-in-law, who had already been found guilty *in absentia* by the French courts). Many families of the Pan Am victims wanted an oil embargo imposed as well, so Libya would face economic disaster if it failed to comply, but Qaddafi’s regime avoided the extreme penalty for the moment. This was the first time the Vienna Annex to the Bonn Declaration was implemented; the fact that this happened again highlighted a weakness in the aviation security regime.

Almost four years after the bombing of Pan Am 103, Libya was still flouting the will of the international community. On November 11, 1993 the Security Council ran out of patience and: (1) froze all Libya’s financial assets, other than export related funds, (2) banned all technical support for the Libyan oil industry, including the supplying replacement parts, and (3) ordered all Libyan airline offices closed, and (4) banned other states from supplying spare parts and training for any airline staff.⁴¹² Libya had agreed to surrender the suspects in the Pan Am for trial to a neutral third party, but this was rejected by both the United States and the U K. The crime had taken place in Scotland and would be handled by its legal system.

⁴¹⁰ Puwantissa I.R. Abeyratne, *op. cit.*, p. 120. For a full and fascinating legal discussion of the position and role of the ICJ and UNSC see pages 117-127.

⁴¹¹ United Nations Security Council Resolution 748, p. 1.

⁴¹² *Ibid.* p. 3.

Almost a decade after the attack and five years of punishing sanctions, a deal was finally reached whereby the trial would take place under Scottish law with Scottish judges, but in a former NATO base at Camp Zeist in the Netherlands. The two suspects, Abdel basset Ali Al-Megrahi and Al Amin Khalifa Fhimah, were sent to Camp Zeist in April, 1999 and the long-awaited trial began on May 3, 2000. On January 31, 2001 the verdicts were handed down: Al-Megrahi was found guilty and Fhimah was found not guilty and was transported back to Libya. Al Megrahi began serving his life sentence in Barlennie Prison, outside Glasgow. Libya's cooperation with the prosecution allowed air sanctions to be "suspended," but they were not lifted until September, 2003 once Libya had taken responsibility for the bombing of Pan Am 103, admitted the use of state-supported terrorism and renounced it, and compensated the victims' families. The Libyan government claimed to the United Nations Security Council that it "accepts responsibility for the actions of its officials" and agreed to compensate the families of PA 103 and UTA 772. The Pan Am 103 families were to receive about 10 million U.S. dollars per family, while the French families, who had settled earlier, were getting only 33 million total. The long awaited deal was nearly blocked by the French because their settlement was too low, and it was resolved so that each French family would get an extra million dollars in the settlement. The U.S. payments were to be distributed in three installments, the last based on the U.S removing Libya from its list of state sponsors of terrorism, which had not yet happened as of March 2005.

The fourteen-year-long-odyssey is in its final stages and leaves in its wake some clear lessons for counter-terrorism and aviation security. Three of the five permanent members of the Security Council, and some of the most powerful members of the aviation community, indicated they had no faith in the existing conventions and

created an ad hoc structure. The ICAO was never even consulted on the substance of the issue, only asked to strengthen the security responsibilities spelled out in Annex 17.⁴¹³ The Bush administration (1989-1993) did underscore its commitment to multilateralism by working through the UN, which has the authority to make and enforce policy decisions for its agencies (as established in the ICAO by the South Africa controversy; see Chapter 1), but it can be argued that a regime is at best undermined or at worst rendered pointless if it is circumvented when participants find it inconvenient. The one contribution the ICAO did make under U.S. and British pressure was to strengthen Annex 17 with regard to baggage screening, an addition still not fully implemented by U.S. carriers.

The sanctioning of Libya eventually led to a partial victory with the extradition of Libya's two suspects and the conviction of one of them in 2001 in connection with the Pan Am attack, but none of those convicted in the UTA attack has yet surrendered to France. Although the international approach through the UN was successful, it seems to contradict the recommendations of the President's Commission on Aviation Security and Terrorism, established by Executive Order in 1990 to investigate the many failures in the structure and implementation of aviation security, that the "United States should continue to work through ICAO to improve aviation security internationally."⁴¹⁴ But -- should a nation cooperate with an institution and a regime in which it no longer has confidence? The Commission did not even seem to acknowledge that there was any problem with the existing regime, even as its creators acted otherwise. The Commission also recommended an increase in intelligence, particularly human intelligence,⁴¹⁵ but did not indicate that terrorism constituted a strategic threat. It also made recommendations on tactical security issues, which were

⁴¹³ Eugene Sochor, The Politics of International Aviation, p. 153.

⁴¹⁴ Report of the President's Commission on Aviation Security and Terrorism, p. 40.

⁴¹⁵ *Ibid*, p. 125.

necessary and implemented, but did not study any strategic issues. These several shortcomings do not diminish the work of the commission. As the first body of its kind to focus on terrorism in general and specifically on the aviation security system, it embarked on a substantial undertaking and worked assiduously. The commission made important contributions to the debate on security and some sound recommendations; the two most important concern passenger and baggage reconciliation,⁴¹⁶ and general guidance on when to inform the public of a threat to aviation.

The Commission recommended that baggage and passengers on all flights within the United States have a positive reconciliation process. Authority to make the determination and when to warn the public was delegated to the FAA and air carriers. The President's Commission of Aviation Security did a commendable job, but lacking the legal authority to enforce its recommendations, it was unable to follow through on implementation. Its investigation also put in bold relief a fundamental weakness in the majority of the academic and policy communities, which had not perceived that terrorism was in flux and that international civil aviation was on the threshold of a new, more danger-fraught era.

The first Bush administration and the successor Clinton administration followed the same broad foreign policy line -- close coordination with allies and working through multilateral institutions -- and the use of the judiciary to deal with terrorism. However, the Clinton administration did take unilateral action after the East African bombings in 1998. President Bush benefited from the end of the Cold War and the desire of the international community to achieve the UN founders' goal

⁴¹⁶ A term that means the matching of each checked bag on an aircraft with a passenger. This is a fundamental security requirement that is designed to prevent a bomb being smuggled onto an aircraft in luggage that is not linked to a passenger. If a passenger checks a bag and then does not show up for the flight the bag is removed from the baggage hold. It can be transported later only if it has been hand searched.

of a truly collective security system. Libya was the ideal test case: a small rogue state that was politically isolated, and had attacked three of the five permanent members of the Security Council through its targeting of their civilian airliners. No state could or would attempt to defend Libya and its actions. The international community was being asked to enforce the principles and norms long established through both the ICAO and UN; in addition, none of the victim states was asking that the sanctioning consist of a military response, but rather judicial proceedings. This provided a substantially easier point around which to rally international consensus. Despite all factors in the allies' favor, it consumed almost a decade and a half to render justice. The potential lessons of international cooperation and the benefits of judicial response may have been overshadowed by the belief by a vocal minority that the accused and convicted bombers were not the architects of the attack. The truly guilty may have escaped. Irrespective of the lessons of this case of state supported terrorism, the phenomenon of terrorism was changing. Neither the Bush nor Clinton administrations comprehended that change, nor the fact that once the threat moved to the strategic level, diplomacy and international institutions were no longer the most appropriate ways for combating terrorism.

Change in the strategic environment did lead to calls for change in the existing federal structures. The ability to reduce security spending -- the "peace dividend" -- spurred the Clinton Administration to "reinvent government."⁴¹⁷ Some of the first changes attempted to consolidate federal law enforcement into the FBI and transfer the State Department's ambassador for counter-terrorism into a new office of global issues, thereby downgrading the position. Both attempts failed.

⁴¹⁷ Reinventing government was an idea of the Clinton administration to streamline government to make it work in a more cost effective and efficient manner. The anticipated cost saving could be used to pay down the national debt.

After the first World Trade Center and Oklahoma City bombings, the Omnibus Crime Bill of 1995 and the Effective Death Penalty and Anti-Terrorism Act of 1996 were enacted. Although both provided opportunities for various interest groups to re-fight old battles over gun control and the death penalty, they yielded an important new legal tool: the mandate requiring the Secretary of State to designate foreign terrorist organizations operating within the United States, which in turn would allow the government to target them for legal action.⁴¹⁸ Other key provisions criminalize financial transactions with states that sponsor terrorism, proscribe terrorist organizations (there are currently thirty), and makes state sponsors of terrorism liable for civil damages.⁴¹⁹

The need to reorganize the national security structure at the end of the Cold War created a cottage industry of government commissions, congressional hearings, think-tank reports and conferences. Most of the commissions centered their attention on particular issues related to terrorism. The Gilmore Commission (a congressionally appointed commission chaired by Governor Jim Gilmore, Republican, of Virginia) looked at preparedness for WMD attacks and the ability of various levels of government to respond.⁴²⁰ The three most comprehensive commissions were The U.S. Commission on National Security in the 21st Century (Co-chaired by former U.S. Senators Warren Rudman and Gary Hart, the so-called Rudman-Hart Commission) and The National Commission on Terrorism⁴²¹ (NCT, or Bremer Commission, named for its chairman, former ambassador for counter-terrorism L. Paul Bremer, later in charge of the Civil Authority in Iraq), and the National Commission on the Terrorist Attacks Upon the United States (the so-called 9/11 Commission). Only the 9/11

⁴¹⁸ Christopher Harmon, Terrorism Today, pp 248-249

⁴¹⁹ Ibid.

⁴²⁰ Charter: Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, www.rand.org.

⁴²¹ National Commission on Terrorism, from www.fas.org/irp/threat/commission.

commission addressed the changing nature of terrorism. The Rudman-Hart Commission was formed in 1999 to address the changing nature of the security threat and the way government should approach it.⁴²² Its brief did not look exclusively at terrorism, but did provide a framework for facing the new challenges. The Commission took a comprehensive look at both the structures and threats facing the United States in the 21st Century. It noted right at the start that the United States would be increasingly vulnerable to attacks on the homeland⁴²³ and that even excellent intelligence would not necessarily protect the country.⁴²⁴ While not specifically focusing on terrorism the commission did recognize the need to restructure government to deal with the new fluid environment. It also stressed the need for the government to more effectively address the strategic nature of the threat faced and to develop a more comprehensive approach to addressing the multi-threat environment. Its final report was issued in February 2001.

The NCT report has three chief weaknesses: it fails to delineate its conception of terrorism, it focuses exclusively on international terrorism, and it did not recognize terrorism as a strategic threat. It may be fair to assume that the members of the Commission had a shared understanding of the nature of terrorism, but the failure of the commissioners to have formally adopted their own definition, or those of other existing government agencies, does present difficulties. It is also understandable why the commission focused on the threat of international terrorism--for it was still the most serious—and made only passing reference to domestic terrorism. The Commission's most grievous weakness was its failure to deal with the strategic threat posed by Al-Qaeda. It predicted a "Pearl Harbor" - type surprise, but did not seem to grasp the implications of such an attack. It had access to all the classified and

⁴²² Rudman-Hart Commission Addendum Vol 1. p.VIII-IX.

⁴²³ Ibid.

⁴²⁴ Ibid. p. IX.

unclassified materials, but did not detect that the Al-Qaeda threat was profoundly different, even if its tactics were not new. The rhetoric, network connections, and audacious planning, if not operational skill, were therefore known to the Commission (the first World Trade Center bomber, Ramzi Yousef, was in custody, and his links to Al-Qaeda and other Islamists were in the public domain) but were not analyzed, let alone utilized. The NCT did, however, make some important recommendations. It recognized that the most effective tool is the prevention of terrorist incidents, achieved through a reliance on intelligence. It recommended a more aggressive intelligence and law enforcement stance, including the removal of restrictions on the CIA's recruiting of "unsavory" individuals when the recruiting is for counter-terrorism.⁴²⁵ Also, it recommended that the FBI should bring all its resources to bear on domestic security operations and disseminate information it collects⁴²⁶ to better effect. It asked that Congress should provide full reimbursement for the cost of premiums for civil liability insurance for CIA and FBI officials involved in counter-terrorism.⁴²⁷

The NCT supported continued firmness vis-à-vis states that support terrorism. Syria and Iran were to remain on the list of states that sponsor terrorism despite ongoing political changes in both countries.⁴²⁸ Further, states such as Greece and Pakistan should be punished for "not cooperating fully" with U.S. efforts to fight terrorism.⁴²⁹ One can only speculate on the impact of enforcement of the recommendation on the latter in the pre-9/11 world.

The NCT urged that the government address the use of the United States as a "rear area" for terrorist fund-raising, recruiting and weapons procurement. It stated

⁴²⁵ Christopher Harmon, Terrorism Today, .p .3.

⁴²⁶ Ibid. p. 4.

⁴²⁷ Ibid. p. 12.

⁴²⁸ Ibid. p. 16.

⁴²⁹ Ibid. p .4.

this can be achieved through (1) ratification of the UN Convention on Suppression of Funding of Terrorism, (2) the use of all means available to the government to punish and or disrupt terrorists' networks, and (3) when all other options have been exhausted, a terrorist should be expelled.⁴³⁰

Mass casualty terrorism through the use of weapons of mass destruction (WMD) was deemed a serious threat by the NCT, one that was not effectively countered. The Commission also recommended that:

- the president have a manual prepared to assist in implementing existing authority and should work with Congress to create any new legislation necessary to deal with a WMD attack;⁴³¹
- the Department of Defense should formulate plans to deal with a WMD attack and be ready to take over the role of lead agency in a mass casualty incident;
- that annual training periods be required of all agencies and Congress should restrict access to WMD materials;⁴³²
- there should be a long-term research-and-development program to develop detection and protection methods and international treaties to protect cyber resources.⁴³³

The Commission discussed neither conventional mass casualties events, such as aircraft targeting buildings, nor preparations for such eventualities.

A final recommendation involved the structure and budgeting of the counter-terrorism system. The NCT asked that the coordinator for counter-terrorism have a

⁴³⁰ Ibid.

⁴³¹ Ibid. p. 26.

⁴³² Ibid. p. 4.

⁴³³ Ibid. p. 5.

greater say in the budget,⁴³⁴ that Congress develop a means to comprehensively review the counter-terrorism program,⁴³⁵ and that the congressional oversight process be simplified, in light of the twelve committees with some jurisdiction over this area.⁴³⁶

What is interesting about the NCT recommendations is their moderation. Despite the heated rhetoric about the militarization of counter-terrorism, the fundamental law-enforcement-centered approach was seen as adequate to the task. There were recommendations for clarification of existing procedures for investigating terrorists⁴³⁷ and for more aggressiveness, but none to return to the unregulated days of the 1960s and '70s. The notion of a greater need for intelligence and the sharing of intelligence is central to counter-terrorism. An enhanced role for the coordinator of counter-terrorism in the budget process is an additional critical component. The clarification of existing laws on mass-casualty incidents is useful, whether perpetrated elsewhere or in the United States. Finally, the Commission's stress on both domestic law and international cooperation also makes its recommendations worthwhile. Its other recommendations call for more human resources in the intelligence cycle and for linguists. The Commission did not specify how to gain such personnel, but perhaps the forgiveness of student loans would be an incentive. The 9/11 Commission would make several of the same recommendations in 2004, with better effect.

The three most controversial recommendations by the Commission involve the tracking of foreign students in the United States, the use of secret evidence in deportation hearings, and the use of the military in domestic incidents. The NCT

⁴³⁴ Ibid.

⁴³⁵ Ibid. p. 24.

⁴³⁶ Ibid. p. 25.

⁴³⁷ Ibid., pp. 10-11.

proposed to expand an existing pilot program that identifies foreign students who change majors⁴³⁸ (for example a student from Iran who enters the United States to study American literature and changes to nuclear physics). It is clear that the United States needs to tighten immigration controls. The monitoring of the status of individuals on student visas is appropriate, but the Commission did not clearly establish the value of this program. Is there an example of a terrorist who was actually apprehended due to a change in academic major? Do foreign students taking flight training now receive enhanced scrutiny? The Commission also failed to mention if there are special restrictions on persons from suspect countries who are entering as students in nuclear physics, chemistry, biology or other monitored majors. It is also unclear to whom this applies, though Arab-American groups fear it is targeted against them.⁴³⁹ It does seem likely that a student from Ireland would not be monitored.

The use of secret evidence gained through intelligence sources in deportation hearings is troubling but is already permitted.⁴⁴⁰ The Commission suggested more vigorous usage. Defendants are not permitted to see the evidence, let alone cross-examine the source. The process is unsettling and is currently used only in alien deportation cases. It has been used more regularly since 9/11.

The most vehement objections were against a recommendation never made: the Commission did not call for the military to take the lead in counter-terrorism, despite some widespread rhetoric to the contrary. It recommended that the military prepare to take lead agency responsibility in mass casualty incidents, particularly WMD attacks, reasoning that state and even federal civilian resources cannot match

⁴³⁸ Ibid., pp. 22-23.

⁴³⁹ CNN On-line, "US panel: Civil liberties not jeopardized by anti-terrorism recommendations," June 5, 2000.

⁴⁴⁰ National Commission on Terrorism Report, p. 23.

the resources the military can bring to bear. The military would have the lead in responding to an event, but not in investigating the perpetrators. This seems a reasonable recommendation, in that the military role would not involve a law enforcement role and hence no special legislation would be required. Still, legislation enabling the projected use of the military would mitigate potential problems. The concern raised by the misunderstanding of the recommendation highlights, not only old fears, but terrorists' new realities.

Until the past decade, terrorism was dealt with as either a domestic or an international problem. Foreign groups, other than the IRA, did not operate in the United States, and domestic groups did not venture beyond the borders. Further, there was little connection between criminal organizations and terrorists. But now the American right wing has relationships with its European counterparts, and various Middle Eastern groups have operations in the United States,⁴⁴¹ including some illegal fundraising.⁴⁴² Guerrilla groups around the world maintain alliances with drug lords to gain access to funds, weapons, and personnel; Al-Qaeda has both support and operational cells active in the United States. This blurring of the lines between terrorists and criminal organizations and the international nature of all of these new networks is termed "net war,"⁴⁴³ and is forcing governments around the world to rethink many of their security structures.

Just when the convenient distinction between international and national terrorism began to break down is not easily pinpointed. It may have been when the FBI began to exercise its long-arm-of-the-law authority and carried out overseas arrests, or when with the expansion of the legal attaché program FBI agents were

⁴⁴¹ Simon Reeve, *The New Jackals*, p. 232.

⁴⁴² BBC on-line, "Hezbollah suspects arrested," July 22, 2000.

⁴⁴³ John Arquilla et al., "Networks, Netwar, and Information Age Terrorism." pp. 39-55.

assigned to U.S. diplomatic posts to coordinate with the host nation's law enforcement communities,⁴⁴⁴ or when law enforcement adopted the weapons and tactics of elite military units, or with the CIA's growing involvement with domestic terrorism through intelligence sharing and interference with immigration law.⁴⁴⁵ Whenever it occurred, it is manifest that both the government and terrorists are operating in a new environment. Is the government properly structured to operate in this environment? The answer is no. Prior to 9/11, thirty or so federal departments and agencies reported to as many as eighty congressional committees and subcommittees. The FAA was responsible for overseeing security at 429 major airports and attempting to coordinate the security programs of the several hundred commercial carriers, state, local, and special law enforcement bodies, and the air marshal program (33 officers responsible for in-flight security for the more than 35,000 daily flights).⁴⁴⁶ This complex and decentralized system was at best adequate for the non-strategic threat in the pre-9/11 era, but in the post-9/11 world drastic change has been needed and is beginning to be delivered.

Unlike either the Rudman-Hart or the NCT Commissions, the 9/11 Commission's recommendations were implemented with the passage of the Intelligence Reform Bill in December of 2004, with as much controversy as the establishment of the commission itself.⁴⁴⁷ It was charged with examining the attacks of that day and to recommend how to eliminate the gaps in the national security system that existed then. The Commission analyzed three areas: the ideology and history of Al-Qaeda, the specific security failings that contributed to the attacks, and

⁴⁴⁴ FBI facts and figures 2003, www.fbi.gov.

⁴⁴⁵ Simon Reeve, *op.cit.*, p. 60.

⁴⁴⁶ www.ice.gov/fams.

⁴⁴⁷ CNN on-line, "Deal Reached on Intelligence Bill," December 7, 2004.

more fundamental systemic failings of the U.S. Government in dealing with the threat posed by Al-Qaeda.

For most of the American public the Commission's report is the authoritative account of the attacks on 9/11 as well as the most readily accessible examination of Al-Qaeda and the failings of the American security system. It developed a wealth of testimony describing the personal, bureaucratic, legal, and technical conflicts that contributed to the success of the audacious attack. It did not, however, break any new ground. The history and ideological section have been covered in greater detail by many authors⁴⁴⁸ and the Joint Intelligence Committee Report provided much of the same detail on the U.S. government's failings.⁴⁴⁹ The 9/11 Commission's findings can be described in two broad areas: strategic vision and tactical implementation. Ultimately the failings on 9/11 were those of imagination.⁴⁵⁰ Policy makers were not aware that terrorism had changed to a strategic threat. No one was sure Al-Qaeda "was a big deal."⁴⁵¹ This hesitancy at the top permeated all levels of government and allowed for strategic drift. As there was no direction from senior policy makers, the fragmented intelligence community had widely dispersed its limited resources, contributing to the hesitancy.⁴⁵² Even if either the outgoing Clinton or the incoming Bush Administration had properly identified the threat, they had few options. Al-Qaeda was given sanctuary by the rulers of Afghanistan (the Taliban) who were largely impervious to diplomatic pressure.⁴⁵³ There was little clear intelligence⁴⁵⁴ on either the Taliban or Al-Qaeda, thereby making a military intervention of any scale

⁴⁴⁸ Authors such as Rohan Gunaratna, Jane Corbin, Daniel Benjamin and Steven Simon all provided extensive coverage of these issues, the latter two having the best coverage on the ideology segment.

⁴⁴⁹ United States Senate, Joint Inquiry into the Intelligence Communities Activities before and after the Terrorist Attacks of September 11, 2001, December 2002.

⁴⁵⁰ 9/11 Commission Report, Executive Summary, p. 14.

⁴⁵¹ Ibid.

⁴⁵² Ibid., p. 17.

⁴⁵³ Ibid., p. 16.

⁴⁵⁴ Ibid., p. 17.

impractical, irrespective of the lack of public support.⁴⁵⁵ The Commission recommended the creation of one central voice for the intelligence community through the creation of the National Intelligence Director (NID),⁴⁵⁶ which would help to focus both the policy maker and the intelligence community on strategic issues. The Commission also focused on the ideological dimensions of the strategic diplomatic and political environment.

