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ACTIVE DEFENSE: STATE MILITARY RESPONSE TO INTERNATIONAL TERRORISM*

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The way to get after these people [terrorists] is to get after them with both barrels.

—*Secretary of State George P. Shultz* [1]

INTRODUCTION

Secretary of State Shultz expresses the frustration and anger felt by many in the wake of terrorist attacks.[2] Americans abroad are

* First prepared as part of an LL.M. research paper at Harvard Law School under the supervision of Profesor Abram Chayes. The views contain herein, however, are those of the writers alone.

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1. Boston Globe, Nov. 25, 1985, at 7, col. 4.

2. The term "terrorism" is inherently value-laden. *See* Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969); and Levenfeld, *Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law*, COLUM. J. TRANSNAT'L L. 1 (1982). Falk chose to "balance" the terms he used; Levenfeld chose to use the "neutral" term "Fedayeen."

The idea that one person's "terrorist" is another's "freedom fighter" may be apropos in the Israel-Lebanon battle arena, the subject of the Falk and Levenfeld article. This Article, in contrast, concentrates on terrorist attacks in general, undertaken by a variety of organizations for a variety of purposes, and argues that certain acts cannot be justified regardless of the cause espoused. "Terrorism" is the most recognizable term to apply to such attacks. "Indeed, for most terrorist acts, the acts themselves—aside from questions of political motivation—are precisely those crimes (for example, homicide and kidnapping) which are universally recognized as morally and legally unacceptable." Comment, *Controlling International Terrorism: An Analysis of Unilateral Force and Proposals for Multilateral Cooperation*, 8 U. TOL. L. REV. 209, 242 (1976).

A comprehensive definition of "terrorism" is beyond the scope of this Article. An *Ad Hoc* the number one target for terrorists and the frustration grows as the attacks continue.[3] Pressure builds for the United States to fight back and on April 14, 1986, the United States did just that with an air strike against targets in Libya.[4]

Secretary of State Shultz has been a strong advocate for military action. "Passive defense" is to give way to "active defense:"

> From a practical standpoint, a purely passive defense does not provide enough of a deterrent to terrorism and the States that sponsor it. It is time to think long, hard, and seriously about more active means of defense—about defense through appropriate preventive or preemptive actions against terrorist groups before they strike.[5]

Yet, anger must be tempered by reason. The strategic, political and legal wisdom of an "active defense" must be weighed carefully. This Article will assess the legality of state-sponsored military responses to terrorism: Does a state have a right under international law to use extraterritorial force to combat terrorist attacks?

The legality of an "active defense" will be examined against the international norms represented in the Charter of the United Nations. Moreover, since the United Nations provides the forum for international debate on the propriety of any military response, United Nations' practice will be examined in detail.[6] General Assembly resolutions and Security Council decisions will be reviewed

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Committee on International Terrorism established by the United Nations General Assembly in 1972, and periodically renewed, has been unable to fashion a definition satisfactory to its 35 members. *See* G.A. Res. 3034 (XXVII) (1972); G.A. Res. 31/102 (1976); G.A. Res. 32/174 (1977); G.A. Res. 34/145 (1979); G.A. Res. 36/109 (1981); G.A. Res. 38/130 (1983); and G.A. Res. 40/61 (1985).

However, a lack of a definition of "terrorism" has not prevented the adoption of measures to deal with the problem. The European Convention on the Suppression of Terrorism 1977, Europ. T.S. No. 97, without defining terrorism, lists offenses which for the purposes of extradition are not regarded as political in nature. And the Security Council of the United Nations saw fit to condemn terrorism "in all its form, wherever and by whomsoever committed" without further explanation. 40 U.N. SCOR S/PV 2618 (1985). So, too, this Article will address the subject of "terrorism" without the benefit of a detailed definition.

3. Oakley, *Terrorism: Overview and Developments*, 85 DEP'T ST. BULL., Nov. 1985, at 61. Robert Oakley is director of the Office for Counter Terrorism and Emergency Planning. In his overview, a 20% increase was noted in terrorist incidents in 1984 with 600 terrorist incidents recorded.

4. A recent example of a compendium of writings urging a forceful U.S. response is FIGHTING BACK (N. Livingstone and T. Arnold eds. 1986). A summary of the U.S. air strike against Libya is found in TIME, Apr. 28, 1986, at 16-33; NEWSWEEK, Apr. 28, 1986, at 16-31.