The Commission argued that the United States can no longer afford to ignore failed states and had to engage the Islamic world and its myriad problems in a unified manner.⁴⁵⁷ The basic argument is a return to greater public diplomacy through the use of cultural centers and other ways of stressing American values and areas of agreement with the Muslim community. If a lasting victory over Al-Qaeda is to be achieved one must offer an alternative to its ideology.

Even with the strategic drift at the policy-making level, the security services should have been able to detect and even prevent the 9/11 attacks. The Commission found the all too familiar problems that have plagued U.S. security and counterterrorism particularly since the end of the Cold War. The Commission asserted that management and organizational problems led to failures to “exploit specific vulnerabilities within the plot.”⁴⁵⁸ National security agencies ranging from the Customs and Immigration Service to the CIA failed. Beyond the creation of the NID, the Commission recommended the creation of a National Counterterrorism Center to focus on Islamic terrorism,⁴⁵⁹ and to reorganize government in a network fashion in order to defeat a network-centered opponent.⁴⁶⁰ The commissioners

⁴⁵⁵ Ibid, p. 15.

⁴⁵⁶ Ibid., p. 17.

⁴⁵⁷ Ibid., p. 23.

⁴⁵⁸ Ibid., p. 13.

⁴⁵⁹ Ibid., p. 25.

⁴⁶⁰ Ibid.

suggested using the military's Unified and Specific Commands model.⁴⁶¹ The need for a more coordinated security effort is obvious, and is almost a cliché as it has been recommended so often. Coupled with the superficial attention to aviation security, the report begs the question what the Commissions' purpose actually was.⁴⁶²

The Commission accurately noted the changed threat posed by Al-Qaeda and its type of terrorism, and highlighted how the concept of homeland security does not begin at the home shores, but at any point in the process that allows foreigners to enter the country. The first point of contact for most immigrants or visitors is the U.S. embassy or local consulate. The visa applicant files the necessary paperwork and has his or her name checked against various terrorism watch lists. If the paperwork is in order and the individual does not appear on the watch list, the visa is granted. If there are paperwork problems the applicant may be brought in for an interview to make a final determination on granting the visa. One of the key questions on the application is whether the applicant filed any previous visa applications, and failure to disclose past applications is grounds for rejection of current requests. Due to poor technology the State Department has no way of knowing if individuals have applied for visas in the past. Several of the 9/11 hijackers had previously applied for U.S. visas and been rejected, and failed to disclose this on their pre-September 11 applications.⁴⁶³ The State Department had no way of knowing this and missed an opportunity to prevent some of the hijackers entering the United States. The lack of technology was not the

⁴⁶¹ Ibid., p27. Unified and Specific Commands are geographically or functionally organized commands, such as Central Command-Middle East and South Asia-or Transport Command, which are responsible for all military assets in a given region or function. They have been widely praised as an effective way of forcing the parent services of assigned units to work together. These are not fluid networks as envisioned by the Commission, nor do they have responsibility for all U.S. government activities within a given area. Thus the military and civil missions are not always properly coordinated and can duplicate or even undermine each other's objectives.

⁴⁶² The Commission released a staff report in March 2005 that provided a detailed description of the events of 9/11 and covered aviation security. None of the information was new, nor was it covered in the text of Commissions report.

⁴⁶³ Ibid., p. 18

only failing; human agents conducted no investigation on other questionable or incomplete statements that could have been grounds for rejection.⁴⁶⁴ It is ironic that some of the weaknesses in the visa system that were exploited by terrorists to attack the United States, were implemented by the United States in Saudi Arabia to protect applicants from terrorist attacks.⁴⁶⁵ The Commission has recommended both the integration of the various terrorism watch lists and the introduction of high technological biometric travel documents and scanners.⁴⁶⁶

The failings on the international side of homeland security were matched on the domestic front. The details are covered in Chapters 5 and 6 but the highlights are unsettling. The North American Defense Command (NORAD) is responsible for the defense of U.S. and Canadian airspace. Its orientation was for external threats, primarily nuclear missile attack. It did have hijacking protocols with the Federal Aviation Administration (FAA) but they rested on force availability assumptions that no longer existed.⁴⁶⁷ The FAA still had many of the same security problems reported after the Lockerbie bombing over a decade earlier. The system was fraying but complacency caused inaction.

The longstanding difficulties between the CIA and FBI permitted one of the hijackers to enter the United States. The FBI had management, cultural and technological problems that prevented it from acting aggressively or at all to deal with the growing threats posed by Al-Qaeda.⁴⁶⁸ The inability and unwillingness to cooperate among federal agencies also hampered local law enforcement, such as the lost opportunity to apprehend one of the hijackers when he was pulled over on a routine traffic violation. The officer did not know the suspect was wanted for

⁴⁶⁴ Final Report 9/11 Commission, end note, 33 p .581.

⁴⁶⁵ Ibid., p. 257.

⁴⁶⁶ 9/11 Commission Executive Summary, p. 24

⁴⁶⁷ 9/11 Commission Final Report, p. 369

⁴⁶⁸ 9/11 commission Executive Summary, p. 18

immigration violations because that information was not available to him. The poor cooperation and contradictory policies and approaches is illustrated by the hijackers' use of box-cutters. Prior to 9/11 knife blades under 4 inches were not banned for three reasons: they were not illegal, they were not easily detected, and they were not seen as dangerous; in any case, the screener guides explicitly permitted them.⁴⁶⁹ Once again confusion and difficulty created an exploitable gap.

The commissioners made very few aviation security-specific recommendations, which was surprising as 9/11 was an aviation security failing as much as anything. It is possible that the Commission believed that The Aviation and Transportation Security Act of 2001⁴⁷⁰ had covered most of the relevant issues, but the lack of coverage and decision as to why this glaring oversight exists in the first place, is a serious weakness in the report.

The Commission did address the question of how the U.S. should respond to the attacks. Beyond the recommendations covered above, the commissioners asserted both the need for international cooperation and the vital increase in better public diplomacy by the United States⁴⁷¹. The final report failed to mention the existing cooperation on aviation security conducted by the United States, or makes any recommendations on how to enhance cooperation with the ICAO or IATA.⁴⁷² The report also failed to address the dual paradoxes of public diplomacy; namely that it is not the lack of a U.S. message that is creating the problem with the Muslim world, but the overexposure of less edifying aspects of western (American) culture that is the problem. The counter argument to this message is the "official" picture developed by

⁴⁶⁹ op.cit. p.101.

⁴⁷⁰ CRS Report for Congress: Selected Aviation Security Legislation in the Aftermath of the September 11th Attack, December 14, 2001 pp. 6-9.

⁴⁷¹ President Bush nominated Karen Hughes as Ambassador for Public Diplomacy in March 2005 to address this recommendation.

⁴⁷² The report mentions the ICAO only twice, in footnotes on pages 389 and 565, and fails to mention IATA at all.

the State Department and distributed through U.S. cultural centers. These are/were located away from the embassy compounds to make them more accessible to an interested public. This also made them more vulnerable to terrorist attack, which caused many to close for security reasons. This creates the second paradox, expanding the accessibility of the message also expands the opportunity for terrorists to attack its messengers.

Strategic Intelligence: Whose Job Is It?

The 9/11 Commission provided a clear answer to who was responsible: no one. The events of 9/11 are widely seen as an intelligence failure. How could the world's largest, most complex, and costliest intelligence operations—those of the United States-- have not predicted or even stopped the horror of that day? Wasn't that their *raison d'être*? How could the only superpower, which annually spends more than \$30 billion on intelligence, not have discovered Al-Qaeda, the worldwide terrorist perpetrator? After all, Osama bin Laden made no secret of his war against the United States and the West. The fundamental failure was one of comprehension; policy makers never grasped the true significance of bin Laden's statements. Intelligence analysts, schooled in the old terrorism, thought that his group was not really interested in mass casualties (no other terrorist group had been) and was only engaging in hyperbole when he declared he wanted to usher in a new Muslim order. The thinking seemed to be that many terrorist groups engage in bombast and Al-Qaeda was no different. Such thinking was based on partial information, little of it, if any, developed by means of agent infiltration. The academic community provided little input to policy makers, because of the preoccupation with the WMD threat posed by terrorist groups, including Al-Qaeda. The use of conventional weapons in

unconventional fashions was not widely reviewed. Nor were academics attempting to focus on Al-Qaeda as an organization, the veracity of its goals or its influence as an ideology; it was just not on many scholars' "radar screens." This failure of vision is exacerbated by the fragmented nature of intelligence.

The intelligence community can at times be viewed as a loose confederation of warring tribes, nominally reporting to the director of the community, who is also the director of the CIA. Ideally, the structure enables coordination and eliminates duplication. During the Cold War the structure achieved some of its coordination goals (shared use of satellites between the Air force and the CIA), but as the threat became multifaceted, the focus became more diffuse. The end of the Cold War left an opening for political manipulation; increasingly fragile budgets could be protected if a particular agency could provide useful information and resources for policy makers' pet issues. Both international and domestic terrorism were on the minds of most senior officials, but it was one of a half-dozen issues that were seen at least to be equally urgent. The CIA was given no guidance from the NSC regarding what the strategic threat or threats were, so the agency was neither able to properly fulfill its strategic mission, nor develop the proper tactical information on individual threats.

The often directionless reordering of the intelligence community can be illustrated by the CIA-FBI struggle over counterterrorism. Their jurisdictional and philosophical issues in dealing with terrorism were similar to those in dealing with counter-intelligence operations. Terrorism and counter-intelligence often blurred the domestic international distinction central to the CIA and FBI. The two agencies attempted to develop cooperation on many issues, such as determining which had jurisdiction over foreign agents recruited by the CIA overseas if the agent transferred to the United States, and vice versa. A domestic terrorist group (such as the Ku Klux

Klan) is within the FBI's jurisdiction; a group such as November 17 (Greek Communists) within the CIA's. But dealing with terrorists who cross both national and jurisdictional lines can be vexing. For example, the Earth Liberation Front, an environmental terrorist group, operates in Europe and the United States. Is it a CIA or FBI target? Still, faults aside, at least there is a system for national security threats originating beyond U.S. borders.

The intelligence community structure had little to do with the domestic situation, even if foreign groups were operating in the United States. The National Security Council did not have jurisdiction over domestic threats, and there was no corresponding body that did. The FBI and CIA cooperated on investigations such as the 1983 Beirut embassy and the 1998 East Africa bombings, but the relationship, often fraught even on international events, did not carry over into domestic areas.

The events surrounding 9/11 underscore the difficulties in sharing and coordinating security services and in developing a clear strategic picture of the threat posed by Al-Qaeda. Some have offered a defense of the intelligence community on the grounds that even if all appropriate agencies had all the available intelligence, they might not have been able to predict, let alone prevent, 9/11. However, there is a bit of disingenuousness in this defense, for there was no way that the domestic security services could know the extent of the information they had or to coordinate it usefully.

The FBI is the primary domestic security agency, but is not an intelligence agency; its function is law enforcement. This means its approach is not to see *terrorism* as a threat, but to see particular groups or individuals as criminals. The United States does not have a law like the UK's Terrorism Act 2000 that criminalizes terrorism. Rather, the FBI has to have probable cause that a crime is about to take

place before it investigates an organization. It does have jurisdiction to target groups that may have foreign links and can investigate to ascertain if such links exist. It cannot track or maintain a database on individuals who are not involved in criminal activities. If a suspected terrorist is not breaking any laws, the FBI cannot maintain an indefinite surveillance. These barriers render it exceedingly difficult to develop the background information (basic intelligence) vital to forming a picture of the structures, capabilities and intentions of any organization, especially terrorists. The FBI is hampered, then, when it is asked to provide domestic policy makers with assessments of the threat environment within the United States. The Counter-Terrorism Center (CTC) was established within the CIA in the 1980s and is staffed by FBI, CIA, FAA and other officials as required. It is concerned solely with international threats and has no equivalent for domestic threats. The CTC's information flow is unclear. Intelligence derived from foreign sources is most likely shared with the FBI when it involves domestic threats, but if there is no criminal activity (ongoing or planned) the information cannot be retained. Even when the FBI did try to formalize a more systematic approach to terrorism, establishing its counter-terrorism division, it was widely dismissed from within its own ranks as the "latté Division."

The trails of events in the lead-up to 9/11 illuminate this systemic failing. The FBI, Customs, Immigration and Naturalization (INS), the CIA and even the FAA all had elements of the picture, but none had all the elements, nor was there a generalized inclination to share with sister agencies. Because there was no strategic understanding of or for domestic security, no single agency was able to evaluate properly the individual strands it possessed. None had an overall picture. Thus, when the Mossad (Israeli intelligence) briefed the CIA and NSC on an Al-Qaeda

operation in the United States, the CIA dismissed the information.⁴⁷³ The FBI was not represented at the meeting, but was reported to have received a copy of the briefing, and then lost it (a report hotly denied by the Bureau).

Several 9/11 hijackers were suspected Al-Qaeda operatives and should have been refused visas to enter the United States, but the CIA had neglected to pass that information to the U.S. Customs Service, which maintains the visa “watch list,” one of at least eight terrorism watch lists. Once Customs entered the names, INS responded that the men in question were already in the United States. It was only then that the FBI was informed and a nationwide manhunt instigated⁴⁷⁴

The FBI was also aware that there were Middle Eastern men interested in flying lessons, but had little interest in learning how to take-off and land. They seemed overly interested in airport security. The facts were collected by the FBI’s Phoenix field office and forwarded to Headquarters. Special Agent Ken Williams, the author of the so-called Phoenix memo, later testified at a congressional hearing that there was no reason to suspect that anything criminal was afoot, so the memo had not been urgently dispatched to Washington.⁴⁷⁵ The contentious handling of the Zacharias Moussaoui case also illustrates the FBI’s problematic ad hoc approach to terrorism, which tends to be driven by its field offices. This is not new. For example, to acquaint itself with the Black Liberation Army’s tactics in the 1960s the FBI’s New York Field office watched the movie *The Battle of Algiers*.⁴⁷⁶

⁴⁷³ David Wastell and Philip Jacobson Telegraph on-line, “Israeli Security issued urgent warnings to CIA of large-scale terror attacks” 16/09/2001.

⁴⁷⁴ Yosri Fouda and Nick Fielding, Masterminds of Terror, p. 135.

⁴⁷⁵ Joint Intelligence Committee Report, Phoenix Memo Appendix.

⁴⁷⁶ Danny Coulson, No Heroes, Inside the FBI’s Secret Counter-Terror Force, p. 42.

As the lead agency in domestic terrorism and lead investigative agency in international attacks, the FBI has been inexplicably remiss in not having undertaken a systematic effort to understand terrorism and, subsequently, to develop the strategic tools to deal with it. The Hostage Rescue Team of the Bureau has a superb tactical understanding of terrorism, and has learned from the Ruby Ridge and Waco disasters. The field offices have since innovatively defused potential domestic terrorist groups through developing and maintaining a dialogue with them.⁴⁷⁷

The George W. Bush administration (2001-) moved quickly to overcome some of the above failings. It established the Homeland Security Council with the same function as the NSC's but with the directors of the CIA and FBI as members, and created the Department of Homeland Security by merging some twenty-two agencies and parts of agencies into one body. The new department also houses the Transportation Security Agency (TSA), charged with securing transport infrastructure, and most critically, the administration federalized the baggage and passenger screeners at the 429 FAA-regulated airports. The FBI has accepted that CIA analysts help the Bureau strengthen its capabilities in counter-terrorism, which mirrors the cooperation in developing a better operational and strategic understanding of counter-intelligence operations.⁴⁷⁸

Conclusions

The transformation of the domestic security structures in the United States is still a work in progress. The legislation creating the Department of Homeland Security was passed in December, 2002 after long and rancorous debate. Ahead lies the monumental task of merging 170,000 employees and the two-score agencies, each

⁴⁷⁷ Ibid., pp. 537-538.

⁴⁷⁸ FBI Report to the National Commission on the Terrorist Attacks Upon the United States, p. 25.

with its own cultures, focus, and approaches. The coming consolidation has not been matched with an equivalent effort to streamline the eighty-plus congressional committees and sub-committees to which the new department will report. The 9/11 Commission urged this, and it is encouraging to see the Congressional leadership looking into creating one committee. The various natures of the evolving investigative and intelligence cultures will present some difficulties. The establishment of a domestic security council is an important step. Even so, there is no reason to believe that cooperation on intelligence will be any better under this structure than it has been under fifty-five years of the National Security Council. The Homeland Security Council lacks the statutory authority given the NSC, which means it does not have clear authority; mission and a long term guaranteed legal existence.

The creation of the National Intelligence Director is supposed to overcome the problems of intelligence drift and poor cooperation. The NID will have input and some control over the budgets and strategic intelligence priorities, as well as assets such as satellite deployments.⁴⁷⁹ The director will also have the authority to make some staffing decisions.⁴⁸⁰ Most critically, the legislation requires the President to develop intelligence sharing among all levels of government and the private sector.⁴⁸¹ The difficulty with the new bureaucracy is that members of the old system will staff it. Personnel will rotate into the new system from their parent agencies with all the cultural and bureaucratic baggage that entails. Even if this is overcome, any intelligence analysis will be a product of community consensus, much like the current National Intelligence Estimates. The legislation does try to overcome this problem with Alternative Analysis,⁴⁸² but since the NID does not have independent hiring

⁴⁷⁹ Intelligence Reform and Terrorism Prevention Act 2004, Subtitle A, Sec. 102(3).

⁴⁸⁰ *Ibid.*, Title A, Sec. 102 A (e)(1)(A).

⁴⁸¹ *Ibid.*, Title I, Subtitle F, Sec. 1016(a)(1) and Title VII, Subtitle C, Sec. 7305.

⁴⁸² *Ibid.*, Title I, Subtitle A, Sec. 1017.

power, where are the alternative analysts going to come from? While the goals of the NID are laudable, it's not clear whether the creation of a new layer of bureaucracy meets the Commission's goal of enhancing security and making government more networked. The NID seems to achieve neither goal.

The prime counter-terrorism agencies, the CIA and FBI, were left intact after the creation of the DHS, but will both report to the NID; in that each had been blamed for the failures of 9/11, leaving them intact was highly criticized. It was only after the failure of intelligence after the Iraq war that the CIA Director George Tenet was forced to resign. The problem now for both is one of cultural. The CIA has moved to a more technology-driven intelligence approach, in which field agents are few and far between. Case officers' career advancement is based on the number of agents recruited and not their quality, assuming they are recruiting agents at all. Technology provides "clean" intelligence, and so there is no more need to rely on the dubious individuals required to infiltrate terrorist cells, and thereby possibly delay or even end a case officer's career if a criminal rogue is recruited. Technical intelligence can help provide indications of a pending event (it led to the arrest in 2002 of Ramzi Binalshibh), and traffic analysis on suspected Al-Qaeda computer networks has indicated that major events such as the Bali and Kenya attacks and the apparent attack on Heathrow were pending. Still, without an agent inside the organization, there is an extremely slim chance of learning where the next attack will actually take place. The restrictions on recruiting agents of questionable character developed during the Clinton Administration are being relaxed by the Bush administration.

The FBI's culture problem is its law enforcement approach-- wait for a crime, investigate, apprehend a suspect and then prosecute--may no longer be appropriate. The Bureau does not behave like an intelligence agency, gathering and storing

information (intelligence) so as to develop a strategic picture of all potential threats. Its procedures accord with a suspicion of government, particularly after the controversies involving domestic spying of the 1960s and 1970s. But for the federal government to carry out its constitutional defense responsibilities, it must acquire information from all sources in order to fully and properly evaluate the threat environment and then provide policy makers with sufficient background information to inform their decision-making.

The quality and quantity of information available to the security community is irrelevant, if policy makers are not focused on the threat at hand. Since 9/11, U.S. policy makers have been focused on terrorism to the exclusion of most other issues. Resources are being allocated accordingly, and the skills and equipment that were developed for the Cold War are beginning to demonstrate their continued validity. The central question remains unanswered, however: Who is responsible for strategic intelligence? Perhaps the best solution is to place the role not with a law enforcement agency, which would have the power to act on the intelligence, but in a security agency with limited functional responsibilities, such as the Department of Homeland Security (DHS).

The centralization of upwards of twenty law enforcement and public safety agencies within the DHS enables coordination of the vast array of intelligence available to the government. The department has a broad mission, but because its component agencies have mission specific tasks (for example, TSA deals with the transportation infrastructure; the Secret Service protects the president and currency), there is little reason to fear an encroaching police-state as long as information is being collected and maintained by the DHS. The information can be used to enhance physical security, but any law enforcement undertaking would remain within the

purview of the FBI. The Bureau would have the ability to produce its own information, but it could also consume new information developed and maintained by the DHS. This is critical: DHS has to be able to receive raw intelligence from the CIA and FBI as well as information for its databases, in order to produce the analysis that is required. Failure to share new information will lead to weak analysis and poor advice to policy makers.

The centralization of intelligence will, it is hoped, manifestly improve the quality and quantity of intelligence available to the civil aviation industry as well. The industry has often been unable to respond properly to an FAA warning because of the lack of specifics, which could not be provided because the FAA intelligence analysts did not have access to the raw information. The FAA produces little intelligence on its own, but consumes highly edited data provided to it by the CIA and FBI. FAA analysts have been unfairly held in low regard due to their generalized, poor-quality warnings. The new Transportation Security Administration will house the intelligence function of the FAA and other agencies and hence will be producing at least some of its own intelligence, the quality of which should increase. Even if this is the only outcome of the reorganization of the domestic security functions, it will be worthwhile.

Chapter 5

Al-Qaeda's War: a Regime failure?

The current phase of the threat to international civil aviation is the war against it perpetrated primarily by Al-Qaeda, which has used or attempted to use three of the four tactics discussed earlier. Al-Qaeda has hijacked, sabotage bombed and attempted to shoot down civilian aircraft. It targeted international civil aviation because of its potential for human and economic damage. These actions are part of its strategic aim to drive the West, particularly the United States, out of what it believes are Muslim lands. In reintroducing aviation attacks as a strategic weapon, Al-Qaeda is following the very same approach that George Habash employed more than three decades ago.⁴⁸³

It is important not only to discuss certain operations or attempted operations planned or implemented by Al-Qaeda (the 1993 World Trade Centre bombing, the Bojinka Plot, 9/11, the Richard Reid episode, and the attempts to shoot down aircraft in Kenya and London), but also to relate what the international civil aviation community knew about its opponent at the time of each incident. It is surprising that the one body specifically charged with protecting the international civil aviation system, the ICAO, has escaped the scrutiny that U.S. organizations have faced since 9/11, but such an effort in that direction is now desirable.

⁴⁸³ See Chapter 3 for a full discussion.

Al Qaeda's War

During the late 1980s and early 1990s terrorism experts were becoming increasingly alarmed by the emergence of religiously oriented terrorism. The ideology of extreme violence and fascination with chemical, biological, radiological and nuclear weapons (CBRN) could lead only to an enormous loss of life.

Al-Qaeda and its leader Osama bin Laden first came to the attention of the American public and security services on February 26, 1993 when Ramzi Yousef and four co-conspirators attempted to topple one tower of the World Trade Centre into the other. Had they been successful there could have been as many as 250,000 casualties. The "dirty bomb" he had hoped to use would have showered a large area of lower Manhattan with radioactive fallout.⁴⁸⁴ The attempt was to have been part of a larger operation that included crashing a plane containing chemicals into CIA headquarters and the Pentagon.⁴⁸⁵ It was learned later that Khalid Sheikh Mohammed (Yousef's uncle, also known as KSM) was most likely the mastermind of the operation, and that although at the time neither he nor Yousef had a formal connection to Al-Qaeda, such a link was soon to follow. The attempt was a harbinger of attacks to come on high-value targets in the United States, the probable use of chemical and radiological weapons, and aviation-based suicide attacks.

The Bojinka Plot

Yousef and KSM would attempt to strike again in an even more audacious operation called Project Bojinka (Bojinka is a Serbo-Croat word meaning explosion). First, over a forty-eight hour period, Yousef would place bombs on eleven or twelve

⁴⁸⁴ Simon Reeve, *The New Jackals*, pp. 146-147.

⁴⁸⁵ *Ibid*, p. 87.

U.S. civilian jetliners operating in the Pacific region heading to the U.S., killing perhaps as many as 5,000 people. Second, KSM had planned to assassinate President Clinton and Pope John Paul II on their visits to the Philippines, using aircraft to drop bombs on Clinton's motorcade⁴⁸⁶ and on the Pope during an open air mass.⁴⁸⁷ Finally, suicide pilots would set their sights on the World Trade Centre in New York, the Pentagon, CIA headquarters, the White House, and skyscrapers in Boston, Chicago, and San Francisco.⁴⁸⁸ The first part of the operation was well under way in December 1994 when Yousef conducted a dry run. He had developed a liquid-nitrogen explosive that he smuggled onto Philippines Airlines flight 434 to Cebu, in the Philippines, with continuing service to Tokyo. The bomb was concealed in bottles of contact lens solution and hidden under Yousef's seat.⁴⁸⁹ He left the flight at the layover in Cebu. When the bomb later exploded in flight, it killed a Japanese passenger and severed the aircraft's aileron cables, which control its flaps.⁴⁹⁰ Only the skill of the flight crew saved the lives of the remaining 292 passengers. Satisfied with the trial run, Yousef recruited five "brothers" (operatives) and assigned them to the targeted aircraft.⁴⁹¹ The entire Bojinka project was "blown" when the apartment Yousef and the plotters were using as a bomb factory caught fire in January 1995. Yousef escaped capture but left behind his laptop, which was examined by Filipino authorities. He was arrested in Pakistan on February 7, 1995 and was sentenced to 240 years in a super-maximum security prison on February 12, 1997.⁴⁹²

⁴⁸⁶ Ibid., p. 77. Ramzi Yousef had also considered a ground attack against the motorcade and trying to shoot down Air Force One (President Clinton's aircraft).

⁴⁸⁷ Yosri Fouda and Nick Fielding, Masterminds of Terror, p. 98.

⁴⁸⁸ Ibid p. 99.

⁴⁸⁹ Simon Reeve, The New Jackals, p. 79.

⁴⁹⁰ Ibid.

⁴⁹¹ Rohan Gunaratna, Inside Al Qaeda, pp. 175-176.

⁴⁹² Simon Reeve, The New Jackals, pp. 242-243.

Even after Yousef's arrest and incarceration his background, identity, and group affiliation were still a mystery. Few terrorist experts had ever heard of Osama bin Laden, and fewer still of Al-Qaeda. Yousef had some vague connections with bin Laden but nothing more was known about the relationship. No one was aware either of Khalid Sheikh Mohammed, nor of his role in the World Trade Centre attack and the Bojinka Plot. It appears that the security and academic communities saw Yousef as a lone wolf terrorist mastermind. It is also unclear where the information and planning concerning the aircraft attacks on U.S. buildings ended up. The international civil aviation community and security services were aware of the attempted suicide attack against Paris by the GIA in 1994 (see chapter 3), but the intended attacks planned in the Bojinka Plot seem to have gone unexamined.

The shadowy figure of Osama bin Laden and his connections to various terrorists were increasingly troubling to the intelligence community. In early 1996 the Counter-Terrorism Centre (CTC) established a special unit to focus on him (the FBI established a similar unit in 1999), but it has been unable to answer even the most basic question: how much money did he have?

September 11, 2001

The planning for the 9/11 events began as early as 1995. It is now known that Khalid Sheikh Mohammed was its architect and spent the years between 1995 and 2001 developing and refining the plans. At some point during this interval he also became chairman of the Al-Qaeda military committee, with access to bin Laden and his inner circle.⁴⁹³ Evidence was accumulating throughout the late 1990s that Al-

⁴⁹³ Yosri Fouda and Nick Fielding, Masterminds of Terror, p. 100.

Qaeda was going to attempt a “spectacular” operation that would include international civil aviation as a weapon.

In June 1998 the U.S. intelligence community learned that bin Laden was “considering” New York and Washington.⁴⁹⁴ In August, the FBI and FAA were provided information about an Arab plot to “fly an explosive-laden plane from an unnamed country into the World Trade Centre.”⁴⁹⁵ A sceptical FAA reacted by saying it was “highly unlikely given the state of the foreign country’s aviation program.”⁴⁹⁶ FAA officials were also confident that any aircraft would be detected before it reached the United States. The intelligence was retained by the FBI’s New York field office, and it is unclear whether it proceeded further. The FBI is notorious for its antiquated computer system that makes information effectively disappear, which may hint at, but does not explain what happened to the information at the FAA.

It was during late 1997 or early 1998 that hard planning for what Al-Qaeda called its “Holy Tuesday”⁴⁹⁷ operation began. During an interview with Al-Jazeera reporter Yosri Fouda, Khalid Sheikh Mohammed acknowledged that Al-Qaeda’s military committee had considered nuclear targets but had ruled out that option “for now.”⁴⁹⁸ It was at about this time that Mohammed Atta, an Egyptian post-graduate student studying in Hamburg, Germany, arrived in Afghanistan for training. He would become the leader of the six-man cell (all pilots) that would carry out the attacks on 9/11. By late 1999, cell members legally entered the United States on student visas and were continuing the flight training they had begun in Afghanistan.

Al-Qaeda continued to mount other attacks against the United States and its allies, including the August 7, 1998 attack against the U.S. embassies in Kenya and

⁴⁹⁴ Report of the Joint Committee Into the Terrorist Attacks of September 11, 2001, p. 199.

⁴⁹⁵ *Ibid.*, p. 210.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ Yosri Fouda and Nick Fielding, Masterminds of Terror, p. 114.

⁴⁹⁸ *Ibid.*

Tanzania and the October 2000 attack against the USS *Cole*. During the fall of 1998 the U.S. intelligence community was aware of Al-Qaeda support infrastructure and operational cells in the United States, as well as plots using aircraft against targets in New York and Washington, D.C. and domestic airports. It is unclear if this information pertained to the cells recently established in the United States as a run-up to 9/11. In late 1999 the intelligence community received information of possible attacks against New York and the nation's capital during the Millennium. As if to confirm the information, a possible Al-Qaeda operative, Ahmed Ressam, was arrested as he attempted to enter the United States from Canada on a mission to attack Los Angeles International Airport during the Millennium celebrations.⁴⁹⁹

As the Millennium dawned, U.S. intelligence knew that Islamist terrorists had tried to crash a hijacked aircraft in Paris, had planned to destroy multiple American aircraft over the Pacific, had planned to use aircraft to assassinate the Pope and President Clinton, and were interested in launching a massive airborne attack against multiple targets in the United States, including the World Trade Center and targets in Washington, D.C. The FBI was aware of an Al-Qaeda network operating in the United States, but was not aware that Nawaf Ahlhamzi, a man with links to the USS *Cole* attack, had come to the United States after a meeting in Malaysia with Tawfiq al-Atash, who also had links to the *Cole*. He should not have been given a visa to enter the United States, but the CIA had not made the Immigration and Naturalization Service or the State Department privy to that fact. In January 2001 the CIA station in the United Arab Emirates (UAE) had local officials question Ziad Jarrah, one of the pilots of United Flight 93, but after being satisfied with his responses, allowed him to

⁴⁹⁹ Ibid., p.201.

continue his trip to the United States.⁵⁰⁰ In March 2001 the FAA gave information to “specific U.S. airlines” relative to threats from terrorists in Middle Eastern countries.⁵⁰¹ Although there was no mention of suicide attacks, such sharing exemplifies the proper use of intelligence. The FAA furnished U.S. carriers with a more general alert on April 18 about terrorist threats due to the April 6 conviction of Ahmed Ressam. The FAA and U.S. carriers were unaware of the intelligence “speculation”⁵⁰² by a source with terrorist “connections”⁵⁰³ that bin Laden was interested in using commercial aviation for a “spectacular and traumatic”⁵⁰⁴ attack, such as the World Trade Centre attack in 1993.⁵⁰⁵ Because the source with terrorist “connections” proffered no hard information, the matter rested there. The speculation was deserving of more attention, however, for guidance purposes in developing strategies for countering Al-Qaeda.

The federal government was not the only body investigating terrorism. On April 27, 2001 Joe Lawless, director of public safety at Massport, the state agency responsible for Boston Logan International Airport, urged strengthening of security at Logan because of suspected terrorists in the Boston area, “with links to the airport”⁵⁰⁶ having been uncovered by local law enforcement. It is unclear if Lawless’s communication was also sent to the FAA, the FBI’s Boston Joint Terrorism Task Force, or even the local FBI field office.⁵⁰⁷

In April and May 2001 National Security Advisor Condoleezza Rice received specific intelligence indicating Al-Qaeda attacks against the United States. It remains

⁵⁰⁰ CNN Who Knew What When, Al Qaeda timeline, www.cnn.com interactive section March entry.

⁵⁰¹ Ibid, March 2001 entry.

⁵⁰² Report of the Joint Inquiry Into the Terrorist Attacks of September 11, 2001, p.201

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

⁵⁰⁵ CNN Who Knew What When, Al Qaeda timeline, www.cnn.com, interactive section April entry.

⁵⁰⁶ Andrew Thomas, Aviation Insecurity, p. 63.

⁵⁰⁷ Ibid.

unknown if this was a prompt for the FAA to issue a bulletin to U.S. airlines about “unconfirmed reports that American interests may be the target of terrorists threats from extremist groups.”⁵⁰⁸ The information highlighted the hijacking threat. On July 2, 2001 the FBI alerted domestic law enforcement about the increasing threats. It noted that although the threats were focused on foreign locations it added, “While we cannot foresee attacks domestically, we cannot rule them out.”⁵⁰⁹ For the fourth time in five months the FAA issued a security message about threats to carriers and terminals.⁵¹⁰

The intelligence “chatter” was raising concerns at the highest levels of the U.S. government. On July 5, 2001 the president asked Dr. Rice to ascertain what was being done about the growing volume of Al-Qaeda intelligence. Rice replied that “the threat reporting had become sufficiently robust, though not, again, very specific . . . There was a lot of chatter in the system.”⁵¹¹ The next day, Counterterrorism Chief Richard Clark convened the NSC Counterterrorism Security Group, which decided that the threat level was sufficient to cancel all nonessential travel for counterterrorism staff.⁵¹² This ban seems to have been applied only to overseas travel.

Meanwhile, the FBI field office in Phoenix had become aware of a large number of Arabs in flight training in the area. Special Agent Ken Williams sent a memo to FBI headquarters on July 5 speculating that the students could be Al-Qaeda operatives.⁵¹³ The memo was marked routine and⁵¹⁴ was not seen by senior officials until after September 11.

There were intelligence victories during 2001. The CIA in cooperation with other intelligence services was able to disrupt Al-Qaeda attacks in Paris, Turkey and

⁵⁰⁸ CNN Who Knew What When, Al-Qaeda Timeline, www.cnn.com, June 22, 2001 entry.

⁵⁰⁹ Ibid. July 2, 2001 entry.

⁵¹⁰ Ibid.

⁵¹¹ CNN chronology of the Joint Inquiry report July 5, 2001.

⁵¹² Ibid., July 6, 2001.

⁵¹³ Ibid., July 10, 2001.

⁵¹⁴ Joint Intelligence Inquire Report, Appendix Phoenix Memo. 2001

Rome, and to prevent an assassination attempt on President Bush and other leaders at the G8 Summit in Genoa. Al-Qaeda had intended to crash a plane into the summit meeting.⁵¹⁵ On July 18 the FBI and FAA issued security alerts because of the conviction of Ahmed Ressam and others in connection with the Millennium-bombing plot.⁵¹⁶ It was the FBI's third alert in July, and the fifth time in six months that the FAA had issued security alerts; it issued another alert on July 31, bringing the total to six in six months.⁵¹⁷

The increasing activity lead President Bush to ask for information on Al-Qaeda during his June 6 intelligence briefing. Rice described the information as an "analytical brief" and although it included hijacking it was in the "traditional sense."⁵¹⁸ No one seemed to collate all the available information to raise the prospect of a different kind of hijacking. The information was available.

On August 17, Zacarias Moussaoui was arrested for immigration violations in Minnesota after a tip from his flight school instructor who was concerned about Moussaoui's interest in mid-air manoeuvres and not take-off and landings. The Minneapolis field office asked FBI headquarters for permission to access Moussaoui's laptop computer for possible clues to the reasons for flight training, but was turned down. Neither the field office nor headquarters was aware of the concerns in Phoenix. Another example of the failure to share information in timely fashion occurred on August 23, when the CIA asked the INS to place Khalid al-Mihdhar on its watch list because of his links to the USS *Cole* bombing and to refuse him admission to the United States. It was then that the INS informed the CIA that he had

⁵¹⁵ CNN chronology of the Joint Inquire report Mid July, 2001.

⁵¹⁶ Ibid., July 18.

⁵¹⁷ Ibid., July 31.

⁵¹⁸ Ibid., August 6.

entered the United States on July 4.⁵¹⁹ Both agencies informed the FBI, which launched a frantic, unsuccessful search.

In early September the FBI agents in Minneapolis suggested that Moussaoui was the “type of person that could fly something into the World Trade Centre.”⁵²⁰ The FBI informed the CIA and FAA about the Moussaoui situation, but not the Counterterrorism Security Group of the NSC. The FAA decided not to tell the airlines about the threat.⁵²¹ On September 10 the National Security Agency (NSA) intercepted two vague messages indicating an event of some kind would take place on September 11. The messages were not translated until September 12.

Mohammad Atta had planned and assembled his team late in 2000 and early in 2001. He gathered publicly available data, including slowest travel days and times. He settled on transcontinental flights because they carry the maximum amount of fuel and he would not be tricked into having to land to refuel as was the GIA in 1994. Having trained pilots would also have precluded that. He is said to have reconnoitred Boston’s Logan Airport (where both World Trade Centre attacks originated) and taken a ‘test flight.’⁵²² On September 11 his team for American Airlines flight 11 entered the civil aviation system through Portland, Maine and boarded the doomed flight as transit passengers in order not to have to face security screening in Boston.

The choice of airports and airlines is interesting. Boston, Newark (New Jersey), and Dulles Airport (outside Washington, D.C.) are all about as far from the West Coast as one can get and still be on an internal flight. This was important mainly for the fact that gasoline when mixed with air increases the energy released in

⁵¹⁹ Joint Intelligence Committee Report p.395. Khalid al-Mihdhar was one of the hijackers of American flight 77, which attacked the Pentagon.

⁵²⁰ CNN Special Report, Who Knew What When, September entry, www.cnn.com.

⁵²¹ Ibid. Early September.

⁵²² Joint Intelligence Staff Report, p. 139.

an explosion fifteen times the equivalent of TNT.⁵²³ The airports and airlines are also of interest because of their security problems. Boston's Logan Airport is the largest in the New England FAA region, and at the time had the most inexperienced senior staff and lowest morale of any FAA region.⁵²⁴ Logan, the nation's eighteenth busiest, had the fifth-highest number of security violations.⁵²⁵ The security staff's low wages and high turnover rates compounded the problem. Staff problems at Newark and Dulles were little different. The airlines chosen by the terrorists also had security problems: United Airlines was the second most cited airline for security breaches in 1999 (661) and American Airlines third (555).⁵²⁶ It may have been that United and American were the only carriers operating from those airports with the desired flights. But it is just as likely that Atta had ample security knowledge, some of which could have been based on inside information, such as the kind Joe Lawless warned about in his April 2001 memo. Even if all of the above information had been made available to the proper authorities before September 11, it is unknowable if the attacks actually could have been prevented.

Richard Reid

On December 22, 2001 American Airlines Flight 63 from Paris to Miami narrowly averted disaster. The passengers and cabin crew subdued passenger Richard Reid, who had attempted to ignite one of his shoes, which contained the plastic explosive PENT in quantities sufficient to have destroyed the aircraft. This security failure was almost an intelligence success. The U.S. military had discovered information in an Al-Qaeda "safe house" in Afghanistan that the group was preparing

⁵²³ Andrew Thomas, *Aviation Insecurity*, p. 175.

⁵²⁴ *Ibid.* pp. 61-62.

⁵²⁵ *Ibid.* p. 59.

⁵²⁶ *Ibid.* p. 85.

to use plastic explosives concealed in boots or other large shoes. The military passed the information to U.S. intelligence, which immediately forwarded it to the FAA. The FAA issued a warning on December 10 to all American carriers detailing the threat, yet the information did not seem to have reached American Airlines' Paris station.⁵²⁷ These poor communications were rendered almost irrelevant when American Airlines staff in Paris encountered Richard Reid.

Reid, a Jamaican-born British citizen, was en route from Paris to Miami on American Airlines Flight 63 when the Computer Assisted Passenger Profile System (CAPPS) alerted staff that he required additional scrutiny. CAPPS noted that he had purchased a one-way ticket on an international flight, with cash, but had not checked any baggage. Questioned, Reid gave unsatisfactory answers so he was turned over to French security. Two security teams found no reason to delay him, but because he had already missed his flight on December 21 he was allowed to board flight 63 on December 22. At no time did the American Airlines security staff or the French examine Reid's shoes. American Airlines had been warned about the threat of shoe bombs, but had not told the French. It is mind boggling that the heightened security climate didn't respond more energetically to such a clear warning.

Despite his original denials of belonging to Al-Qaeda, Reid was an active member. The *Wall Street Journal* discovered that he was an Al-Qaeda operative known as Abdul Ra'uff, who apparently was scouting locations for Al-Qaeda strikes.⁵²⁸ He had previously been in Israel casing the Azrieli Centre (its tallest building) and gauging security on El Al, including the cockpit doors, but was

⁵²⁷ Several U.S. broadcast media outlets reported the FAA had issued warnings, but they have not been reiterated in print media.

⁵²⁸ *The Wall Street Journal* had purchased a laptop computer from an Al-Qaeda safe house where it uncovered information about an Al-Qaeda operative who had travelled in Europe and Israel casing potential targets. While no evidence emerged directly linking Reid to this individual, the circumstantial evidence was overwhelming, and Reid did admit membership in Al-Qaeda as part of his guilty plea on October 4, 2002; he was sentenced to life imprisonment on January 30, 2003.

unsuccessful.⁵²⁹ If it had not been for Reid's feet, whose sweating prevented the match from igniting the fuse, there would have been a major loss of life. International civil aviation security was lucky.

Al-Qaeda's Missile Attack

On November 28, 2002 Al-Qaeda returned to Kenya with a coordinated attack against Israeli interests there. A suicide car bombing⁵³⁰ of the Israeli-owned Paradise Hotel just north of Mombassa killed sixteen and injured eighty. At approximately the same time an Arkia Airways flight departing Mombassa airport for Israel with 264 passengers on board was fired on by two-man portable surface to air missiles (MANPADS), but no damage was done. The Soviet-manufactured missile SA-7 (the type used in the attack (see chapter 4 for more details on this type of missile) was linked to a little-reported attack in 2002 against an American military transport in Saudi Arabia. Al-Qaeda demonstrated its ability to transport weapons from the Middle East to Africa, despite the international interdiction effort and use them, though unsuccessfully. Al-Qaeda's biggest asset is its capacity to learn from its mistakes.

Al-Qaeda may have attempted to use a MANPAD again in February 2003 against a flight using London's Heathrow Airport. The British government deployed troops from the Grenadier Guards, the Household Cavalry and seven hundred extra police officers to secure the airport and likely areas for a missile launch. Prime Minister Tony Blair told the press that the "chatter" was the most specific the intelligence community had ever had on an impending operation. Cynics charged the

⁵²⁹ Reid was viewed as suspicious by Israeli security as well. He was seated at the back of the El Al flight he was placed on so that its air marshals could keep him under surveillance.

⁵³⁰ It is also reported that the attackers had a general aviation aircraft that dropped a bomb or bombs on the hotel as well. This remains difficult to confirm.

government with hyping the threat when no weapon was found and criticized the value of deploying light armoured vehicles at the airport. But the deployment may suggest that there was intelligence information about an impending ground attack against the airport as well. This is the only main tactic Al-Qaeda has yet to use against international civil aviation.

September 11: Whose Failure?

Recriminations after 9/11 were widespread and understandable, but one surprise was the absence of an examination of the international civil aviation regime. There was and still is considerable investigation into the failings of security and intelligence. How could the U.S. intelligence community spend more than \$35 billion annually and not detect an international plot of the proportions of 9/11? Wasn't that investment over the past fifty years supposed to prevent a surprise attack? The FBI didn't escape scrutiny either. Questions about lack of investigation and poor communications within the Bureau and between the Bureau and other branches of government agencies were debated. The redundancies and confusion within the domestic counter-terrorism structure were rendered moot with the creation of the Department of Homeland Security (DHS).