5. Shultz, *Terrorism: The Challenge to the Democracies*, 84 DEP'T ST. BULL., Aug. 1984, at 31, 33.

6. Practice of the United Nations is regarded as a valuable source of information, especially given the universality of its membership. *See* Higgins, *The Legal Limits to the Use of Force by Sovereign States United Nations Practice*, 1961 BRIT. Y.B. INT'L L. 269.

as sources for interpretation and clarification of the original articles of the United Nations Charter.

In the final decision to use military force, considerations of international law may not be determinative, giving way to political and public pressures. Nevertheless, legality is important particularly for the United States, a nation that prides itself as being governed by the rule of law and that has striven to create an international order based on the rule of law.[7] The battle against terrorism presents no exception; it too must be waged within the rules of international law.[8] If respect for international norms is to be preserved, the United States must lead by example. To resort to illegal means in order to combat terrorism sets an undesirable precedent. Unlawful use of force only encourages further illegal force. Breach invites counterbreach.

Legality also impacts on the morality of the cause. Moral righteousness of the action will be enhanced or be diminished according to its perceived legality. The United States asserts that it has a moral right to act against terrorism.[9] But moral imperatives will not persuade the world community to ignore a breach of international law. Action in accord with international norms, on the other hand, is a powerful influence on world opinion.

I. International Law under the Charter of the United Nations

President Reagan, in an address concerning terrorism before the American Bar Association, made passing mention of former President Theodore "Teddy" Roosevelt.[10] The contrast in constraints imposed by international law between the eras of the two Presidents underscores the evolution of international law wrought by the League of Nations and the United Nations.

President Roosevelt would have been expected to respond to ter-

7. For a further discussion of the U.S. role in international law, *see* Chayes, *Nicaragua, the United States, and the World Court*, 85 COLUM. L. REV. 1445, 1446 (1985).

8. Abraham Sofaer, Legal Advisor of the Department of State, in a recent article dealing with terrorism emphasized that "[w]e must persist in asserting that the rule of law be obeyed, if we want to retain the hope that some day it will be obeyed." Sofaer, *Fighting Terrorism Through Law*, 85 DEP'T ST. BULL., Oct. 1985, at 38, 39.

9. Shultz, *Terrorism and the Modern World*, 84 DEP'T ST. BULL., Dec. 1984, at 12, 16.

10. Address by President Ronald Reagan, "The New Network of Terrorist States," before the American Bar Association, in Washington, D.C. (July 8, 1985). Theodore Roosevelt was President 1901-1908.

rorist attacks; such was the practice of states at that time.[11] No multinational organization existed to oversee disputes in international affairs. States relied on their own self-help remedies.[12] War, the ultimate sanction, remained largely unregulated. To be sure, the concept of "just war" had evolved in international legal theory, but had not been translated into practice. War remained an accepted tool of statecraft. Resort to force, war if necessary, was governed primarily by three realities: a) domestic support for the action—political reality; b) anticipated forceful reaction of other "powers"—diplomatic reality; and c) likelihood of success of the military operation. This paradigm culminated in the First World War which was "sparked" by a terrorist act, the assassination of Archduke Franz Ferdinand at Sarajevo.[13]

The carnage of the First World War made the option of war less acceptable to states and in fact the League of Nations was created to regulate war.[14] The Covenant of the League imposed two radical changes:

> 1) Signatory states were obliged to employ pacific means for settling disputes and not to resort to war without first exhausting those pacific means; and
> 2) Members of the League were empowered to pass judgment on the legality under the Covenant of any state's resort to war and to apply sanctions against a state in violation of the Covenant.[15]

The Second World War marked the final failure of the League. The greater devastation of this war impelled the international community to prepare once again to "save succeeding generations from the scourge of war."[16] The United Nations was molded by the fail-

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11. In 1899, the European Powers, Japan and the United States combined in a classic illustration of state intervention to suppress the so-called Boxer Rebellion in China.

12. For a comprehensive review of the self-help remedies, restoration, reprisal and intervention, *see* J.L. BRIERLY, THE LAW OF NATIONS (H. Waldock 6th ed. 1963); L. OPPENHEIM, INTERNATIONAL LAW (H. Lauterpacht 7th ed. 1952).

13. There is no suggestion that the assassination "caused" the First World War; rather it was the immediate precipitating event.

14. *See* Covenant of the League of Nations, art. XII, *in* HUDSON, INTERNATIONAL LEGISLATION 1 (1933), which restricted "resort to war." An arguable gap in the Covenant was that it did not address lesser forms of armed force. For a discussion of this issue, *see* Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 454 (1952).

15. Waldock, *supra* note 14, at 469. Articles X-XVI of the Covenant dealt with the regulation of war, obligations and sanctions. The essence of the League system was to compel member states to submit disputes to arbitration, judicial settlement or inquiry by the Council prior to a "resort to war" and not to go to war until three months after a decision was rendered. Further, a state was obliged not to go to war against a member state complying with any stipulated decision.

16. U.N. CHARTER preamble.

ures of its predecessor and by the now recognized horror of war. Under the Charter of the United Nations, "the threat or use of force" in international relations is prohibited.[17] The one express exception to this general prohibition on the use of force available to an individual state acting unilaterally is the right of self-defense as outlined in Article 51 of the Charter. Under the Charter, individual recourse gives way to collective enforcement action through the Security Council.[18] The Security Council is designed to ensure "prompt and effective action by the United Nations" to maintain "international peace and security."[19] If necessary, the Security Council is authorized to respond with military measures.[20] Such is the ideal. In reality, the Security Council is paralyzed by the conflicting interests of the five permanent members wielding the power to veto any proposed action. Given the inability of the Security Council to enforce international law, the validity of the entire United Nations normative structure is in jeopardy. Sir Humphrey Waldock, writing during the infancy of the United Nations, warned that "[a] legal system which merely prohibits use of force and does not make adequate provision for the peaceful settlement of disputes invites failure."[21] For some, Sir Humphrey's prophecy has come to pass and the failure of the United Nations to act compels states to act unilaterally.

Thomas Franck, for one, spoke of the death of Article 2(4) of the Charter, the general prohibition on the use of force, and foresaw the evolution of a new norm in international affairs premised on super-power spheres of interest.[22] Professor Michael Reisman, without pronouncing the demise of Article 2(4), reinterpreted it.[23] He maintained that Article 2(4) must be applied to enhance the "fundamental principle of political legitimacy in contemporary interna-

17. U.N. CHARTER art. 2, para. 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *See also* art. 2, para. 3: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered."

18. Chapter VIII of the Charter permits the use of force through regional arrangements and Chapter VII of the Charter allows military action through the Security Council on behalf of the United Nations.

19. U.N. CHARTER art. 24.

20. U.N. CHARTER art. 42.

21. Waldock, *supra* note 14, at 456.

22. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970).

23. Reisman, *Coercion and Self-determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984).

tional politics"—self-determination.[24] He proposed to bypass ineffective collective security by allowing individual states to unilaterally pursue and enforce the aims of the United Nations Charter. The fundamental test will be: "Will a particular use of force enhance or undermine world order?"[25] For Professor Reisman, ensuring free choice for suppressed peoples and deposing repressive regimes enhances world order. Professor Reisman's view of Article 2(4) expands the permissible bounds of the unilateral use of force from that necessary for self-defense to that resorted to in the "good cause" of self-determination. Oscar Schachter, in a scathing rebuttal, saw this as an "ominous" proposal, pointing to the "historic realities of abuse by powerful states for supposedly good causes."[26]The most poignant legal argument against the Franck and Reisman theses is that no state has chosen to "opt out" or to "reinterpret" the United Nations international order. As Louis Henkin noted in his defense of the Charter norms,

> [a]ll of the evidence is persuasive that they [the draftsmen of the Charter] sought to outlaw war, whether or not the U.N. organization succeeded in enforcing the law or in establishing peace and justice. And none of the original members, nor any one of the many new members, has ever claimed that the law against the use of force is undesirable now that the United Nations is not what had been intended.[27]

For states, the law remains the United Nations Charter as drafted, interpreted and applied by them through their representatives. And it is generally accepted that the Charter prohibits the unilateral use of force except in self-defense. These, then, are the legal parameters within which "active defense" is to be judged by the community of states.[28]

II. THE STATUS OF REPRISALS

The Security Councils' inability to enforce the provisions of the Charter has also spawned efforts to resurrect reprisal as an acceptable form of state action.[29] Reprisal is seen as one means of nar-