Domestic aviation security did not escape reform. The federal government reversed decades of resistance and took control of passenger and baggage screening from the private security companies whose purview that had been. Interestingly the international civil aviation security regime went untouched.

Did the International Civil Aviation Security Regime Fail?

On and before Monday, September 10, 2001 the international civil aviation regime had two security related missions: to provide the framework for dealing with identified security threats, and to develop and disseminate information on emerging threats. The regime had four primary tools for dealing with security: (1) Annex 17 to the 1944 Chicago Convention (discussed below); (2) the 1963 Tokyo Convention, which establishes jurisdictional hierarchy over criminal acts on aircraft; (3) the 1970 Hague Convention, which sets out states' obligations with regard to hijackings; and (4) the Montreal Convention and its 1985 amendment, which criminalize sabotage bombings and attacks on ground infrastructure.

Annex 17 provides for the basic security measures with which all travellers are familiar, such as baggage and passenger screening. The Annex is constantly reviewed by the contracting states through the ICAO's Unlawful Interference Committee (UIC) comprising members of the ICAO Council.⁵³¹ The UIC is responsible for reviewing and updating Annex 17 and other conventions in this field. The conventions mentioned above provide the framework for states' obligations; the Annex furnishes specific security provisions.

Under their host-state obligations, contracting states implement measures. Although some measures are mandatory, a state can opt out of a measure by request. The state does not have to provide a reason, understandable for security reasons, and is given the opportunity to implement the standards as well as it can. The regime does

⁵³¹ Rodney Wallis, *Combating Air Terrorism*, pp. 103-104. Wallis is sceptical about this committee that comprises contract states and is represented by individuals who are unlikely to have specialist background. He believes the IATA Security Task Force is a more effective model because its members designate their security directors to serve on it.

not have any mechanism for enforcing standards against a state that decides to ignore them. Undermining the very idea of a regime.

The civil aviation regime is premised on states; its contracting members are all recognized state actors in the international community. Any sanctions contemplated for breaches of the conventions will be decided and enforced by other member states. Even though two states (Libya and North Korea) have directly contravened ICAO conventions, the organization itself has never punished a transgressor because it deems punishment to be a political decision best left to the UN Security Council. The primary difficulty the ICAO has faced during the second and perhaps third phase of terrorism is that most of the terrorists are non-state actors. Individual states may and do support these groups, but the ICAO has no mechanism to punish non-state actors, or their sponsors. During 9/11 the attackers were not a state, nor were they state supported, thus the civil aviation regime had no available recourse.

The hijackers had not even committed a crime under existing conventions by conspiring to hijack an aircraft, in that conspiracy is not a crime under some contracting states' laws;⁵³² it is a violation of U.S. law. The weapons carried on the aircraft by the hijackers, box cutters and razor blades, were not prohibited items under Annex 17 or U.S. regulation. The FAA didn't consider a knife blade less than four inches to be illegal. It was not until the aircraft was actually hijacked on 9/11 that any of the hijackers ran afoul of the Montreal Convention. By then it was too late. After the tragedy of that day the regime seemed paralysed. Although the FAA banned all blades, including safety razors, and required cockpit doors to be locked, other nations did not. Swiss Air did not ban the famous Swiss army knives from aircraft, nor even close its cockpit doors. It is unclear why the ICAO did not enforce this basic measure

⁵³² Ruwantissa Abeyratne, *Aviation Security*, p. 169.

on its member states. The United States could and did do so on flights going to or traversing its territory but that was an ad hoc approach.

The second mission of the ICAO is to develop information and design policy to anticipate new threats. The international civil aviation regime has a unique strength: the support of a vast epistemic community of interested parties. Aircraft manufacturers, pilot and cabin-staff unions, airports and cargo airlines are just a few of the many parties interested in providing information to assure safe and effective air travel. One of the most influential actors in this community is the International Air Transportation Association (IATA). Through its Security Advisory Group (SAG)⁵³³ it can provide policy recommendations for both carriers and airports, and also provide security evaluations of airports in the international system. SAG has both policy input and a formal audit function under the mandate of safe, regular and economical air transport.⁵³⁴ Member airlines can nominate an airport for review by SAG. This process is useful in two ways: the SAG looks at the security needs of a facility, while considering the most economical way to enhance security. In addition, it is viewed as a neutral party,⁵³⁵ because it is a body comprising not governments, but commercial carriers that do not have a political agenda. This has allowed SAG to make recommendations that are viewed as both security enhancing and economical; one such example is the development of baggage security.

Since the late 1980s the ICAO has recognized the need for a multilayered approach to baggage security that includes matching each bag with a passenger and refusing to transport unattended bags without full hand searching. After the

⁵³³ Rodney Wallis, "The Role of International Aviation Organizations in Enhancing Security," *Terrorism and Political Violence* ;10:3 Autumn 1998 Special Issue, pp. 83-88. Prior to 1988, the SAG force was named the Security Advisory Committee, which became the Security Task Force between 1998 and 2002.

⁵³⁴ *Ibid.* pp. 88.

⁵³⁵ *Ibid.* pp. 90.

Lockerbie bombing, the European Civil Aviation Commission (ECAC) had its members institute such a system.⁵³⁶ British Aerospace Authority (BAA) went a step further and implemented a high-tech⁵³⁷ multilayered approach.⁵³⁸ The latter system reduced human input, with its inherent risk and cost, without decreasing in throughput.⁵³⁹

Despite the obvious security benefits, not to mention the ICAO requirements, the U.S. carriers were not in compliance. The industry furnished several reasons: the volume of traffic was too large, matching passengers to bags was too costly and time-consuming, and that since the terrorist threat was international, domestic matching was unnecessary. The industry did concede the need for screening in foreign airports, but only in airports designated by the FAA as category X airports.⁵⁴⁰ But Pan Am didn't follow FAA procedures in this matter: in 1988, at the Category X Frankfurt International Airport, and the Lockerbie bomb was transferred to Pan Am from Air Malta. During its early years, the U.S. civil aviation system could argue with validity that the technology did not exist to make the security "pay off," but it could not explain why the industry undermined the FAA research efforts.

Obviously, no convention would have prevented a suicide hijacking; in fact, despite various convention titles intended to suppress *crimes* against civil aviation, no convention has actually suppressed *attacks* against civil aviation. It seems evident that the conventions in place are not being adequately enforced. Not until 9/11 did the United States fully implement passenger-baggage matching on all international

⁵³⁶ Rodney Wallis, Combating Air Terrorism, p. 125.

⁵³⁷ Rodney Wallis, How Safe Are Our Skies?, p. 41. This involved U.S.-developed technology.

⁵³⁸ *Ibid.*, p. 40.

⁵³⁹ A term used by the aviation industry to describe the number of bags passing through security checks in a given time. The industry requires a high throughput in order to maintain the flow of goods and passengers.

⁵⁴⁰ Rodney Wallis, How Safe Are Our Skies?, p. 32.

flights, and the move toward a system-wide standard for all domestic flights in the United States is pending.

Terrorism and response are about message and perception. When the Security Advisory Committee (SAG's predecessor) was in existence, it reported directly to the director general of the IATA.⁵⁴¹ It has lost that direct channel, which is an unintentional message about the downgrading of the importance of security. Irrespective of the organizational structure, IATA has a vital role to play in the security regime, and it does coordinate closely with the ICAO and other international bodies dealing with security and criminal matters, such as INTERPOL. One key area of information sharing is the training provided by IATA to carriers incapable of providing it themselves.⁵⁴² The ICAO and IATA may need to formalize a process of information/intelligence coordination through a joint security intelligence centre; there, information could be developed, analysed and disseminated throughout the system. In the Richard Ried case it would have been advantageous if the FAA had had a means of informing American carriers and their host states (because they are responsible for security) about the threat and possible means of mitigating it. Had this been the case, French authorities would have checked Ried's shoes.

Information sharing is appropriate, but its benefits are undermined by the international civil aviation regime's inability to enforce its security standards. The U.S. carriers have evaded the baggage-screening requirements for years. It is likely that they had permission to do this, but in the absence of any time frame for compliance, the term *security standard* is meaningless. Did the regime fail? No. But neither could it succeed in the new or even in the older threat environment.

⁵⁴¹ Rodney Wallis, *Combating Air Terrorism*, p. 103.

⁵⁴² *Ibid.*, p. 108.

A U.S. Security Failure

The U.S. security system failed on 9/11, due not to lack of information but lack of cooperation and agency culture clashes. These clashes exacerbated the strategic drift that plagued the U.S. security thought out the 1990s. Policy makers became complacent due to the false sense of security that emerged after the end of the cold war, just as the international community in general and the Muslim world in particular, were facing an emerging threat. The fragmented U.S. security system never constituted a regime, so the regime could not have failed; it didn't exist.

There have been attempts to combine the efforts of the more than forty agencies dealing with terrorism, creating a potential regime, but none seemed to work.

The Federal Bureau of Investigation

The primary agency for countering terrorism in the United States is the Federal Bureau of Investigation (FBI). The Bureau is internationally respected for skilful criminal investigation; through the meticulous collection of evidence and application of science, it has assisted in the apprehension and conviction of some of the nation's most notorious criminals. Even so, investigations into terrorism seem to have created problems for this agency. The FBI looks for crimes to investigate and solve; if there is no crime or apparent emerging crime, there is no case and no Bureau involvement. Terrorism is a crime, and the criminal investigative technique is useful in convicting terrorists after capture, but it does not help in identifying and connecting the dots that the FBI had in the run-up to 9/11. Simply put, the FBI's problem was that it was unaware of the dots it had.

The Bureau knew that there were Al-Qaeda support cells in the United States; it also knew that Al-Qaeda was attempting to establish active cells as well. It knew, and provided this information to domestic law enforcement and the FAA, that there was an increased threat environment throughout 2001. It knew that Khalid al-Mihdhar, a known Al-Qaeda operative, had been wrongly granted entry into the United States. It knew, or at least should have known, about Al-Qaeda's interest in unconventional use of aviation, and its continuing desire for a terrorist "spectacular" in the United States. Its concern about Al-Qaeda was so intense that it established a unit dedicated to Osama bin Laden in addition to the existing unit focusing on Islamic extremist groups. The New York, Phoenix, and Minneapolis field offices all had information on the possible threats, but because no information pertained to a pending operation, no action was taken. Even after the arrest of Zacarias Moussaoui, FBI headquarters turned down a request to search his computer. Why would the field office need to ask for Washington's permission? Of whom was the request made -- the bin Laden unit? The Islamic Extremist Unit? The counter-terrorism staff? Or headquarters staff in general? The Phoenix memo did go to both the bin Laden and Islamic Extremism units, but there does not appear to have been any movement on the information. Even if the information went to the correct unit or units, the FBI information technology was so antiquated that the information could not be easily e-mailed to others who may have been interested in it. Its technology problem may be why the FBI "lost" the intelligence provided to it by NSC during the summer of 2001.

The proliferation of special units is indicative of the FBI's concern with the threat posed by Islamic extremists and bin Laden, but did those units communicate among themselves, let alone the rest of the intelligence community? The special units did not seem able to provide the investigative and analytical support they should have.

This was partially due to the poor flow of intelligence within the Bureau, but more fundamentally, the law and the FBI culture worked against it. “To connect the dots” one has to have the dots in the first place. The FBI is legally prohibited from collecting and maintaining information not related to a specific case. Information no longer needed for an active case must be destroyed. Because terrorism investigations involve grasping the larger and often non-criminal aspects of an organization, the FBI’s hands are tied in this respect. So, even though strands of relevant information were emerging throughout 2001, the FBI was prevented from using them because it was not part of an ongoing criminal investigation.

The Bureau’s culture also helps to undermine its efforts. The FBI is hierarchical in its structure and dedicated to developing and prosecuting criminal cases. All information is developed with this end in mind. Special agents operate out of field offices, each run by special agents in charge (SAC). Most agents aspire to end their careers not in Washington headquarters but in charge of a field office.⁵⁴³ The SAC has independence in running his or her office; headquarters has a powerful, if rarely used, check on that independence. Agents are supervised, but can run “their cases” in conjunction with the U.S. attorney in the jurisdiction. The thirty-four largest field offices have Joint Terrorism Task Forces (JTTFs) as a means of coordinating federal, state, and local law enforcement agencies in countering terrorism. Agents are all trained at the world-famous FBI Academy in Quantico, Virginia, where they learn technical investigative procedures and the legal parameters within which they can conduct investigations. They receive information about past abuses of the Bureau’s powers and are drilled in the Levi and Smith guidelines for national security investigations with possible foreign links (see chapter 4). Terrorism is not

⁵⁴³ Siobhan Gorman, “FBI, CIA Remain Worlds Apart,” *Goveexc.com Daily Brief*, August 1, 2003.

specifically covered in the guidelines; the foreign Al-Qaeda seems to fall in this category. Agents are well aware of the legal and career implications of violating the guidelines and are reluctant to operate too close to the edges.

The individual special agent conducts investigations on matters destined for the courts, so every item of evidence must be properly accounted for and the chain of evidence must not be broken lest the case be lost. The FBI does not attempt to develop new cases from intelligence. Its traditional law enforcement approach has made the FBI second to none in criminal law enforcement, and it has led to the conviction of terrorists ranging from Ted Kaczynski to Richard Reid, but the investigative process is reactive and driven by different assumptions from those that are needed for intelligence gathering.

The FBI, like other intelligence agencies, has developed a risk-averse approach to investigation. The Bureau has a long and distinguished record of infiltrating criminal organizations, but it is not confident when it comes to infiltrating terrorist groups. The future role of the FBI in counter-terrorism is highly controversial.

Did the FBI fail on September 11? Yes. It failed not because it could not predict and stop the attacks, but because it was unable to gather sufficient dots and connect the ones it had. The foregoing opinion assumes the Bureau knew it had the dots in the first place. The FBI is attempting to address some of the troubles it has had with collecting and analyzing information. It has added terrorist groups to its gang member and symbols database⁵⁴⁴ but even here, as long as the individuals on the

⁵⁴⁴ Episcopo, Peter and Moor, Darrin, "The Violent Gang and Terrorist Organizations File," *FBI Law Enforcement Bulletin*, October 1996, from FBI Website www.fbi.gov/publications/leb

database are in contact with the judicial system, (under indictment all the way through to parole) they are on the database but are purged once contact has ended.

The Central Intelligence Agency.

The CIA is the nation's foreign intelligence body. As a result of the Intelligence Reform Bill of 2004, its director no longer serves as the director of the intelligence community, but has been replaced with the National Director of Intelligence. This arrangement is supposed to assist in tasking of resources for both budgeting and intelligence targeting. The CIA has a long tradition of cooperating (or at least it is supposed to) with agencies such as the State Department and INS in maintaining the terrorism watch lists. The list, which is one of twenty-four maintained by the government, is used to deny visas and entry to suspect foreign nationals. The CIA has cooperated with the FBI on terrorism since the 1986 establishment of the Joint Counter-Terrorism Centre (CTC).

Despite the well-established cooperative structures in place, the CIA did not provide information relative to Khalid al-Mihdhar to the appropriate agencies. It failed to inform the State Department (the agency that granted the visa) or the INS that they should deny entry to al-Mihdhar because of his suspected links to Al-Qaeda. In January 2001, CIA case officers in the United Arab Emirates were present at the questioning of Zaid al-Jarrah (the pilot of United Flight 93, which crashed in Pennsylvania on 9/11) and were satisfied with his answers. Hence he was permitted to travel to the United States. The case officers did not inform the INS, FBI, or CIA headquarters about this event until after 9/11. The CIA was aware of the increasing level of communications traffic "chatter" within the Al-Qaeda network, and aware of its interest in using aviation as a tool for a terrorist "spectacular," but did not share

this information with relevant domestic agencies. Some of the information-flow problem stems from the CIA's structure and some is due to the nature of intelligence.

The CIA is a less structured organization than the FBI. Field agents (case officers) have tremendous freedom to develop informants and follow leads with little or no direction from the CIA chief of station (COS). CIA headquarters develops the targets for recruitment and monitors operations, but exerts little day-to-day control. Case officers are evaluated on the number of assets (spies) they recruit, not necessarily on the information the spies provide. This is understandable because it may be years before a recruit is in a position to provide high-value information, but it does tend to pressure the case officer to reach some arbitrary numerical quota, rather than recruit for the eventual information payoff.

The Agency uses all means of collection (HUMINT, TECHINT, and so on) but the most effective tool against terrorists is having a human agent in the right place at the right time. This takes time and also clear direction from policy makers. If Washington decides Al-Qaeda is a serious threat to national security, the CIA needs to develop not only the contacts that can infiltrate the network, but appropriate tactics for the recruitment of these assets. The Agency began a concerted effort against Al-Qaeda in 1996 but has experienced mixed results to date. It has been able to identify Al-Qaeda-linked Web pages, and has been able to assist the National Security Agency in monitoring "chatter" and to foil a 2001 plot to attack the G8 summit in Genoa. But it has not been able to penetrate bin Laden's inner circle, where many of the decisions are made.

In the past the CIA had its case officers in U.S. diplomatic posts under "official cover," which meant that if the CIA officer were caught, he or she faced only expulsion from the country. The "assets" faced far worse. The case officer tended to

recruit people met at diplomatic functions, which made sense because the U.S. government was interested in acquiring information on its state opponents. Even the terrorist Palestine Liberation Organization (PLO) had diplomatic establishments in many countries, so its recruitment techniques were similar. Al-Qaeda presents a different set of problems. It doesn't have embassies or diplomats; its supporters don't go to embassy parties, but congregate in mosques. Having a quiet drink with a potential recruit is not an option. A U.S. diplomat would never be able to meet with Al-Qaeda.

The only way for a CIA case officer to meet with an Al-Qaeda supporter would be if the CIA officer were an "illegal" agent, one who lacked diplomatic protection. If caught meeting with an informant, both the informant and the CIA officer could be arrested. The closeness developed and nurtured during the risky contacts between case officers and assets fosters a hypersensitive approach to security. The CIA resists providing information to any other agency for fear of compromising sources and methods, which could lead to the arrest or even death of an asset. This understandable concern creates bottlenecks and hampers the flow of information. The Agency has recognized the risk associated with human intelligence collection (both to the case officer's safety and the reliability of the intelligence provided by human assets) and has moved to more technical collection. Its risk-averse culture intensified in the late 1990s after the Jennifer Harbury case.⁵⁴⁵

Intelligence officers must be watching with great interest the investigation in the UK of military intelligence operations in Northern Ireland. Whatever the merits of the

⁵⁴⁵ Jennifer Harbury is an American who married the Guatemalan rebel leader Everardo. He disappeared into government custody and was later killed. Mrs. Harbury alleged that the killer, a Guatemalan Colonel, was a CIA agent, and that his case officer was aware of the murder. The Agency confirmed that the officer was an asset, but it denied any knowledge of the killing. After the very public scandal, the Agency instituted new policies regarding recruiting assets and the appropriate background of such individuals.

investigation, the message is clear: there are limits to what is considered an acceptable intelligence operation in democratic societies. The limits are determined not by operational necessities, but by the prevailing political climate.

Did the CIA fail on 9/11? Yes. It did not utilize the information it had to predict the increased risk of attack in the homeland; it failed to share intelligence with the INS and FBI until it was too late; and it was slow at infiltrating an organization that two fairly average, albeit motivated, American citizens could join with little difficulty.⁵⁴⁶ It remains to be seen if the more aggressive activity undertaken by the Agency since 9/11 will include better sharing of information.

The National Security Agency.

The National Security Agency (NSA) is responsible for technical intelligence (communications intercepts, satellite surveillance, and so on). Because of the low risk involved in the collection and the perceived “objectivity” of its intelligence, the NSA is seen by policy makers as more valuable than other intelligence agencies. The NSA’s record relative to 9/11 is mixed. It had been monitoring “chatter” by suspected Al-Qaeda members and noticed a spike in communications prior to the attacks, but was unable to determine what the spike meant. It was able to raise the alert level around the time of the Bali bombing and the threat against Heathrow, but the communications were not specific. The Agency had intercepted messages mentioning the events due to take place on 9/11 in the days leading up to the attack, but because of the lack of translators, none were translated until September 12.

The NSA has technologies that allow automatic translations and reduce the need for translators, but the technologies are not capable of detecting regional accents.

⁵⁴⁶ John Walker Lindh and Jose Padeilla.

Even after the pre-9/11 messages were translated, none indicated the target of the attacks. Communications intelligence is important in monitoring international terrorist organizations, but unless the encryption protection or other codes have been broken, and there is specific targeting information transmitted, communications can serve only as an indicator of any impending operation and not a warning. Did the NSA fail? Yes. It did not have sufficient capabilities to manage and exploit the information it collected. It has relied too heavily on the technological powers of collection, and failed to invest in the human intensive analysis. This is not a unique failing in the American approach to security.

The Federal Aviation Administration

Before the Department of Homeland Security (DHS), the FAA had sole responsibility for domestic aviation security. It developed policy, researched technologies and monitored the security of all airlines operating in and to the United States and at the more than four hundred federally regulated airports. The federal security manager was the primary individual responsible for coordinating the various private security companies handling passenger and baggage screening, as well as local law enforcement across the system. Security seemed to exist in a gray area and thus was a low priority for all concerned. The airlines and airports asserted that the attacks against them were a result of their having been perceived as representing the United States, and being “soft” targets for anyone with a grievance against particular government policies. Consequently the airlines and airports argued that because the attacks were not a regular business expense, the government should be responsible for security. The government, through the FAA, argued that although it was true that the targeting of U.S. civil aviation had little to do with any business decisions of the

industry, terrorism was still a cost of conducting international business. Accordingly, the cost of protecting the international civil aviation industry should be absorbed by the industry. Thus the for-profit industry attempted to implement the most basic, lowest-cost security money could buy.

The FAA was long supposed to establish basic training standards and work rules to strengthen the existing security system, but standards had not been established by September 11. The three airports chosen for the hijackings were not unique in their security-related difficulties. Between May 1998 and April 1999 Boston's Logan Airport had a 207 percent annual staff turnover⁵⁴⁷ and John F. Kennedy International in the New York City area had a staff turnover of 53%.⁵⁴⁸ Washington D.C.'s Dulles Airport had a 90 percent average turnover rate and all three had poor wages⁵⁴⁹. The nineteen largest U.S. airports had an average staff turnover rate of 126 percent during the 1998-1999 period; European airports had 50 percent. At many airports the wages for screening staff were lower than the wages received by the counter staff at the fast-food concessions. High turnover and low wages undermined the limited training that did occur because there was little practical experience that could be provided by the line staff. Not only was the staff of dubious quality, many had a poor grasp of English and some screeners were colour blind, a condition that rendered them unable to discern the colour coding on screens that was indicative of the presence of suspect material. Some screeners had criminal records.