24. *Id.* at 643.
25. *Id.*
26. Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 650 (1984).
27. L. HENKIN, HOW NATIONS BEHAVE 138 (2d ed. 1979).
28. The United Nations has become a truly universal organization with 159 member states as of January 1, 1985. U.S. DEP'T OF STATE, TREATIES IN FORCE (1985).
29. *See* Falk, *supra* note 2; Bowett, *Reprisals Involving Recourse to Armed Force*, 66

rowing the alleged "credibility gap" between international norms and state practice, particulary in light of the conflict in the Middle East.[30] Reprisals "permit" the illegal use of force by a state to redress wrongs committed by another state. They also have a long history in international affairs.[31] The conditions requisite for a legitimate reprisal action under customary international law are:

1) a prior delict by another state under international law;
2) an unsuccessful demand for redress; and
3) a reasonable, proportional forceful response.[32]

Reprisals are differentiated from self-defense largely in terms of object. Reprisals focus on the wrongdoer state and are intended to punish the wrongdoer for past delicts. Obviously, punishment also contains an element of future deterrence in that the wrongdoer state is coerced through force to act appropriately or face further reprisals.

The focus of self-defense, on the other hand, is on the victim state. In this context, action is taken to prevent future injury to the state. A harm exists and the state acts to address that harm. Admittedly, the distinction between self-defense and reprisals blurs in the state of quasi-belligerency existing between Israel and her Arab neighbors. Given the cycle of violence and ever present danger, certain Israeli military responses can be seen as being both reactive and preventive and thus classified as acts either of self-defense or of reprisal.[33]

Self-defense and reprisal can be visualized as two circles in a venn diagram. The circles overlap to encompass a quarter portion of each. Critically, the overlap area remains within the circle of self-defense and acts falling in this field can be so justified even though they can also be thought of as reprisals. Nevertheless, the overlap does not rationalize general acceptance of reprisal.

For example, in his work on reprisals, Falk provides a framework for "legal reprisals" to guide state action.[34]
Twelve criteria are outlined in which are all the essential elements of self-defense among which are:

AM. J. INT'L L. 1 (1972).

30. Bowett, *supra* note 29, at 1.

31. For an overview of the law of reprisals, *see* L. OPPENHEIM, *supra* note 12, at 135-43; Waldock, *supra* note 14, at 456-61.

32. Waldock, *supra* note 14, at 460.

33. Falk, *supra* note 2, at 434-35; Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 585 (1972).

34. Falk, *supra* note 2, at 441-42.

1) The purpose of the force is defensive, to protect the state (Point 2);
2) The force is necessary in the sense that all reasonable pacific means are exhausted and the state must resort to extraterritorial action (Points 4 and 9);
3) The force used is proportional to the danger presented and is directed against military and para-military targets and precautions are taken to avoid excessive damage and unnecessary loss of life (Points 5 and 6); and
4) The user of the force promptly reports and explains its conduct to the appropriate multinational organization—presumably the Security Council as required under Article 51 (Point 7).

Compliance with the twelve criteria brings the state action into the rubric of self-defense—into the area of overlap.

Supporters of "legal reprisal" refer to the selective contradiction in the decisions of the Security Council in failing to condemn all acts of reprisal.[35] They argue that since there is no blanket condemnation of reprisal, reasonable reprisals are acceptable. Yet, instances where the Security Council failed to condemn can be seen as falling within the acceptable parameters of self-defense. Invariably, the justification for not responding to such acts was self-defense.[36] Failure to condemn, therefore, can be seen as quasi-acceptance of the self-defense argument and ought not be construed as an endorsement of "legal reprisal."

Nor is it desirable to recognize reprisal as a legitimate use of force. Reprisals are inherently open to abuse by states. Any delict or any unfriendly act by a state could provide the pretense for military intervention by the aggrieved state. Furthermore, reprisals are a remedy only available to the powerful, that is, those who are in a military position to act. In these circumstances, the potential for abuse is enormous, especially when the fundamental purpose of reprisals is to "coerce" appropriate state behavior. Also of concern are reprisals between equally powerful states which are likely to escalate to war.[37] Continuing censure and condemnation of such practice is a far better course, for in an international community lacking in active enforcement, vocal world condemnation remains a valid deterrence.

During the period of heightened debate over reprisals, the United

35. Bowett, *supra* note 29; Levenfeld, *supra* note 2, at 35.
36. *See* Bowett, *supra* note 29, at 33-36.
37. Waldock, *supra* note 14, at 459.

Nations responded with its own statement. The General Assembly adopted by consensus the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States which specifically addressed reprisals: "States have a duty to refrain from acts of reprisal involving the use of force."[38] In 1974, the United States, when pressed to accept reprisals under international law, responded with an open letter from Acting Secretary of State Kenneth Rush:

> The United States has supported and supports the foregoing principle [state duty to refrain from forceful acts of reprisal]. Of course we recognize that the practice of States is not always consistent with this principle and that it may sometimes be difficult to distinguish the exercise of proportionate self-defense from an act of reprisal. Yet, essentially for reasons of the abuse to which the doctrine of reprisals particularly lends itself, we think it desirable to endeavor to maintain the distinction between acts of lawful self-defense and unlawful reprisals.[39]

The distinction between self-defense and reprisal is material to the issue of "active defense." To reiterate, self-defense is the only exception to the general prohibition on the unilateral use of force by a state. Other self-help remedies, of which reprisal is one, are illegal under the Charter.[40] "Active defense" must be framed within self-defense.

A. *Article 51: Self-Defense*

> Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in

38. G.A. Res. 2625 (XXV), Doc. A/8082 (1970).

39. Letter from Acting Secretary of State Rush to Professor Eugene Rostow of the Yale Law School (May 29, 1974), *reprinted in part in* 68 AM. J. INT'L L. 736 (1974).

40. Another term recently coined to apply to Israel's use of force in the Entebbe Raid is "rectification." This concept can be summarized as a form of state restoration to the status quo. "Rectification," like reprisal, is a self-help remedy without justification under the U.N. Charter. *See* Sheehan, *The Entebbe Raid: The Principle of Self-Help in International Law as Justification for State Use of Armed Force*, 1 FLETCHER F. 135 (1977).

order to maintain or restore international peace and security.[41]

Article 51 does not define self-defense. However, under customary international law, general principles have evolved to guide states in applying self-defense.

A reference point is the *Caroline* case where self-defense "was changed from a political excuse to a legal doctrine."[42] The *Caroline* incident occurred during the aftermath of the unsuccessful Rebellion of 1837 in Upper Canada against British rule. The rebellion aroused sympathy and support in the American border states. Sympathy turned to active assistance. The *Caroline* was a steam boat used by American "volunteers" to ferry men and supplies to a contingent of men who had seized Navy Island, a British possession in the Niagara River. From the island, the band allegedly committed "repeated Acts of Warlike aggression on the Canadian shore, and also on British Boats passing the Island."[43] The British responded. A force crossed the Niagara River at night, boarded the *Caroline*, set the boat on fire and towed her into the current to be swept over Niagara Falls. Two Americans were killed in the boarding.[44]

Exchange of diplomatic notes between the governments of the United States and Britain followed.[45] In these notes, Daniel Webster, then Secretary of State, outlined a framework for self-defense. He called on the British government to show a

> necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories if the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by the necessity, and kept clearly within it.[46]

Of binding importance is that the British government accepted the framework, although it disagreed over the facts.

Two guiding principles for self-defense emerge from the *Caroline* case: necessity for action and proportionality of any response. Moreover, for the purposes of "active defense," the *Caroline* case

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41. U.N. CHARTER art. 51.
42. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).
43. *Id.* at 83.
44. *Id.* at 84.
45. The most intense diplomatic activity occurred after 1840 following the arrest of Alexander McLeod, a British subject, in New York state and charged with murder and arson in connection with the *Caroline* incident. *See generally, id.* at 85.
46. *Id.* at 89.

presented an instance where a state responded to armed infringements by "individuals" which prompted a military incursion into the territory of another sovereign state. The *Caroline* case also supports the principle of anticipatory self-defense, although within narrow, prescribed limits. The Webster formulation did not require an actual attack; response to a threat was permissible so long as the danger posed was "instant, overwhelming, leaving no choice of means and no moment for deliberation."[47] Indeed, the British action can be seen as an example of essentially a pre-emptive strike to prevent the transport of further supplies to Navy Island and to stem the perceived threat of an insurgent invasion.

Article 51 leaves unaltered the principles of necessity and of proportionality and United Nations practice confirms an emphasis of these principles.[48] Necessity is comprised of two factors. First, the danger presented must warrant a military response. In this way, military reactions to unfriendly economic or political actions by states are eliminated and self-defense is confined to a response to an "armed attack" under Article 51. Second, peaceful alternative means of settlement must be exhausted.[49] In this way, the obligations of Article 2(3) to pursue peaceful means of dispute resolution are met. Thus, necessity minimizes the opportunities to use force. Proportionality, on the other hand, minimizes the amount of force used once it is necessary; that is, proportionality prevents a state from using massive force in response to a minor incident.[50]

What is not settled is whether the customary law of anticipatory self-defense remains unaffected by Article 51. International law scholarship is divided over this issue. One school of thought is that Article 51 merely declares customary international law; a second sees Article 51 as fashioning a new, more restrictive statement of self-defense.