The FAA's lack of training standards and poor on-the-job testing rendered the system porous. Most of its field-testing consisted of unconcealed items made to look like bombs. Even with the obvious testing, screeners still failed to spot "bombs" in 20

⁵⁴⁷ GAO, Aviation Security Long-Standing Problems Impair Airport Carriers Performance, pp. 24-25.

⁵⁴⁸ Gerald Dillingham, GAO testimony, "Aviation Security: Vulnerabilities Still Exist," p. 16.

⁵⁴⁹ Ibid.

percent of tests.⁵⁵⁰ After fines and negative publicity, the discovery rate held at 80 to 85 percent, well below the rates achieved by other industrial nations.⁵⁵¹ However, the FAA's elite Red Team (which conducted covert security assessments) found that in 1996 Germany's Frankfurt Airport, one of the busiest in Europe, had major security failings, the same failings that had been identified six years earlier during the Lockerbie bombing investigation.⁵⁵²

The main criticism of the FAA is that it was too close to the industry it was supposed to regulate. Although it aggressively enforces the rules, it is also exceedingly accommodating to the wishes of the commercial carriers.⁵⁵³ The Lockerbie investigation provided the earliest substantiation of this charge. All U.S. carriers operating from Category X airports,⁵⁵⁴ of which Frankfurt was one, were to match baggage with passengers, screen all baggage, and not transport unmatched baggage unless it had been hand searched prior to loading in the hold. A carrier wishing to deviate from these procedures had to request a waiver from FAA headquarters in writing, explaining the purpose of the waiver. The FAA had to respond in writing within thirty days. During 1988, Pan Am, operating from a hub in Frankfurt, failed to follow these mandated procedures. It relied on X-ray screening of hold baggage despite the FAA warning that such screening could not detect plastic explosives concealed in portable radios, did not hand screen unattended baggage, and had no written permission to deviate from the security plan.

During the subsequent investigations and civil court proceedings against Pan Am it emerged that the carrier may have had an informal agreement with the federal

⁵⁵⁰ Rodney Wallis, *How Safe Are Our Skies?* p. 76.

⁵⁵¹ *Ibid.*

⁵⁵² Andrew Thomas, *Aviation Insecurity*, pp .58-59.

⁵⁵³ *Ibid.*, Chapter 2.

⁵⁵⁴ These are the airports that are seen as having the highest security risks, and that are some of the busiest airports in the world.

security manager⁵⁵⁵ that allowed the airline to evade the security mandates. That no fines were imposed by the FAA subsequent to inspections before the Flight 103 attack supports this speculation.

The FAA's entire approach to security tended to be skewed. It could produce impressive statistics on the number of weapons seized⁵⁵⁶ and arrests made, but no information on the actual threat posed by the weapons. It did not publish figures on the number of arrests for attempted hijackings and the commandeering of aircraft, nor the number of breaches of secure or secured areas. Seizing a pocket knife from a farmer attempting to board a flight in Nebraska is not the same as taking a knife from a Middle Eastern male in Boston. Raw numbers are an easy way to demonstrate the effectiveness of security, but motivation is more important than means.

The statistics-driven approach extends to the enforcement process. The FAA can tabulate security violations and corresponding fines, yet critics of the industry and of the FAA fault the system, because fines are reduced after long negotiations. For FAA detractors, this is proof of a culture of compromise. Alternatively, it may demonstrate how the FAA wants to show Congress and the public that its enforcement is rigorous. Later, revised numbers are usually truer assessments, but usually are not widely reported and are unlikely to undo previous press coverage. The widely held impression of compromise does not serve security well. The FAA did not seem interested in fixing the problem. The aforementioned Red Team constantly evaluates both U.S. and foreign airports served by U.S. carriers. If the team discovers a violation, it cannot use the information as the basis for an enforcement action,⁵⁵⁷ causing some to question the purpose of the exercise in the first place.

⁵⁵⁵ Rodney Wallis, *Lockerbie: The Story and the Lessons*, p. 138.

⁵⁵⁶ See CNN special reports "War Against Terror: Flight Risks," November, 2001.

⁵⁵⁷ Andrew Thomas, *Aviation Insecurity*, p. 58.

Faults aside, the FAA did have some notable successes, even against Al-Qaeda. Its Air Carrier Standard Security Program (ACSSP), established in cooperation with industry, must be followed by all carriers. In 1997, 152 scheduled and charter carriers were covered by this program⁵⁵⁸ and by the similar Dangerous Goods and Cargo Security Program (DG/CS).⁵⁵⁹ The FAA also requires foreign carriers to submit a Foreign Air Carrier Security Program (FAC) in order to fly to the United States. Required by the Antiterrorism and Effective Death Penalty Act of 1996 (49 U.S.C. § 44906), foreign carriers may use the FAA's Master Security Program (MSP), their own FAA approved program, or the program of the last point of entry to the United States; currently there are more than 170 carriers covered by one of these programs.⁵⁶⁰

The FAA developed passenger profiling systems that contributed to reducing the threat from Cubans hijackers; similarly successful has been the Computer Assisted Passenger Pre-Screening Profiling System (CAPPS) and the more powerful CAPPS II in development. The FAA has funded research into Explosive Detection Systems (EDS), cargo hold hardening and other programs designed to detect and reduce the impact of undetected explosive devices. The research record is impressive, though deployment has been haphazard. Despite the positive record on the technology side, the FAA has reduced the effectiveness of the lower tech approach by ending the security-related questioning of passengers because it did not prevent 9/11. This seems to be a result of faulty reasoning; the purpose of the questioning was not to detect a hijacker, but to detect an unwitting bomber. This is a like removing the smoke detector from your home because it didn't prevent the robbery.

⁵⁵⁸ Department of Transportation annual report to Congress, 1997, page 18.

⁵⁵⁹ *Ibid.*, page 20.

⁵⁶⁰ *Ibid.*, page 24.

The FAA was slow to acquire an intelligence capability to augment its security program, and it was criticized early on for providing largely useless information. It was an accurate charge, but failed to take into account that the agency was analyzing produced intelligence; it did not produce any raw intelligence of its own. Its dissemination of the warning of a shoe-bombing attack against U.S. carriers was extraordinarily rapid. The FAA provided at least five indications/warnings of threats to carriers in the months prior to the 9/11 attacks.

The FAA's primary failure on September 11, 2001 was complacency. The weak security system and lax oversight were not perceived to be a serious problem, because there had not been a domestic hijacking or commandeering since 1994, and that one had not been politically motivated.⁵⁶¹ Hijackings and bombings happened to U.S. carriers overseas. The FAA's reaction to the August 1998 intelligence information mentioned above is illustrative. It was simply dismissed as dubious because "the state of that foreign country's aviation program" made it "highly unlikely." Further, it was assumed that an international flight on such a mission would be detected before it entered U.S. airspace. There is no indication that the FAA used the information to re-examine the domestic security system. Even if the specific threat was deemed unlikely to be realized, the FAA should have known of Al-Qaeda's long-standing interest in the unconventional use of aviation, and because Al-Qaeda, or some Arab group, was plotting to use aviation as a suicide weapon, there should have been more concern.

This list of failures should not diminish the efforts and abilities of individual FAA staff. The 9/11 Commission correctly observed that air-traffic-controllers

⁵⁶¹ David Gero, Flights of Terror, p.163. On April 7, 1994 a FedEx employee attacked a fellow crew member while the aircraft was in flight. The attacker was an off-duty pilot, travelling as a passenger, who, it was discovered, had falsified his previous employment record and was facing a disciplinary hearing.

moved swiftly during an unprecedented attack to close U.S. airspace and get more than 6,500 airborne craft on the ground safely. Individuals worked around the existing chain of command to get Air Force fighters airborne to protect New York and Washington. None of these improvised actions overcomes the fact that the FAA failed in its mission to protect the flying public that fateful September day. As a consequence FAA had its security responsibility transferred to the Department of Homeland Security.

The Aviation Industry

The final member of the epistemic community surrounding the ICAO is the civil aviation industry. Although the term *industry* is inclusive of its many components, it refers here primarily to the carriers and the airport authorities. Because the United States constitutes 40 percent of the global aviation market⁵⁶² and accounts for 650 million passengers and one billion bags,⁵⁶³ American carriers have been the primary focus of this work.

Before 9/11 the carriers seemed to hold security in low regard. They looked for the lowest common denominator when they awarded contracts for passenger and baggage screening. Moreover, security was not to interfere with the flow of passengers and baggage and thereby reduce the numbers of people flying. To turn a profit, 65 percent of seats must be occupied. Carriers have constantly argued that screening should not be their responsibility because hijackings and bombings are not a result of their business decisions, but occur because they are seen as proxies for the United States government and are used as symbols for protest. By this reasoning it is the government and not the carriers that should pay for security. The government

⁵⁶² Andrew Thomas, Aviation Insecurity, p. 87.

⁵⁶³ *Ibid.*

acknowledged this, but says that security is a legitimate business expense of the carriers. The dispute created the mixed nature of the security environment that existed prior to September 11.

One of the key elements of any security system is layering, the presence of multiple barriers that those with ill intent have to surmount or circumvent. Because there is no foolproof way to provide security, the thinking is that the more layers, the higher the probability that a terrorist or terrorist group will be caught. One of the bedrocks of aviation security is the matching of baggage to passengers, a standard practice in international aviation. It is likewise a standard practice not to carry unaccompanied luggage; American carriers are required to do so only on international flights. They assert that it would be too costly and disruptive to implement baggage-matching domestically. With 35,000 flights a day it would be almost impossible to do, particularly because 85 percent of domestic flights are routed through hub airports.

The carriers could have invested in appropriate technology, but not only did they not, they actually undermined the FAA's efforts to research such technologies. Most of the required technology had already been deployed in Europe -- and it was American technology.⁵⁶⁴ The cost of security is considerable and usually best shared. Relative to baggage reconciliation, the federal government and the local governing authority could each pay a quarter of the cost and the carriers pay the rest, based on the market share at that facility. A reconciliation system would lower the cost of finding lost baggage, and reduce customer complaints.⁵⁶⁵ Security can be good for business.

⁵⁶⁴ Rodney Wallis, How Safe Are Our Skies, p. 40.

⁵⁶⁵ *Ibid.*,47.

The carriers are often accused of not taking FAA fines for violations seriously. The fines are factored in as a business expense, and because most fines are never paid in full in any event, fines are not a major expense.⁵⁶⁶ One key component of security is the availability and flow of information among the aviation system's users. U.S. airports have had as poor a record as some of the carriers. U.S. airports are owned and operated by a variety of governing bodies: state governments (e.g., Connecticut's Bradley International Airport), county governments (e.g., Atlanta's Hartsfield/Jackson International Airport), municipal government (e.g., Chicago's O'Hare International Airport), or a special jurisdiction, such as the Port Authority of New York and New Jersey which owns and operates the area's three airports.⁵⁶⁷ These authorities provide law enforcement, access control, and perimeter security services. The number of investigative journalists who have penetrated both secure and secured areas in recent years suggests that security is not tight.⁵⁶⁸ Criminal gangs steal cash and other valuables from cargo shipments and passenger baggage, and narcotics smugglers, such as the network discovered operating from the FedEx hub in Memphis, Tennessee, are common. Stricter enforcement of the FAA's ACSSP requirement for staff background checks and tighter control of facility IDs may reduce this threat.

The paramount consideration for airports is the cost of security. Airports are funded by user fees and concession profits. The International Air Transport Association (IATA) and Airport Council International, the airport trade association, are acutely aware of the financial pressures on the airports and work closely with the ICAO when developing security programs for the industry.

⁵⁶⁶ Andrew Thomas, *Aviation Insecurity*, p .85.

⁵⁶⁷ John F. Kennedy International and La Guardia, both in New York City, and Newark-Liberty International in New Jersey.

⁵⁶⁸ A secure area is any part of the airport that requires a background check and airport identification to enter. A secured area is any area that deals with passenger boarding and deboarding; it is supposed to have the highest security.

Despite the less than positive reputation that U.S. carriers have when it comes to domestic security, they and their trade association have made major contributions to the development and implementation of the international security regime. IATA has worked very closely with the ICAO to develop rigorous and economical security measures. Its most important contribution has been the development and implementation of the so-called 8 Points:

1. Establishment of airport “sterile” areas that require security screening to enter.
2. Dedicated secure communications between passenger screening points and a control center.
3. Armed law enforcement officers with mobile communications to provide support for any unlawful interference event; airports should have a crisis management plan.
4. Restricted access areas should be clearly marked and have access controls to prevent accidental unauthorized entry.
5. Positive airport identification should be worn by all persons and vehicles authorized to be airside, and identification is to be checked at a control point.
6. All baggage, mail and cargo should be physically separated from public areas after the carrier receives them, and facilities to x-ray or otherwise screen materials should be available.
7. Aircraft parking areas should be adequately controlled, protected and illuminated.

8. All public areas overlooking airside are adequately protected to safeguard security.⁵⁶⁹

IATA conducts security audits of an airport upon request by the airport authority or of an individual carrier's operation at a given facility at no cost to the airport.⁵⁷⁰ Unlike investigations conducted by the media, the findings of the IATA Security Advisory Committee (SAC) are confidential and are used to improve identified deficiencies. The Eight Points are recognized by the Council of Europe as the "only objective survey program available to the industry and to government"⁵⁷¹ because it is conducted by industry professionals. Given U.S. carriers' poor domestic record it is ironic that an American, the head of TWA security, chaired SAC for many years. Why has the industry failed to develop a robust response within the United States? The seeming lack of a threat prior to 9/11 was a factor.

Policy Makers

The most important failure is one at the policy level. Presidents are supposed to task the intelligence and security services of the United States to focus on threats. No administration perceived a severe threat facing the United States after the end of the cold war so they did not task the security services to identify any particular threats. The overwhelming desire to believe peace was at hand lead the first Bush and the Clinton administration to cut the defence and intelligence budget, to realize the "peace dividend." Neither administration understood the changing nature of conflict at the end of the cold war, nor did they dedicate resources to understanding them. Even when the threat from Al-Qaeda became clear in the late 1990s there was no political will to remove the threat.

⁵⁶⁹ Rodney Wallis, How Safe Are Our Skies?, p. 70.

⁵⁷⁰ Ibid. p. 71.

⁵⁷¹ Ibid.,p. 72.

At the same time, neither the Presidents nor Congress were interested in reforming the dysfunctional security system in the United States. The low regard for aviation security highlighted the underlying problem. The federal government was interested in security on the cheap, seeing its role only in setting standards and investing in research. It failed completely on the former and never implemented the latter. It did this at the request of the airline industry and the airport operators. The industry didn't want to pay for the cost of security, or inconvenience passengers. The various governments that owned and operated the airports didn't want to pay for security either. Nor did they want to impose higher landing fees on the carriers that provided jobs, tax revenue, and political contributions to all the elected players. The system "worked" only because it had not failed.

Only when the system did fail on 9/11 did policy makers move to overhaul it. But even in 2006, five years after the terrible attacks on 9/11, policy makers are still arguing over cost, and the level of federal involvement in security.

Conclusions: Whose Failure Was It?

There is no easy answer to the very basic question concerning the failure. The international civil aviation security regime, although dedicated to the safe and efficient movement of goods, people and services, lacks enforcement tools. The international community missed an opportunity to increase the enforcement powers of the ICAO by failing to include any of its treaties within the jurisdiction of the International Criminal Court (ICC) when that body was established in July 2003. It declined to take jurisdiction over terrorism offenses because there was no standard legal definition of terrorism, yet it ignored the considerable body of conventions

covering tactical aspects of terrorism. It is unclear why the ICC was not given authority over violations of existing UN conventions. Although it never granted *de jure* responsibility for security to the IATA, the ICAO *de facto* ceded security to the trade association. This may have been an efficient way of developing practical security practice, but it was a legally dubious transfer of state responsibility without state enforcement authority as well. Thus the first layer of civil aviation security, the international regime, exists only as rhetoric.

Layer two, the host-state, and layer three, the carriers themselves, each failed. Within the United States, complacency and inadequate understanding of the new threat were wedded to the patchy security system with devastating effect. The U.S. aviation industry had not faced a domestically oriented threat since phase one of the threat to civil aviation. The security in place had reduced that threat, and because no aviation sabotage campaign had originated in the United States, the security system seemed to work, as weak as it was. Any change would entail significant investment, and who would pay for something that few thought was necessary? Security continued to function on a “wing and a prayer.”

Industry thought it was the government’s job to protect it and the country from terrorism; government thought industry should protect itself. U.S. security system was administratively fragmented, led by different bureaucratic cultures, and -- in many cases -- legally prevented from cooperating. There was no lack of dots to connect that caused the intelligence failure of 9/11; there was the lack of communication among the dot collectors.

Various special units in the FBI, CIA, and the National Security Council were set up to deal with the threat posed by Osama bin Laden, but none communicated with any other units or even knew what it had, let alone what any other agency had.

Several FBI field offices had information, as did at least two special units, but no information seemed to get where it needed to go. The CIA didn't provide the State Department with information to prevent Khalid al-Mihdhar from entering the United States. No agency appears to have told the FAA about the interest of Al-Qaeda in the unconventional uses of aviation. No one in any administration or agency seemed to fully comprehend the threat posed by Al-Qaeda or believe that it was capable of masterminding devastation on the scale of 9/11.

Who then failed on 9/11? The entire system did. This does not mean no one bears responsibility, only that no one agency or person should bear the onus. The United States has been taught a grim, sobering lesson and has moved quickly. The federal takeover of security screening and the combining of more than forty agencies involved in counterterrorism into the Department of Homeland Security (DHS) was critical. Even had this department existed before 9/11 it could not have prevented the attack. The reduction of the fragmentation of the existing system is positive. The merging was accomplished on the run, so to speak, but fragmentation is diminished and the Department is receiving high marks for its positive initiatives. But, as the near shooting down of the Governor of Kentucky's plane over Washington, D.C. during President Reagan's state funeral demonstrated, it is too soon to sing "the skies above are clear again."

Chapter 6 Recommendations

The Presidential campaign of 2004 centred on the war on terror and how the United States was organized for and conducted this war. Due to the intense glare of the Presidential race, the 9/11 Commission's recommendations were adopted into law in December 2004 with the passage of the Intelligence Reform and Terrorism Prevention Act. (Hereafter referred to as the Intelligence Reform Bill.)⁵⁷² The major theme of the report was that there were repeated failures and missed opportunities across the U.S security system responsible for protecting both the nation and its vital aviation industry. For all the positive press about the report and the Bill, the authors of the 9/11 Commission and the Intelligence Reform Bill missed opportunities and failed to be imaginative in its solutions.

The international community has recognized the need for security, but has been reactive and has failed to systematically learn from the lessons of previous disasters. It has tried to develop a layered approach to security, but has lacked the authority and will to enforce this policy. The international civil aviation regime is only as strong as its members enable it to be, thus the primary relationship examined here is between the international civil aviation community and the United States. .

The international civil aviation community consists of more than 190 independent sovereign states and is legally represented by the United Nations agency The International Civil Aviation Organization (ICAO), which is the first layer of security. Through its mandatory Standards and Recommended Practices the ICAO in

⁵⁷² Intelligence Reform and Terrorism Prevention Act of 2004, Title VII.

theory has the power to mandate security procedures for member states. But in reality there is no such authority. A state can opt out of particular procedures without consequences. This weakness has been addressed by the advanced industrialised bilaterally by the advanced industrialized nations, but needs to be formalized in the existing regime. It is the individual state, through the host-state doctrine that is responsible for providing security at their airports. If they are not meeting their obligations, and there are no sanctions, then the security regime does not exist. The ICAO needs to address this weakness.

The United States is the predominant state actor in the international civil aviation community. Thus, how it responds to international civil aviation directives has enormous impact on the rest of the community. The U.S. has complied with the basic standards required by the Tokyo, Hague and Montreal Conventions. Unlike many other nations, the federal government does not own or operate any airports – rather, various levels of local governments do. Prior to 9/11, security was further divided between law enforcement, which was provided by local police authority, and security, particularly passenger and baggage screening, provided by private companies on behalf of the airlines. This widely criticised approach, which some Europeans denigrated by saying that getting on a plane in the U.S. was like getting on a bus, began to be radically altered after 9/11, though momentum has slowed recently.

The security system employed by the U.S. and the international community prior to 9/11 was designed to deter and defeat the “old” terrorism but was not capable of addressing the new terrorism. Yet this thesis has documented the international civil aviation security regime’s failure to counter either the old or the new terrorism. It is vital not only to highlight the failures, but also to propose some possible solutions. This process will encompass looking at how the international civil aviation regime

addresses security, how the regime interacts with the United States, and finally how the United States addressed the issues, particular new security realities created by the attacks of September 11, 2001.

The International Approach to Counter-Terrorism

Chapter 2 described the key approaches to dealing with counter-terrorism: international, military, criminal justice and political. Underpinning all is the role of intelligence. The international community tends to be predisposed toward using the political and criminal justice approaches. In the former, the international community takes two tacks. The first condemns violent actions and, where appropriate, develops treaties and conventions banning particular terrorist activities such as the 2001 UN convention on the financing of terrorism. These conventions contain at least the possibility of legal proceedings against states that fail to enforce the terms of the conventions. However, few conventions apply to the individuals who are involved with terrorism. The second tack addresses the “root causes” of terrorism, through addressing legitimate grievances. All successful strategies to defeat terrorism will try to use this approach as a means of ending both the violence and the causes of violence. Still, relying solely on the political and criminal justice approach has sent mixed messages and done little to deter terrorism. Most states have a predisposition towards non-violent approaches, as well as the difficulties of coordinating international security and intelligence personnel, allows the international community to more easily leave intelligence and military approaches to individual nations.

The United Nations failed to condemn Hezbollah for the kidnap and murder of Colonel Higgins, a U.S. marine working for the UN in Lebanon in the 1980s⁵⁷³. It has failed even to define what terrorism is, it has been bogged down in endless debates over the causes of terrorism, and it is quick to condemn any member state that uses force to retaliate against state sponsors of terrorism.

The UN was successful in brokering a solution that brought the accused Lockerbie bombers to trial in 2000, but it could be argued that justice delayed is justice denied. The organization has never sought legal action in the International Court of Justice against state sponsors of terrorism and ignores attacks by the Palestine Liberation Organization and the Palestinian Authority against Israel. The political/legal approach has some useful qualities, but it is not sufficient to the task at hand. The international community's mixed record can be illustrated through the international civil aviation community's actions and non-actions.

The International Civil Aviation Regime

Chapter 1 introduced the idea of regime and, for this author, formal regime theory and its application to international civil aviation. Although a regime does govern the workings of the international civil aviation system, it was unevenly applied in the pre-9/11 world and seems incapable of dealing with the new threat of suicide terrorism.

Regimes are devised to operationalize shared norms and values so that there are mutually shared and predictable outcomes. The international community agreed that the free exchange of goods, ideas and people was beneficial to all, and developed an apolitical institution (the ICAO) to develop and enforce the rules governing

⁵⁷³ On February 17 1988, Hizbollah kidnapped U.S. Marine Lt. Col. William Higgins in Lebanon. Col. Higgins was commanding the UN Truce Supervisory Observer Group. He was murdered by them in July 1989.

international civil aviation. The outcomes and benefits are debatable, but the principles are accepted. However, the spirit of international cooperation is undermined by the other key principle enunciated by the ICAO, that contracting (member) states have absolute sovereignty over their airspace, which allows states to interpret rules and implement them as they see fit.

The individual contracting states have almost always been reactive in terms of counter-terrorism and security, and the ICAO suffered from the same weakness. Security, which is governed through Annex 17 to the Chicago Convention, was an afterthought, and the Tokyo, Hague and Montreal Conventions that emerged from the ICAO were a response to specific terrorist threats. Its apolitical nature allowed the ICAO to avoid various political disputes that have undermined many of its sister UN agencies when it came to defining terrorism, with the result that the various conventions passed and were ratified by contracting states with little dispute.

The ICAO sidestepped controversies surrounding the Cold War, South Africa's apartheid policy⁵⁷⁴ and the Iran-Iraq⁵⁷⁵ War by adhering strictly to the principle of political neutrality, which had various consequences. The security conventions are the clearest positive examples. The ICAO tried to close off debilitating debates created by trying to define terrorism by defining it as interference, for any reason, with international civil aviation, a criminal offence. This helped in devising the legal framework to punish terrorist attacks on international civil aviation, and demonstrated the importance of the issue for the international community. But the conventions failed to suppress terrorism against civil aviation, as the convention titles asserted they would, and the lack of enforcement caused states to act outside the conventions. The then G7's 1978 Bonn Declaration and the sanctions were all

⁵⁷⁴ Eugene Sochor, Politics of International Aviation, pp. 44-47.

⁵⁷⁵ *Ibid.* pp. 117-121.

“extrajudicial,” in the sense that there are no bases in the existing international civil aviation regime for such sanctions. The regime is supposed to be universal in its jurisdiction, but it is parochial in its interpretation.

The contradiction at the core of the ICAO is starkly illustrated by its most widely quoted provision. The so-called “prosecute or extradite provision”, which is widely attributed to the Hague Convention, does not contain any such reference. The French government and others objected to an international body dictating to a national executive branch how to proceed with a legal matter. Thus the Hague Convention states only that a suspect must be surrendered to the appropriate authority for a determination whether to prosecute or not. Failure to prosecute does not automatically cause the accused to be extradited to another interested state. Hence the situation after the 1988 Lockerbie disaster: the United States and the UK were under no illusions that the accused bombers would ever face trial in Libya. The two countries, certain that the Libyans would meet their treaty obligations by claiming to have found no evidence for a trial, required intervention by the UN Security Council, which occurred. After more than a decade of negotiations and sanctions, one of the two accused was convicted. Stronger conventions would have precluded this tortuous process.

The ICAO issues Standards and Recommended Practices (SARPs) which all contracting states are supposed to follow. States can, however, ask to opt out of any SARP, and do not have to disclose the reasons or the opt-out duration for security reasons. States’ ability to evade responsibilities under treaties is a fatal weakness in the existing system. Although it is unlikely that a state would be amenable to an international body’s sanctioning it for violations of international agreements, especially when the state has little control over private carriers let alone non-state

actors, there may be market tools available that would induce compliance. Because the carriers have insurance, there could be a system of premiums relating to how a particular airport authority complies with its international obligations; states in full compliance would have the lowest rates. Information on this matter would remain secret lest terrorists use it to find weaknesses in the system. The insurance costs would allow a user airline to calculate the financial risk from any particular airport. Thus carrier and the airport would have a financial incentive to cooperate in improving security. Lower premiums will free up resources to address deficiencies, creating a safer airport. This would make an airport more attractive to travellers, thereby increasing the carrier's loads, and may help to attract more carriers to the airport, reducing landing fees and increasing other airport revenues. If an airport decides not to comply, the costs for all concerned will be very high. The exact mechanisms would still need to be developed, including how missile attacks on an aircraft would be factored into the cost, but this method provides positive incentives for fully complying with a range of safety and security measures without necessarily increasing the financial burden on the state or airport operator in question.

The regime still needs to address its lack of enforcement powers. While the Security Council is the only sanction-making authority in the UN, there are powers the ICAO could employ short of a UNSC resolution. Formal sanctions could include a range of items, including exclusion from election to the ICAO's council for as long as the nation is not in compliance. The organization needs to be more creative in using internal mechanisms in a more positive fashion.

The international community has endeavoured to put in place a broad-ranging international criminal law system over the last decades. The July 2002 establishment of the International Criminal Court (ICC) provided a permanent tribunal. It has

jurisdiction not only over states, but individuals perpetrating “crimes against humanity.” Some of its proponents hailed the ICC as the proper vehicle to try terrorists as well as war criminals; what better venue to adjudicate the international crime of terrorism than an international court? The ICC, however, does not have jurisdiction over terrorism; it declined to exercise competence in this area because there were no commonly accepted definitions of the term. The proponents of the ICC had missed the opportunity to enshrine various conventions dealing with predicate crimes of terrorism (attacks against internationally protected persons, hostage taking and criminal interference with international civil aviation) and thereby had called into question the international commitment to using the legal framework as a weapon against international terrorism.

All of the above tools were designed to punish terrorists in the second phase of terrorism. These are groups that were either state sponsored or were trying to kill a limited number of people. These were not suicide terrorists, but ones who could face justice. Al-Qaeda and its fellow travellers were quite happy to kill enormous numbers of people, including their own operatives. None of the above measures would address the issues raised by the third phase threat posed by Al Qaeda. Courts and international financial incentives have little effect on the dedicated jihadists it recruited and trained. But the changing threat should not negate the political/criminal justice tactic in counter-terrorism.

The regime’s biggest failing is its inability to disseminate changes in security policy and information. In the rapidly evolving post-9/11 environment, it has fallen to individual states to develop and implement policy. Requests by the United States to have passenger manifests and a range of other information made available to its security personnel are being negotiated with individual states or groups such as the

EU.⁵⁷⁶ There is no indication that the ICAO has been consulted in this process.

Although the merits of doing so with individual items can be debated, the principle of information sharing is at the core of the international civil aviation regime; the lack of coordination seems to suggest a loss of faith in the regime among some members.

The ICAO should address this by moving to establish principles of security and intelligence information sharing, including the types of information susceptible to sharing and with whom it can be shared. INTERPOL has similar procedures in place, which could serve as a model. To maintain the apolitical nature of the ICAO, procedures and methods for barring participation in intelligence and security sharing would have to be devised by an internal committee whose own procedures are clear and transparent. For example, Libya's being under UN sanctions would bar it from participating in information sharing. That one member state has blacklisted another, should not be the sole determining factor in participation.

Cooperation should not be limited to information sharing. IATA has a renowned program for evaluating security procedures at airports. Both IATA and ICAO already cooperate on many projects. They should move toward establishing a joint operation to provide training, information collection and analysis. A joint security and intelligence centre (JSIC) would answer a need for a full range of security training and intelligence by collecting open source information involving both criminal and terrorism related information. For example, if aircrews notice increased surveillance of themselves or theft of uniforms, they would report it to a central location. From such aggregated data an analyst can determine if there is an emerging pattern at an airport or across the system. Current fragmented reporting does not allow for sufficient analysis for trends such as these to be identified and

⁵⁷⁶ http://europa.eu.int/comm/external_relations/us/intro/pnr.htm as of summer 2004.

heightens the risks entailed in not connecting the intelligence dots. Any member state or carrier could provide information as well as request research, analysis or security evaluative information on the full range of threats facing the industry.

The centre would also be a pivotal location for the dissemination of warnings to carriers and states. This would avoid situations like the Richard Reid case where American Airlines' Paris station had information about a potential "shoe bomb" attack, but the information did not reach the French government. This information sharing should not consist solely of intelligence warnings. The aviation user community is attempting to develop methods to protect aircraft from both explosives and MANPADS and to formulate common standards to reduce the threat from these weapons to almost nil. Airbus is developing cargo screening technology that may not be certified in other than certain EU countries due to idiosyncratic technical requirements.⁵⁷⁷

There are a host of explanations for the idiosyncratic technical requirements, but the ICAO needs to establish a common set that will allow for continued innovation. The standards need to encompass both passenger and dedicated cargo aircraft; for example, in 1997 passenger aircraft carried 53 percent of all air cargo.⁵⁷⁸ Thus, there is little distinction between cargo and passenger requirements. Other security measures, such as strengthening cockpit doors, arming pilots and hardening cargo holds are all being developed on individual national and carrier bases, with little or no international coordination. No nation should be required to place armed personnel on flights, but the ICAO should allow for the option and devise internationally accepted procedures to deployment staff. Although perhaps beyond

⁵⁷⁷ Off the record discussion with Airbus technical staff at Aviation Conference in Brussels January 2004.

⁵⁷⁸ Developments in the Air Freight Industry, *Aircraft Technology, Engineering & Maintenance*, August/September 2001, p. 20.

the purview of the ICAO, there needs to be a re-evaluation of security concerning international travel documents and where document checks are conducted. The establishment of high-tech security in conjunction with documents, such as biometric data, would reduce the occurrence of fraudulent documents, but skilled customs and immigration officers would still be necessary. It would be desirable to screen all documents prior to departure, as the United States does for passengers departing from Ireland, which would lessen the possibility of hijacking. This would increase the probability of capturing terrorist or other criminals prior to their boarding an aircraft where they could be involved in a hijacking, and also increase the possibility of preventing an illegal immigrant from getting on the aircraft only to have to be returned later. This type of pre-departure searches would encounter myriad problems that, once solved, would yield dividends in security on all flights. The ICAO may not be the most effective instrument in the ongoing struggle against terrorism, even if all the above recommendations were to be fully implemented, but it is international civil aviation's best armour.

The United States and the ICAO

As one of the most important nations in international civil aviation, the United States has an enormous capacity to shape the agenda of the aviation community, but the 9/11 Commission almost totally ignored the ICAO. The U.S commitment to the ICAO did not waver through the years, even when the country was at odds with the rest of the UN system. At its own expense, it has had two FAA security personnel (now from its Department of Homeland Security) on secondment to the ICAO to provide various kinds of assistance. The Bush administration requested \$12.6 million

for the ICAO for fiscal year 2004; this is in addition to the \$1 million request for aviation programs, an increase of \$ 700,000.⁵⁷⁹

The United States has also sent mixed messages at times. The Carter administration, frustrated by the lack of international action against aviation terrorism, pushed the Bonn Declaration through the 1978 G7 summit meeting in Bonn. The George H. W. Bush administration cooperated with the UK in developing UN sanctions against Libya for the Lockerbie bombing, but by doing so explicitly avoided the ICAO. The current Bush administration, while continuing generous funding for the ICAO, has made no public effort to use it to craft conventions dealing with the myriad security threats posed by Al Qaeda. The Intelligence Reform bill does legislate the need for international cooperation with regard to air marshals⁵⁸⁰ but does not go much further with aviation issues.

The above certainly has something to do with the administration's suspicion of international institutions, but it also underscores the weakness of the regime. When the United States seeks a way to address its security concerns other than using the ICAO, a noncontroversial avenue, it sends a loud "no confidence" message to the international civil aviation community, and the UN system in general..

The Bush administration has been widely accused of unilateralism during the "war on terrorism." It is true that the United States has not operated through formal UN structures, but it has worked effectively with allies. It gained rapid support for flight cancellations from the UK,⁵⁸¹ France,⁵⁸² and Mexico⁵⁸³ during late 2003 and early 2004. The European Union is developing agreements with the United States

⁵⁷⁹ International Organizations Funding Items pp. 79-80

⁵⁸⁰ Intelligence Reform Bill, Title IV, Sections 4016-4018.

⁵⁸¹ BBC online "BA Flight Cancelled over Security," Friday January 2, 2004.

⁵⁸² CNN online "Terror Fears Cancel Air France Flights to LA," December 25, 2003.

⁵⁸³ BBC online "BA Flight Cancelled over Security," Friday January 2, 2004.

over sharing of passenger data that will only enhance the security of all passengers.⁵⁸⁴ The cooperation over maritime security with European allies could model future cooperation between maritime and aviation interests.⁵⁸⁵

At the 2003 Asian Pacific Summit President Bush announced that the United States would work on an international convention covering the export of MANPADS; the idea of a convention is a positive development, but does little to eliminate the current threat.⁵⁸⁶ As part of such a treaty process, the United States should develop a program with the ICAO to purchase MANPADS from the black market. The cost estimates vary as to the supply and prices; some missiles can sell for around \$5,000, but even so it would be a rapid and cost effective way of reducing the threat posed by these systems.⁵⁸⁷ The alternative is spending as much as \$10 billion to protect just the U.S. civil aviation fleet. This would seem to be a proper partnership with the international community. The ICAO could also work to adopt an international convention establishing mandatory minimum sentences for possession, transportation, conspiracy to use and other charges relating to MANPADS. The Intelligence Reform Bill of 2004 contains provisions for this sentence in the United States, and it should be used as the starting point for international action.⁵⁸⁸

The approach favoured by the current Bush administration, working with nations on a flexible bases, may not utilize the existing international regimes, but it

⁵⁸⁴ www.statewatch.org., Observatory on the exchange of data on passengers. (PNR with USA.)

⁵⁸⁵ "The United States Mission to the European Union, U.S. Customs Inspectors Deployed to Rotterdam to Screen Containers Date: August 26, 2002

⁵⁸⁶ usinfo.state.gov. "US. Accomplishments at APEC Summit, Day Two."

⁵⁸⁷ There are perhaps 500,000 missiles available on the international market, and although one can sell for as little as \$5,000 the most widely quoted figure is \$100,000. If demand were to rise, one can assume a price increase to \$500,000 or more. If the 500,000 missiles were to be sold the yield would be \$2.5 billion dollars. That total is lower than the \$5-10 billion estimated cost of protecting the U.S. civil aviation fleet from missile attack.

⁵⁸⁸ Intelligence Reform Bill, Title IV, Section 4026.

hardly merits the charge of unilateralism. Perhaps in the future the UN system could develop treaties and other vehicles for protecting international civil aviation and creating an international counter-terrorism program. But that does not address the very dangerous current situation. The United States has recognized the importance of the international civil aviation regime over the past thirty years. All administrations have acknowledged the importance of coordinating aviation counter-terrorism policies through the ICAO and other multinational structures. Cooperation has never been questioned, because the government and American carriers understand that the civil aviation industry operates internationally, and that approximately one third of all international passengers are carried by American carriers. In theory, security in the developed regions of the world could be brought to a level where the threat of terrorism is reduced to virtually nil. But in actuality, the international civil aviation system could never be hermetically sealed. Al-Qaeda has already demonstrated its own flexibility when it comes to operational theatres and tactics: as targets hardened in the Middle East, it shifted its attacks to East Africa. As in-flight security has strengthened, it has looked to MANPADS.

As long as the United States cooperates within the existing international civil aviation regime and works to strengthen that regime for example by supporting enhanced training and intelligence development and sharing, by placing export controls on MANPADS, and by supporting an internationally financed MANPAD repurchase program.. It is the creative thinking, rather than the specific tactical response, that the response to the MANPAD issue illustrates. More of this creative, coordinated approach, will better equip the international civil aviation system to handle Al-Qaeda and the third phase threat

The International Civil Aviation Regime and the Threat of the Third Phase

The use of terrorism against international civil aviation has been an all-too-common occurrence during the past thirty years. The danger currently faced is both new and old: Al-Qaeda has reintroduced the concept of international civil aviation as a strategic weapon, akin to George Habash who linked civil aviation terrorism and the PFLP strategy in the late 1960s. Despite the strategic failure, many terrorist groups adopted attacks against international civil aviation because of its tactical success. Al-Qaeda has reintroduced the strategic element to attacking aviation. Rather than attempting to cut off a country from outside support, Al-Qaeda is attempting to cut off the Muslim world from non-Muslim influences. It is this mix of religious fervour and political goals that makes Al-Qaeda and its affiliated groups so malignant.

Of the four types of sub-state terrorism discussed (ideological, ethno-nationalists/separatist, single issue and religio-political) it is the last that presents the most severe threat to international civil aviation. Ideological groups (either on the right or left) have rarely targeted international civil aviation. Ethno-nationalist/separatist groups have been more involved in attacks against international civil aviation, but have normally attempted to limit casualties. When the attacks occur, they are consistent with propaganda of the deed rather than any strategic objective. Neither ethno-nationalists nor ideological groups accept that they are terrorists, calling themselves soldiers in a legitimate struggle. They thus have a tendency to avoid actions that intentionally place large numbers of non-combatants at risk. Hijackings and sabotage bombings serve no "military" objective and are therefore largely avoided.

Single issue groups or individuals have, with one exception (Ted Kaczynski, the “Unibomber,” who threatened to launch a multiple sabotage bombing attack against American civil aviation in 1995), never attacked or threatened to attack civil aviation. Most groups lack the capacity or ideological interest. Numerous and easier violent ways exist whereby they can advance their cause. Moves against civil aviation require a larger and relatively more sophisticated infrastructure than any of these groups possess. Eco- and anti-abortion terrorists deny the label, asserting that they target only those they deem as “guilty” of killing unborn children or destroying the environment; the eco-terrorists routinely stress they are not terrorists, as they have never killed a human being. Hijacking or sabotaging an aircraft would destroy any self-justifying legitimacy they can claim.

By limiting casualties, terrorists have affected the international response. It could be argued that there was little need for draconian responses and the ratcheting up of security measures; introducing passenger profiling and magnetometers were for the most part sufficient. By the end of the cold war, state sponsored terrorism was waning and most nations and the international community thought that it was a thing of the past. But ominously, though incidents had declined, their lethality had increased, in consequence of the re-emergence of religious terrorist justification of political violence.

What is striking about terrorism, is its ability to innovate and the slowness of the Unites States, the civil aviation industry -- and by extension the international civil aviation regime -- to become proactive. This is in contrast to quicker Europea reactions.

The element that links innovation and response is intelligence sharing and political will. Terrorist groups closely observe one another’s operations and may

share training camps and even sponsors, be they states or individuals. The observation and interaction allow each group to learn from the others' successes and failures, thereby reducing its learning curve. Terrorists see, communicate, and adapt much more quickly than do their potential targets. The private sector, the brunt of most attacks, is reluctant to devote resources to security and in any case does not have access to information pertinent to planning and allocation of resources.⁵⁸⁹

Governments are constrained by bureaucratic conflicts, jurisdictional ambiguities, and often legal barriers in sharing information among involved parties, as well as the lack will. Many of these could be overcome if there was the will to do so. The international community faces all of these circumstances and is burdened by the mistrust endemic among many actors in the community.

The ICAO and particularly its security regime furnish an example. Member states agree that safe and efficient air travel contributes positively to their economies and are outspoken about their desire to suppress criminal activity against aviation. Yet simultaneously many signatories to the conventions support the very groups that are assaulting aviation. Libya and North Korea are culprits in this regard. That some member states are sabotaging the security regime they profess to support, diminishes the resolve of other member states to strengthen the regime, particularly relative to the need to cooperate on intelligence. September 11 and its aftermath may have caused some re-evaluation by state supporters of terrorism, but any impact on the likes of Al-Qaeda and its allies is unclear.

Creation of a more aggressive system to develop and disseminate intelligence and security information is the most effective way to strengthen the security regime in the immediate future, and the need for coordination of security forces is a recognized

⁵⁸⁹ Intelligence Reform Bill Title, VII Subtitle, C Section 7305 addresses this issue.

requirement for countering an insurgent/terrorism campaign. The international civil aviation regime and the United States have yet to demonstrate sustained abilities in this area.

The United States and Counter-Terrorism

It is broadly agreed that success in the struggle against terrorism requires the unified effort of the police, the military and the intelligence community of the affected nation. The 9/11 Commission Report details once again that this did not exist in either the governmental or private sector of the United States. The Intelligence Reform Bill has tried to address this failing through the creation of a National Director of Intelligence,⁵⁹⁰ coordination centers for terrorism and other issues,⁵⁹¹ and working with various levels of government and the private sector.⁵⁹² The aviation industry illustrates both the failures and new opportunities that exist.

Until Al-Qaeda emerged, the United States had never faced the type of sustained terrorist campaigns that many of the other developed nations have long experienced. For most of its history, especially since the end of World War II, the threats faced by the United States were beyond its borders. This is reflected by the National Security Act of 1947, which put in place the national security structure that existed on 9/11. But it does not provide for the involvement of any of the domestic security agencies such as the Attorney General or the Director of the FBI in the National Security Council. Each may be asked to attend meetings of the NSC as needed, but neither is legally entitled to attend or vote. The Intelligence Reform Bill of 2004 did not remedy this situation.

⁵⁹⁰ Intelligence Reform Bill, Title I.

⁵⁹¹ *Ibid.*, Title, I Subtitle B.

⁵⁹² *Ibid.*, Title VII, Subtitle C.

The United States has been a frequent target of international and domestic terrorism, but the tactical nature of the threat did not pose a significant challenge to its interests or bureaucratic organization for countering it. But now the development of Al-Qaeda's strategic threat has exposed the underlying weakness in the U.S. security structure. Internationally, the U.S. has employed all three methods of counter-terrorism. It has worked within the UN system to develop conventions, particularly in the aviation field. Politically, it has worked with its international partners to combat terrorism and its causes through various treaties and conventions, first by attempting to reduce the "causes" of terrorism (poverty and deprivation) through the Peace Corps and the Agency for International Development (USAID), and second through the Bush administration's program for promoting democracy in the Middle East.⁵⁹³ Events in the Middle East since the start of 2005 would seem to support the 9/11 commission's conclusions. These efforts have not been matched with an obvious effort to win the ideological battle, presenting an alternative narrative and vision to counter what Al-Qaeda is offering. This gap undermines all the other efforts the nation undertakes. Focusing on the grievances should not be misconstrued; none of these programs is divorced from the long held principles of non-negotiation and non-recognition of the legitimacy of political violence. They are designed to provide legitimate avenues out of political violence.

The emphasis on terrorism as crime has placed the criminal justice/law enforcement approach at the center of U.S. counter-terrorism policy, thus positioning the FBI as the lead agency in international and domestic counter-terrorism.⁵⁹⁴ The approach has had some notable successes, such as the arrests of Ramzi Yousef and

⁵⁹³ Intelligence Reform Bill, Title VII, Subtitle A. This section covers a wide range of issues relating to implementing the 9/11 Commission's recommendations on public diplomacy and other legislation dealing with aid.

⁵⁹⁴ 9/11 Commission Report, p.73.

Khalid Sheik Mohammad or the convictions in the East Africa bombing trials, and when linked to a sustained political approach can produce victories such as the Lockerbie Trial. The highly respected federal judicial system also facilitates vital international cooperation. Many nations find it easier to cooperate with the FBI because it is deemed an apolitical body that faces public scrutiny during trial, as opposed to the CIA with its associated political baggage. If the United States and its partners view terrorism as crime, this is the most appropriate way to act. The FBI's international effort is directed by the Legal Attaché (Legatts) system in U.S. embassies. It has been an increasingly vital tool, but it is not being fully utilized. The Legatts should also develop training programs for local law enforcement as well as the rest of the judicial system. Through investing in the establishment of a professional, transparent legal and police system that respects human rights, the U.S. not only gains a capable partner in the war on terrorism, but it also helps to build popular respect and loyalty to the police and government of that partner. Strengthening the state denies both political and ideological space for terrorists to exploit. The U.S. Congress currently restricts this type of cooperation and that needs to change. The United States has utilized military responses in counter (passive)-and anti(active)-terrorism as well. Examples of the latter are the 1986 attack on Libya, which included both the highly public bombing mission and a more covert raid on terrorist training camps, and the 1998 cruise missile strikes against Al-Qaeda infrastructure. Policy makers resort to military use because of its range of technical and other skills, and because doing so demonstrate the gravity of the situation. The U.S public is reassured by the action, but not always the allies. The type of action is key to the message. The 1998 missile strike against Al-Qaeda may have demonstrated decisive action to the American public, but it displayed the opposite to

Al-Qaeda. It showed that the U.S. was a frustrated super-power that was unwilling to risk its soldiers, but felt it had to do something.

For more than twenty years civilian policy makers were pressing the military to act, while the military declined. Both U.S. government commissions investigating 9/11 examined the risk-averse culture in the military and intelligence communities. Despite the major investments in the military, its leadership was reluctant to use its forces due to the perception that the public would not tolerate casualties. The military also emphasized the dispute as to the effectiveness of its use against terrorism. Despite the encouraging changes post 9/11 there is still reluctance to using force, and its success is hard to determine. The invasion of Afghanistan, and more clearly Iraq, provide the clearest example of the difficulties of gauging the impact of military intervention.

The Bush administration has put into play legal tools deployed by previous administrations against international terrorism, and explored other innovative ones. Even though the attacks of 9/11 were an act of war, the government still attempted to use the criminal justice system as its initial response. When the Taliban had refused to cooperate, even after both the Clinton and Bush administrations had made it clear that the Taliban regime would be held responsible for Al-Qaeda attacks, there was no choice but to use the military. Although the liberation of Afghanistan was a blow to the Al-Qaeda network it was not a defeat. There was total destruction of the substantial infrastructure Al-Qaeda had developed there, and the severe disruption of its communications network was important, but the loss of the sanctuary and training bases impeded the organization's ability to recover and to replace its highly skilled first generation of operatives. It has, however, now recovered its communications abilities and has dispersed the skill sets to a wider area of the world. The liberation of

Iraq has provided the long-term possibility of creating a peaceful democracy in the heart of the Middle East. Success in this profoundly difficult undertaking can offer the best counter narrative to Al-Qaeda -- Muslims deciding for themselves how they want to be governed. This possibility of a democracy has encouraged a ferocious response from both secular and religious authorities and, at least in the short run, provided an outlet for terrorism. Only time will determine if this U.S. and allied effort was a success. This is not to say the military has no role in responding to terrorism, but it is a difficult-to-quantify instrument, one that cannot be used domestically. The most effective military counter-terrorism tool is special operations forces. Small, flexible and adaptable, they function in remote areas with little support and on their own terms. Raids on camps and other infrastructure targets yield essential information and captives. The military needs to make more investment in these types of forces. It is a slow process to create the right operative, but it has to be done.

Intelligence underpins all the approaches and it is an element that the United States has been lacking. Associated shortcomings have become apparent after 9/11; before then, no U.S. administration conceived terrorism as a strategic threat. Rather, it had been viewed as a tactical situation that could be managed by employing the aforementioned tools and increasing security measures, such as target hardening government buildings. Accordingly, various administrations tasked the intelligence community with monitoring other areas of concern, such as arms trafficking or environmental issues. As both the Senate investigation of pre-war intelligence about Iraq and the 9/11 Commission discovered, policy makers' public desires did not translate into intelligence policy. This drift, combined with the intelligence community's risk-averse culture, has had an impact not only on intelligence targets,

but also on intelligence gathering, moving from human intelligence to more technical means, such as communication intercepts. This reduced the ability of the intelligence community to penetrate the core leadership of groups such as Al-Qaeda, at a time when the threat was metastasizing. Policy makers' lack of attention to and understanding of the new terrorism did not prevent the intelligence community from investigating the problem. The CIA and FBI established a total of three special intelligence units to track the Al-Qaeda threat, but the lack of policy maker attention contributed to the failure to properly task the assets of the entire community.

The tasking failure has been addressed as a result of 9/11. With the United States on a war footing, the entire national security structure, especially its policy makers, is centered on fighting terrorism. The National Intelligence Director is supposed to serve as the focal point for intelligence coordination and strategic direction. But due to the concerns raised earlier in this chapter, the author does not think this will happen. The Department of Homeland Security (DHS), and the Homeland Security Council are vital components of the structures, but the addition of a parallel National Security Council could lead to tasking conflicts. The best way to circumvent this possibility is to amend the National Security Act of 1947 to include as statutory members the Attorney General and the Secretary of Homeland Security. The Director of the FBI can provide a law enforcement advisory function in the same fashion the Director of the CIA does on intelligence.

The failure to adequately task the intelligence community, as well as the restriction of its recruiting abilities, here crippled the U.S. efforts to gather information on Al-Qaeda. The Clinton administration's insistence on "clean" operatives meant that the CIA could recruit only those who had no past criminal or human rights issues. Whatever the merits of the policy might be, it presented the

Agency and other members of the intelligence community with the vexatious problem of assuring not only the accuracy of information, but the reliability of the source's past. If the past is questionable, is the source then ignored? The current Bush administration has lifted the restrictions, but the benefits of doing so are still to be evaluated.

A dearth of information and the varying degrees of analytical ability, further challenged the United States to understand the new threat, let alone provide warnings of impending attacks. The intelligence community was competing with other government agencies and the private sector to recruit and retain qualified analysts and linguists. This crucial shortage was illustrated by the National Security Agency's (NSA) admission that a message in Arabic indicating a possible attack on 9/11 had gone untranslated until the day after the attack.⁵⁹⁵

James Bamford, author of a history of the NSA, has repeatedly called for the establishment of a reserve national translating team. NSA would fund language training in exchange for service in a reserve-style unit. Government agencies needing assistance could then call such linguists as needed. This would have some advantages including prompt access to a pool of specialists without the costs of their full-time employment. But how would this access be prioritized? If, say, the FBI and CIA were to need translating services at the same time, which has first call? If the military needs translators for ongoing operations, would they be subject to military duty? This quandary may seem trivial, but it exemplifies the puzzlement associated with the allocation of resources.

There apparently does not appear to have been any issue during the production stage of the intelligence cycle that could not have been addressed by resolving the

⁵⁹⁵ http://www.unansweredquestions.org/timeline/timeline_2003-04-30.html

above problems. The quality of the production is only as good as the raw materials allow. The final step in the intelligence cycle, and perhaps the most salient, has been shown to have been the weakest: dissemination. It appears that few of the agencies were cooperating; the FAA had stopped asking the FBI for intelligence about threats because of a personality conflict between the parties or agencies to share information (such as the CIA not alerting the INS to deny entry to (Khalid al-Mihdar). In some cases, an agency did not provide information because it was not asked to do so. NSA failed to check deeply into its database for the presence of a suspected terrorist's name. The most devastating revelations to emerge from the 9/11 hearings are not the lack of information, or even "actionable information," but the lack of *useful* information. The August 6, 2001 President's Daily Briefing (PDB) titled "Bin Ladin's Determination to Attack Inside the United States" epitomizes the problem. The PDB states that "since 1998 the FBI has observed patterns of suspicious activity in this country consistent with preparations for hijackings or other types of attacks."⁵⁹⁶ This is reminiscent of some of the security circulars issued by the FAA during the 1980s.⁵⁹⁷ Terrorist groups are always engaged in suspicious operational activities. The PDB says nothing, or at least nothing out of the ordinary. There are no recommendations, no points for follow up, no suggestion that the hijackings would be of a new type or purpose, and no dissemination list. One could argue that it was not a particularly relevant document, other than to provide background. Was this important for the new Bush administration to have? Of course. Did it provide anything other than information that the Al-Qaeda "flies"⁵⁹⁸ were busy? No.

⁵⁹⁶ Presidents Daily Intelligence Briefing, "Bin Laden Determined to Attack the United States," declassified summary, p. 1-2.

⁵⁹⁷ See Chapter 2, p. 38.

⁵⁹⁸ President Bush was quoted as saying he was tired with "swatting at flies" referring to the lack of a plan to role up the Al-Qaeda network. Instead the government seemed to respond to individual attacks.

Coordination at the non-federal level is deplorable. More than 17,000 sub-federal law enforcement bodies⁵⁹⁹ are all looking for access to the “terrorism watch list” which does not actually exist. There are as many as twelve lists maintained among the Departments of State, Treasury and Justice (FBI and U.S. Marshals Service), not to mention the FAA’s no-fly list. Each has different information, criteria for additions, legal constraints on access -- and in many cases -- different technical structures that make cooperation difficult. As one example, the main ‘list’ is the State Department’s Terrorist Tip-Off List (TIPOFF) containing more than 60,000 names. The FAA’s no fly list contains only 20⁶⁰⁰ not all of whom are even terrorist suspects. No one is arguing that all the names on the State Department list should be on the no-fly list, but it is difficult to understand the disparate numbers.

There should be one standard “check list” that all law enforcement and security professionals can access quickly. The list should not be limited to just terrorists, but anyone wanted for a criminal offence, including immigration violations. Each of the just over 700,000 non-federal sworn law officers in the United States⁶⁰¹ could prevent a terrorist attack if she or he had access to all available information. The DHS is working to consolidate existing information into a single database. Speed is of the essence, but the task must be done with due deliberation and be accurate.

The war against Al-Qaeda must be conducted with cooperation. Militaries and security services around the world should be involved; keeping them at the ready will subject Al-Qaeda and its affiliates to continuous and, eventually, unbearable pressure. Allies in the struggle must keep human rights and the rule of law uppermost, because the political and military aspects are synonymous. The key element in all these

⁵⁹⁹ U.S. Department of Justice Bureau of Justice Statistics Law Enforcement Statistics, FBI web page 2005.

⁶⁰⁰ *9/11 Commission Report*, pp. 83-84.

⁶⁰¹ U.S. Department of Justice op.cit.

efforts is intelligence. The United States has the ability to assemble enormous amounts of information, but its analysis is dependent on cooperation as are the actions pursuant to analysis.

In the immediate post Civil War years, the United States military was used to reconstruct the South. It crushed the first wave of domestic terrorism instigated by the Ku Klux Klan. The highly politicized nature of the occupation led to the passage the Posse Comitatus Act in 1878, which prohibited the use of the federal military in law enforcement roles without the express permission of Congress. The prohibition has been redefined over the years, most notably in the ability of the military to support domestic bodies in WMD attacks, but it has largely remained intact. The exclusion of the military from domestic counter-terrorism has placed the domestic law enforcement community in the lead position. This is both proper and vital. The United States cannot claim to view terrorism as a crime and then deploy the military in domestic counter-terrorism. The more than 17,000 domestic law enforcement bodies at the local, state and federal levels have almost 700,000 sworn officers⁶⁰² who know their locale and are well equipped to recognize threats therein. The key here is the coordination of intelligence across the vast community.

The transformation of U.S. domestic security structures is still a work in progress. The December 2002 legislation creating the Department of Homeland Security was passed after long and rancorous debate. Ahead lies the monumental task of merging the two score federal agencies employing one hundred and seventy thousand individuals, each of which has its own culture, focus and approach. The consolidation has not been matched with an equivalent streamlining of the eighty plus congressional committees and sub-committees to which the new department reports.

⁶⁰² U.S. Department of Justice, op.cit.

The 9/11 Commission wisely recommended the creation of one homeland security committee in each house, or even one joint committee.⁶⁰³ Congress needs to follow this recommendation. The various natures of the evolving investigative and intelligence cultures will present some difficulties. The establishment of the Homeland Security Council is an important step, but there is no reason to believe that intelligence cooperation will be any better with this structure than it has been in the fifty five years of the National Security Council. The Homeland Security Council lacks the statutory authority given the NSC, which means it does not have clear authority or mission, nor does it have a long term guaranteed legal existence. It should be merged with the NSC through the amending of the 1947 National Security Act.

The CIA and FBI were left intact after the new department's arrival, but were directed to reform and reorganize by the Intelligence Reform Bill,⁶⁰⁴ perhaps most importantly they will report to the NID. The problem now for both bodies is a cultural one. The CIA has moved to a more technology-driven intelligence approach, where field agents are few and far between.⁶⁰⁵ A case officer's career advancement is based on numbers, not quality, if indeed agents are being recruited at all. It would appear that few terrorism or Iraq case officers have been promoted for some time. Technology provides "clean intelligence", obviating the need to rely on the sometimes dubious individuals required to infiltrate terrorist cells; recruitment of a rogue can delay or even possibly end a case officer's career. Technical intelligence can help portend an event. Traffic analysis of suspected Al-Qaeda computer networks indicated that such major incidents as the Bali and Kenya attacks and the apparent

⁶⁰³ *Report of the 9/11 Commission*, pp .420-421.

⁶⁰⁴ Title ,I Subtitle A deals extensively with the role of the Director of National Intelligence and his authority at the expense of the Director of the CIA. In addition, the legislation chastises the agency for human intelligence failures. Title II deals with the FBI and its failures.

⁶⁰⁵ Intelligence Reform Bill Title I, Subtitle A, Section 104 A (b-c).

attack at Heathrow were “in the wind.” Still, without an agent inside an organization, there is little chance of ascertaining the where and when with certitude. Character restrictions on recruiting agents developed during the Clinton administration are being relaxed by the Bush administration. Providing the CIA with more domestic authority may improve intelligence gathering, such as the necessary reform to the Foreign Intelligence Surveillance Act, but it could weaken the ability to develop criminal cases.

Manifestations of the FBI’s cultural problems are apparent in its waiting for a criminal act, investigating, apprehending a suspect or suspects, and then prosecuting – this may no longer work. The Bureau does not behave like an intelligence agency⁶⁰⁶; its procedures accord with a suspicion of government, particularly after the controversies of the 1960s and 1970s about domestic spying. But for the government to carry out its constitutional defense responsibilities, it must acquire information from all sources to fully evaluate the threat environment and then provide policy makers with sufficient background information to inform their decision-making. But changing the FBI’s culture may not improve its performance in this area, and may weaken its abilities and well deserved reputation as a law enforcement agency. The proponents of the intelligence reform legislation do not address this issue. At the very least the Bureau should rapidly update its IT capabilities, so that its agents can at least email information to each other.

The above responsibilities require that domestic terror intelligence gathering should be handled by the CIA, irrespective of its locale. The fears this would raise in the civil liberties community, as well as from the FBI, would foreclose discussion of the change, let alone moving towards it. A new independent agency might work;

⁶⁰⁶ Intelligence Reform Bill, Title II.

competitive collection and analysis, as well as the perceived safety provided by divided collection, may allow the creation of such an agency. The 9/11 Commission stopped short of making this recommendation, but it has been widely discussed in the U.S.⁶⁰⁷ This brings to the fore a problem only partially addressed after 9/11: the elusive cooperation among agencies.⁶⁰⁸ A promising alternative would be to quickly deploy the existing intelligence functions of the various agencies operating under the aegis of DHS, e.g. the Secret Service, Coast Guard and Border Patrol. The primary difficulty would be changing the intellectual orientation of these law enforcement agencies to those of intelligence, a process slightly eased because the DHS is producing its own institutional culture that would allow new thinking. Truly revolutionary thinking would allow the intelligence community to function like the network it is facing, subject matter experts would function as ad hoc teams utilizing the skills and attributes of their parent agencies.⁶⁰⁹ The pooling of information and talent would further the war on terror exponentially. The real obstacles are not legal or budgetary but parochial bureaucratic interests.

The quality and quantity of information available to the security community is inconsequential if policy makers are not focused on the threat at hand. Testimony before the 9/11 Commission highlighted the difficulty policy makers had in grasping the changing threat posed by Al-Qaeda. This was in part due to the inability of the counter-terrorism professionals to find the language to explain the threat. The language and approaches of past experience shaped the understanding of current experience. Senior officials of both the Clinton and the current Bush administrations

⁶⁰⁷ CRS Report to Congress, Domestic Intelligence in the United Kingdom: Applicability of the MI-5 Model to the United States, May 19, 2003.

⁶⁰⁸ Intelligence Reform Bill Title I, Section 1016 is one of several areas of the bill that deal with this issue.

⁶⁰⁹ *Ibid.*, Title I, Subtitle B, is an attempt to create this type of system. But it creates new bureaucracies rather than ad hoc networks.

have testified that they were focused on terrorism, but they were not focusing correctly. Policy makers didn't know how to interpret the information presented to them about Al-Qaeda, because the counter-terrorism professionals failed to explain the changing nature of the threat. Hence the policy recommendations that developed were the same approaches that were tried against the threats in the past. Since 9/11 the United States has been focused on terrorism to the exclusion of almost all other issues. Resources are being allocated to this new conflict, and the skills and equipment developed for the Cold War are beginning to demonstrate their continued validity. The unanswerable question is will any of them bring the threat of Al-Qaeda to an end?

The central question remains unanswered, however: who is responsible for strategic intelligence? The various commissions empanelled to investigate 9/11 and Iraq seem to have come to the same conclusion: No one. The CIA is not central to the intelligence community, but one of a multitude of agencies. The FBI and other law enforcement agencies are not culturally prepared to function in this activity. While the DHS would be a logical place, the department is limited to focusing on securing the homeland, but where does homeland security begin? All of the reorganizations and new agencies are not going to matter until it becomes clear who has ultimate responsibility for identifying strategic threats to the U.S., wherever they emanate from. The commission recommended the establishment of a National Intelligence Director,⁶¹⁰ a recommendation adopted by the Intelligence Bill in December of 2004. A centralization of intelligence would, it was hoped, manifestly improve the quality and quantity of intelligence available to the aviation industry as well. The industry has often been unable to respond adequately to an FAA warning because of the

⁶¹⁰ 9/11 Commission, p. 399.

warning's lack of specificity, which had been in short supply; FAA intelligence analysts have not had access to the raw information. The FAA has produced little intelligence on its own, but has consumed highly edited data provided by the CIA and FBI, and its analysis suffered as a result. Since the TSA will house the intelligence function of the FAA and other agencies and hence will be producing at least some of its own intelligence, the quality of the data should increase. Even if this is the only outcome of the reorganization of the domestic security functions, then the reorganizations will have been worthwhile.

The FBI and CIA have endured tremendous criticism for their efforts in the pre-9/11 world. Not only did they fail to coordinate their internal bureaucracies, they did not share information between themselves. The Department of Justice, the cabinet department that oversees the FBI, for example, has four different terrorist watch lists,⁶¹¹ but is unable to share information among them for legal and technical reasons.⁶¹² The antiquated technology of the FBI prevents many of its agents from conducting a Google search from their PCs. This might well hamper the effectiveness of even integrated lists.

The biggest impediment to cooperation is the clash of the FBI and CIA cultures. The FBI is a law enforcement agency that identifies and solves crime. The information gathered is called evidence because it has to stand in a public judicial proceeding. The agency can produce impressive statistics on the number of terrorism investigations it opened pre and post 9/11.⁶¹³ Its dogged approach to criminal investigations has earned it an unrivaled reputation for professional law enforcement.

⁶¹¹ GAO "Information Technology: Terrorist Watch Lists Should be Consolidated to Promote Integration and Sharing, GAO-03-322, April, 2003, p. 12.

⁶¹² Ibid., p. 2.

⁶¹³ Report to the National Commission on the Terrorist Attacks upon the United States: the FBI's Counter Terrorism Program, pp. 21-22. Also President's Daily Intelligence Briefing, "Bin Laden determined to strike in the U.S" pp. 1-2.

It is not a domestic counter/intelligence agency, despite its past abuses. The very fact that operations such as Counter Intelligence Program (COUNTERINTPOR) or other ‘domestic spying’ operations were discovered and produced information of such poor quality, underscores the Bureau’s ineptitude outside its purview. Trying to create an intelligence ethos in the Bureau would undercut its very capable law enforcement without enhancing the nation’s security.

The CIA, on the other hand, is an intelligence agency whose wide net gathers information from all sources, sometimes by methods of questionable legality, to be used by policy makers to enhance national security; it is not intended for public disclosure or for legal proceedings. To hear CIA professionals discussing evidence is unnerving and underscores the problems in sustained cooperation with the FBI. The Agency is not looking for evidence; it wants information. If the evidentiary standard is used by intelligence professionals for information evaluation, it will undermine national security. Intelligence rarely produces predictive information “beyond a reasonable doubt”, and does not even measure itself by that criteria. The information obtained by CIA prior to 9/11 indicated an attack was in the late planning stages, but the Agency appears to have waited for clear and convincing “evidence” that an attack was imminent. The FBI has redirected impressive resources to the struggle against Al-Qaeda, more than 2,400 special agents alone, as well as put into place a new reports officer position⁶¹⁴ and created a career path for counter-terrorism and intelligence.⁶¹⁵ Many critics have noted that until it is viewed as part of the national security infrastructure, the numbers of agents covering terrorism will not matter; this issue has been partially addressed through the Intelligence Reform Bill.⁶¹⁶

⁶¹⁴ National Commission on the Terrorist Attacks upon the United States, Staff Statement No. 12, p. 2.

⁶¹⁵ Ibid.

⁶¹⁶ Intelligence Reform Bill, Title II, Section 2002-3.

Whether or not the FBI remains the nations' internal security force, it does need to have access to the highest quality information in a timely manner. Director Robert Muller has been aggressively improving the Bureau's technology,⁶¹⁷ which will hopefully include a secure network where all terrorist and related information can be posted and accessed by field agents as needed. If such a system had existed prior to 9/11 the agents in Phoenix, Minneapolis and Washington D.C. would have been able to see all the information available on the suspicious activity at flight schools and perhaps have launched a more thoroughgoing investigation that may have nipped the tragedy in the bud.

The key issue that remains to be addressed is the flow of information. The revelations in late April 2004, that the North American Air Defense Command (NORAD) conducted drills simulating 9/11 style attacks are illustrative. NORAD is responsible for the air defense of the U.S. territory. In the two years prior to 9/11 it conducted drills simulating attacks involving aircraft as suicide weapons both as guided missiles and a delivery system for a chemical or biological attack.⁶¹⁸ Not all scenarios were drilled; an attack on the Pentagon by an aircraft was not simulated because as it was viewed as "too unrealistic."⁶¹⁹ All the drills focused on aircraft originating from overseas, which as was seen earlier in this work, was an actual threat received in early 2001. The FAA dismissed that possibility as unrealistic in part because the aircraft would have been detected. There is no evidence that NORAD and the FAA were coordinating efforts on these drills. Pentagon personnel were not aware of the growing threat information when they dismissed the drill, but it does

⁶¹⁷ The 1980s Automated Case Support System is not held in high regard. Not only is it user unfriendly but it can not handle secret or other classified information. National Commission on the Terrorist Attacks upon the United States Staff Statement No. 12, p. 6.

⁶¹⁸ Steven Komarow and Tom Squitieri, "NORAD had drills of jets as weapons," USA TODAY on-line, 4/18/2004.

⁶¹⁹ Ibid.

again show that some individuals were thinking about the possibility of a 9/11 style attack, but not in a formal or even informal joint fashion.

Police at all levels in the United States need access to information regarding potential tactics and targets of terrorists, but also all outstanding warrants and other violations of the law. Currently, no mechanism exists for law enforcement officers to discover if an individual who comes to their attention is wanted for immigration violations, for example. Several of the 9/11 hijackers were stopped for traffic violations, but were not detained because the local police did not know the INS was looking for them. Civil libertarians fear the government's having access to this type of information, yet it seems difficult to support the argument that individuals who are wanted for immigration or other visa violations, should not be required to face the legal process. If local law enforcement had been privy to the immigration status of some of the hijackers, the plot may have been discovered.

Homeland security begins not at the nation's borders but at its embassies, and at places where people depart for the United States. The Department of State has been a focus of attention for its watch lists and visa programs. There were more than 10 million requests for U.S. visas in 2001.⁶²⁰ The Department screens requesters' names against TIPOFF and CLASS watch lists, which contain names of suspected terrorists, but to be effective the lists must be current and accurate. The best way to achieve accuracy is for the lists to contain biometric data (DNA, retinal scans, fingerprints, etc.), but few people on a watch list will have provided this type of information and so it is not possible to use this system to its fullest potential for some time. If a person does not appear on either TIPOFF or CLASS, and there are no other problems with the application, the visa is granted. State has no way of verifying false

⁶²⁰ Statement from Mary A. Ryan, Former Assistant Secretary of State for Consular Affairs, to the 9/11 commission, January 26, 2004.

statements related to visas, such as failure to disclose a previous application for one. State's computer technology should allow easy input of all relevant data on the status of anyone applying for a visa or passport. There also needs to be an established profiling system that would indicate risky applications, based perhaps on numbers and patterns of false statements. Also, identifying-biometric data must be submitted, which is no more onerous or invasive than a photograph is for identification. Pictures and documents can be forged; DNA cannot. Accordingly, biometric data are a *sine qua non*. A database of such information and other technology would allow for rapid processing at all ports of entry.

Technology is only as good as the developers and the data. Overdependence on technological solutions eventuates in all-too-common mistakes. Until biometric databases are established -- and even then -- problems will arise. Sufficient skilled staff must be available to interview not only visa applicants, but also persons entering the country. It is now widely accepted that the twentieth hijacker on 9/11 was actually denied entry into the United States by an INS agent in Orlando, Florida,⁶²¹ because his proffered information did not comport with his demeanor. It would have been better if he had been interviewed in Saudi Arabia before boarding. The United States should expand its foreign based program of pre-flight checking of immigration papers.

The Aviation Industry and Terrorism

There has been surprisingly little post-9/11 change in the aviation industry, which is particularly worrisome, as the threat environment has increased drastically. Security has increased with respect to passenger aviation, but security with respect to

⁶²¹ Statement of Jose E. Melendez-Perez, Inspector, Customs and Border Security, Department of Homeland Security, to the 9/11 Commission, January 26, 2004.

cargo and general aviation has lagged. Passenger and baggage screening is now the responsibility of the federal Transportation Security Administration (TSA), which had been a long-term industry goal. In the author's view, the industry correctly argued that the attacks on aircraft had little or nothing to do with it as a business; the attacks are about state policy. The government countered that security was a legitimate business expense and should be handled by the carriers. The formation of TSA should not be equated with recognition of the merits of either argument, but as an indictment of the security system and as a political measure undertaken to save the industry. The numbers support the latter case: aircraft load factors were only 30% in the weeks after 9/11,⁶²² and 98 percent of that was due to fear of flying. It was not until spring 2002 that the weak economy became the predominant reason for not flying.

It is not an apocalyptic speculation to suggest that the industry might have collapsed if the government had not taken over security and deployed military personnel in airports. Longer term, there had to be a complete overhaul of who is responsible for the staffing of aviation security. When the for-profit airlines were responsible they sub-contracted to the lowest-cost service provider, creating the now all-too-familiar toxic mix of low-cost, low-skill, low-motivation staff whose average turnover rate was close to 100 percent per year. A recent TSA report has shown a dramatic drop to a 20 percent annual turnover.⁶²³ Much of the improvement derives from improved wage and benefit packages introduced by the government. A pilot project is being conducted in four airports that use private companies. A recent study by the GAO suggests little difference between the private and federal security

⁶²² Powerpoint presentation, U.S Tourism and overview, Travel Industry Association of America.

⁶²³ GAO Report, Challenges Exist in Stabilizing and Enhancing Passenger and Baggage Screening Operations, p. 11. The report's findings focus on 8 category X airports which are the most at risk airports in the aviation system.

personnel. If this is indeed the case, the government should let the airports decide which to use. It should be the airports and not the carriers that decide between private and government security. Airports are owned and in most cases operated by a government body. It is the federal government that should be accountable overall for security. One could argue that under the Interstate Commerce Clause of the Constitution, it is definitely a federal responsibility, but in any case security -- because of the unique threat posed by Al-Qaeda and its acolytes -- is a concern of government at some level. As long as the policing functions remain the responsibility of a designated law enforcement authority, security can be in private hands.

A company that deals with aviation security would get a contract from each airport authority, and one from TSA that would match spending. Carriers would provide screeners with necessary passenger background. The FAA or TSA would need to develop and enforce training, work and technical standards that will ensure security. No carrier or state can tolerate the existence of the haphazard pre-9/11 approach to this issue.

Carriers and airports need to strengthen background checks on staff, to control access to aircraft and facilities, and to work with government to produce both tamper-resistant documents and technologies relating to security. As transportation becomes increasingly inter-modal so do the threats. An Al-Qaeda operative was caught attempting to infiltrate Europe in a ship-borne cargo container, which was equipped for a relatively comfortable journey. The operative had a uniform, maps, and identification cards for several European airports. There must be better control of these items, as well as use of biometric data on all staff identification. Carriers have been freed from the responsibility for the screening of baggage and passengers, which

renders staff and resources available to conduct this vital security check. The system has to remain flexible as well.

Manufacturers and carriers need to develop and deploy ways to harden aircraft cargo bays against sabotage bombings. Research is needed into this area, but it can be extremely expensive up front, but could pay for itself over time.

Many carriers are utilizing Web-based cameras in the cabin to allow flight deck crews to see what is happening without being exposed. Such surveillance could enable counter-terrorism personnel to acquire vital intelligence on the number of hijackers and their armaments in a more traditional hijacking. And it could also enhance training for cabin crews, in that they are made aware at no risk to themselves, of safety and security threats and possible solutions.

Technologies being deployed against explosive devices, so-called Explosive Detection Systems (EDS), cover a wide range of defensive systems including Thermal Neutron Analysis (TNA). All should be constructed in such a way as to detect the smallest possible amounts of explosives with the fewest false readings. Passenger screening devices such as Magnetometers (X-rays) are becoming better and more revealing.⁶²⁴ There are privacy concerns associated with such systems, but a balance between privacy and security must be achieved.

Civil liberty concerns are impeding security cooperation. The TSA was attempting to work in a cooperative manner with carriers, such as Northwest Airlines, to develop the Computer Assisted Passenger Pre- Screening System (CAPPS II) which would be a more sophisticated profiling system than the current CAPPS. The cooperation stopped after the civil libertarians sued the airline and government for

⁶²⁴ Philip Baum, "Emerging Technologies Tomorrow's Solutions Today," *Aviation Security International*, February 2002 pp .6-12.

privacy rights violations.⁶²⁵ How the government's gaining access to information on passengers that the airline already has, constitutes a privacy violation, remains to be seen. The hypersensitivity to privacy-related issues, in the U.S., ended any possibility of voluntary cooperation; now government mandates sharing of the information to protect companies from lawsuits. This effort has accomplished little to protect privacy and may have weakened security. No one wants the government to spy on citizens, yet neither do the citizens want to be at the mercy of terrorists.

There are other potential weaknesses in the aviation security system. Air cargo security, particularly the known shipper program has to be addressed. One solution is to have all items screened by the airport authority and then dispersed to the individual cargo carrier. The cost would be paid by the shippers and could be based on volume of cargo rather than a flat fee. This centralized point would provide additional safeguards, one more layer, to correct any deficiency at an earlier stage. Screening is vital as was discovered when an American smuggled himself home in a cargo crate.⁶²⁶ This opens a potential new tactic for Al-Qaeda: a mass suicide attack against aviation through the use of bombs concealed in coffins. This *corpus destructus* method would allow the terrorists to infiltrate bodies into the international system with explosives already hidden in them. Instead of attempting to penetrate security through the terminal or stowaways, the bomber can be introduced directly into the system in a coffin. Al-Qaeda could also exploit the charter aviation system by placing operatives on these aircraft and hijacking them, or by buying or leasing aircraft themselves on the international market. The U.S. government reiterated its concern about Al-Qaeda's use of general aviation for suicide attacks, including a

⁶²⁵ Kelley Beaucar Vlahos, "Massive travel Database Raises Eye Brows," FoxNews, January 28, 2004, www.foxnews.com.

⁶²⁶ Boston.com "Man ships self in cargo crate from New York to Texas "
By Associated Press, 9/9/2003

concern about helicopters flying in New York City during the Republican National Convention in late summer of 2004. The system needs to be tightened in all areas.

The Strategic Threat

The 9/11 attacks were the clearest indication that the nature of the threat to international civil aviation had irrevocably changed. Gone were the days when hijackings provided international political theatre. Now they would or could be an opening act of an asymmetric cruise missile attack. Al-Qaeda is manipulating Islam to achieve both a religious and a political end. The charismatic Osama bin Laden has used his organizational and financial skills to bring into being a truly global network of terrorism. He has attracted followers to Al-Qaeda as an organization and a faith, utilizing Al-Qaeda operatives, groups established by Al-Qaeda and pre-existing organizations to achieve the goal of international jihad. None of the tactics he and his acolytes deploy is new. The secular PFLP introduced the use of international civil aviation as a strategic weapon in 1968. Al-Qaeda has reintroduced the strategic element, attacking international civil aviation to isolate the Muslim world from the West, and simultaneously link it to the sacramental duty to engage in jihad. The dark marriage was demonstrated over and over again in the Bojinka Plot and on 9/11.

To protect international civil aviation and defeat the enemy, in the short term, and at the tactical level, we need to layer security, and perhaps limit some civil liberties. We need to move beyond the cliché that by limiting our freedoms we are providing victory for the terrorists. Al-Qaeda and fellow travellers do not care about our civil liberties; they want the West out of the Muslim world, and to obliterate Western secularism. The more hurdles we put in their path, the less likely they are to succeed.

At the strategic level, the West needs to win the battle of ideas. A beginning can be made through research into the goals and methods of Al-Qaeda and other

terrorist groups. This would allow us to understand their *raison d'être* and perhaps predict trends and thus stay ahead of the terrorists. If academic research had been adequately supported, the threat represented by the emerging religious extremists might have been thwarted.

The battle of ideas is fought on two fronts. Only the Muslim faithful can delegitimize the violent fringe that is perverting the faith. What we can do is redefine what it means to be Western for ourselves and the rest of the world. Our society has aspects we do not like, but even so, we cannot defend our values when we no longer understand what they are. The United States and its allies will eventually win the military and law enforcement struggle presented by Al-Qaeda, but that will be of little consequence if they lose the battle of values.

One of the values of the liberal West is the positive benefits of contact. Familiarity with “the other” demystifies the other and reduces the possibility of conflict. The aviation industry has been instrumental in movement towards a more positive international commerce and contact. Familiarity also can breed contempt, it is said, and the international civil aviation system is feeling that as well. The promise and perils of international civil aviation are deeply intertwined with the modern world; in the end, only a sea change in human acceptance of using violence to achieve political ends will bring true security to international civil aviation and the international community it serves.

Conclusions

This work began by examining the large and complex relationship between terrorism and counterterrorism by focusing on its impact on international civil aviation. This industry has been intimately linked with the modern age of terrorism, and now with the new terrorism as well. The international civil aviation system has been at the nexus between the esoteric debates over defining *terrorism*, while attempting to deal with the very practical question of how to protect its passengers and cargo from attack. The international civil aviation community had to find a balance between security and commerce, all within the existing civil aviation regime.

The debilitating debates that have plagued the larger international community, when dealing with defining terrorism, have been successfully avoided by the civil aviation community, through criminalizing any interference with civil aviation, irrespective of the motivation. The International Civil Aviation Organisation (ICAO) seems to have adopted the spirit, if not the letter, of Margaret Thatcher's "Crime is Crime is Crimes" position on terrorism. The ICAO has succeeded in developing this position on terrorism due to its strict adherence to the position that it is a small, technical institution, within the larger United Nations system. Despite having the possibility of maintaining a larger political role, it has passed on the opportunity to develop a position on controversial issues such as the former Apartheid regime and the Iran/Iraq War. Its greatest strength, is perhaps also its greatest weakness; the ICAO has no enforcement power over its member states. They are free to opt out of any and all security obligations for an undetermined period, and without any sanction. Individual member states can take action, such as the United States did in relation to Greece in the mid 1980s, or a group of states can develop response

strategies, like the Bonn Declaration, but the very fact that states find it necessary to operate outside of the existing regime, indicates there is a fundamental weakness in the security aspects of the international civil aviation regime.

One of the key components to the success of any regime, and counterterrorism in general, is the ability to collect, analysis, and disseminate high quality intelligence. The ability place the intelligence in its proper context, and then deploy it creates knowledge. This glaring weakness is illustrated across the civil aviation regime, and most starkly in the events of 9/11. It is understandable that states would be reluctant to share secret intelligence with an international organization. Many of whose members may be supporting terrorist groups who are intelligence targets, and may be intelligence targets themselves. Would the U.S., for example, have been willing to share intelligence with Iraq, if it had learned that the North Koreans were going to attack KLA 858? One can understand the reluctance to share secret information with an international body, who by definition can have no secrets, but there seems little rational argument to the failure of the ICAO, and its partner the International Air Transport Association (IATA), not to collect and analysis the wide array of open source material available on both terrorism and criminal activity against international civil aviation. If the international community is serious about protecting this vital transportation link, it should at least require the deposition of full, accurate, and timely information with respect to criminal or other security issues with a Joint Security and Intelligence Center (JISC) that would be staffed by members of both the ICAO and IATA. At least this would allow for a repository of open source information to be exploited for trained threat analysis.

The international system is only a reflection of the strengths and weakness of its member states. Due to the commanding position of the United States in civil aviation this thesis focused on the United States and how it organized to deal with threats to civil aviation, and the threat of terrorism in general. The size, complexity, and decentralized nature of the United States tends to make any effort at coordination difficult. But this only explains some of the failings of the United States in the pre 9/11 days. Even smaller systems, such as Canada's there are similar failings, as seen in the Air Indian Bombing. This demonstrates a more fundamental issue in gathering and sharing intelligence. The U.S. was organized to face a limited range of security threats, and while it had dealt with domestic terrorist threats, ranging from the radical right to the radical left, none were able to launch a sustained campaign against the United States, let alone threaten its national survival. Thus the reliance of the FBI ,and various non-federal law enforcement agencies ,seemed most appropriate. The military and the CIA dealt with international threats, while the FAA dealt with specific aviation threats.

The Federal government was charged with developing threat information; establishing best practices in dealing with these threats, and had exclusive jurisdiction in dealing with terrorism against US interests abroad. Domestically, various levels of state and local government provided security and response to any incident. The weaknesses in this chaotic response were illustrated time and again in aviation security. The FAA was charged with providing and enforcing security standards, and that threat information was provided to the carriers. The various governmental bodies that run the 429 commercial airports in the United States provided law enforcement, and the carriers themselves provided the passenger, baggage, and cargo screening. As

the Pan Am 103 bombing illustrated, the system failed on all counts. But while some lessons were learned, there was a better system for disclosing information, and the consequent management was improved, the fundamental errors, such as carrier compliance with security best practices, was ignored. The otherwise cosmetic improvements in security after Pan Am 103 created a compliancy that was exploited by Al Qaeda.

Some of the false sense of security in the pre-9/11 environment rests on the twin ideas that the end of the cold war had removed any significant threat towards the United States. Not only had Americas only rival disappeared, but terrorism was also in decline. While it was true that the number of incidents was on the decline, there lethality was increasing. This was attributed to a motivational change, gone were the secular ideological terrorists, who were using violence as a form of propaganda, to be replaced with religiously motivated terrorists. The latter were interested in extreme violence, seeing killing the non-believers as a sacramental duty. Suicide violence became a integral tool, at first confined to ground vehicles, but later individuals and in 1994 aircraft. Very few experts saw this incident as a harbinger of future events.

The key finding of this thesis, relates to this failing, no one was able to “connect the dots” because no one knew they had the dots. The various commissions that investigates aspects of the attacks in 9/11 report a horrifying lack and desire to share information The FBI and CIA were at various times not interested to, or legally prohibited from, sharing information on terrorism.. Neither shared information with the FAA or INS. The Federal government did not share with state and local authorities, and as we illustrated with Boston Logan Airport, the state authorities did not share with the FBI. None of the government bodies shared anything with the airlines or their security providers. This atrocious record of sharing compounds the

problem of poorly trained and motivated front line security staff. The staff turns over, in some airports as much as 120% per year, reduced any chance of creating a professional ethos common to aviation security services such the Israelis.

All of these various, and well documented failings ,were suppose to be addressed by the establishment of the Department of Homeland Security and the Transportation Security Administration.. It is clear that the establishment of both bodies helped to restore the confidence in the American civil aviation system in the immediate post 9/11 environment. What is also becoming clear, is the lasting improvements to security that were supposed to be addressed by the federalization of aviation security are, at best, transient.

The position the author took at the start of this work remains. The best approach to securing civil aviation is a layered approach. Hardening the aircraft, through arming pilots, reinforcing the cockpit doors, and making more bomb and missile resistant aircraft, is a strong start. Better profiling systems, biometric documents, and more sensitive screening systems are also critically important. But the United States is making the same mistake it does on most problems. There must be a technical tool to solve any problem. Technology is an important element in any layer, but there must be a renewed emphasis on the human element in security. Recruiting, training, and motivating staff is the most important element in protecting aviation and the homeland in general. The twin suicide attacks against Russian civil aviation underscores this, all the technology worked, but the ability to bribe low paid and poorly motivated staff lead to the disaster.

The most important layer in aviation security, and counterterrorism in general, is intelligence. It is only with good high quality intelligence that an attack can be prevented. Here one finds the classic conflict with in the American approach to

security. The United States has unarguably the most extensive technical intelligence collections tools in the world. Its human intelligence collections, and more importunately human analysis is very limited. The NSA collected a phone intercept from a known terrorist that indicated an attack was pending before 9/11, but due to a lack of translators, failed to translate it, until September 12, 2001. More resources on humans and less on technology may have helped prevent the attack.

Ultimately, the solution to the threat of terrorism rests with humans. Until humanity rejects violence as a legitimate means of problem solving, terrorism will remain. This work does not hope to solve human inclination towards violence, but perhaps contribute to some of the layering required to protect international civil aviation. If this work helps bridge the intellectual and operational gap then it has contributed to that goal.

Appendix A

The Five Freedoms of Aviation:

1. To fly across its territory without landing.
2. To land for nontraffic purposes.
3. To put down passengers, mail, and cargo taken on in the territory of the country whose nationality the aircraft possesses.
4. To take on passengers, mail, and cargo destined for the territory of the country whose nationality the aircraft possesses.
5. To take on passengers, mail, and cargo destined for the territory of another agreeing nation and to put down passengers, mail, and cargo coming from any such territory.

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Central Intelligence Agency: www.cia.gov

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Congressional Research Service: there is no direct web link to the Congressional Research Service but the Federation of American Scientists has a good link to relevant reports.

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Federal Aviation Administration: www.Faa.gov

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