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47. *Id.*

48. R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 205 (1963).

49. On June 7, 1981, Israeli aircraft destroyed a nuclear reactor in Iraq. The Security Council unanimously condemned the attack. 36 U.N. SCOR (2288 mtg.), S.C. Res. 487 (1981). The United States' vote was "based solely on the conviction that Israel failed to exhaust peaceful means for the resolution of the dispute." *Id. See also*, Mallison, *The Israel Aerial Attack of June 7, 1981, upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT'L L. 417 (1982); Nydell, *Tensions Between International Law and Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor*, 24 VA. J. INT'L L. 459 (1984).

50. The most poignant example of an attempted abuse of self-defense was the German justification for the invasion of Poland in 1939 based on a staged incursion by "Polish" forces.

The restrictive interpretation relies on the literal qualification contained in Article 51 "if an armed attack occurs." Arguably, these words are redundant if the concept of anticipatory self-defense is still valid. Moreover, a restrictive interpretation is presented as being consistent with the net effect and intent of the Charter to go beyond customary international law in prohibiting unilateral state resort to force. Article 51 is also seen as complementing the general prohibition on the use of force contained in Articles 2(3) and 2(4).[51]

In reply, supporters of anticipatory self-defense raise, in general terms, three objections to the restrictive interpretation: Supporters challenge the "literalism" of Article 51, refer to the contrary intent manifested by the original Charter drafters and cite the unacceptable consequences flowing from a narrow application of self-defense.

Challenges of the literal reading of Article 51 concern the reaffirmation in the article of the "inherent right" of self-defense. Reference is also made to the French text of Article 51 and its less categorical statement that self-defense is available to a member state which is "the object of armed aggression."[52] Supporters of the idea of anticipatory self-defense also argue that the limitation in the article was intended only as a "hypothetical" and was not inserted as a condition for action.[53]

The *travaux preparatoires* of the Charter[54] are cited in further support of the theory that Article 51 was not intended by the drafters of the Charter to restrict customary international law and that a marked departure from customary international law is not to be lightly presumed. In the original Dumbarton Oaks Proposals, an article dealing with self-defense was not included.[55] This was consistent with the Covenant of the League of Nations and the Kellogg-Briand pact, neither of which addressed, and therefore preserved, the customary right of self-defense. In the case of the

51. *See generally*, L. HENKIN, *supra* note 27; Brownlie, *The Use of Force in Self-Defense*, 1961 BRIT. Y.B. INT'L L. 183.

52. As quoted in Brownlie, *supra* note 51, at 242, the French text reads: "Dans un cas ou un Membre des Nations Unies est l'object d'une aggression armee." The Spanish text reads: "En caso de ataque armando."

53. Comment, *The Legal Implications of Israel's 1982 Invasion into Lebanon*, 13 CAL. W. INT'L L.J. 458, 481 (1983).

54. Article 32 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969), provides for recourse to "supplementary means of interpretation, including the preparatory work of the treaty."

55. Dumbarton Oaks Proposals for a General International Organization, U.N.C.I.O. Doc. 1 G/1 (1945).

Kellogg-Briand Pact, certain states went on to expressly reserve their unqualified right to act in self-defense.[56]

What then was the intent in inserting "if an armed attack occurs" in Article 51? First, the phrase is not redundant. Its purpose was to clarify the principle of collective self-defense under regional pacts.[57] It was not intended to affect individual state-defense. Strong support for this view is found in the *travaux preparatoires.* In committee, the representative from Columbia, in approving the adoption of the new paragraph (Article 51), stated:

> If a group of countries with regional ties declare [sic] their [sic] solidarity for their [sic] mutual defense, as in the case of the American states, they [sic] will undertake such defense jointly if and when one of them is attacked. And the right of defense is not limited to the country which is the direct victim of aggression but extends to those countries which have established solidarity, through regional arrangements, with the country directly attacked. . . . From this, it may be deduced that the approval of this article implies that the Act of Chapultepec is not in contravention of the Charter.[58]

Yet, the most forceful criticism of the restrictive interpretation is that it simply is not logical for a state to wait and allow a potentially devastating or lethal first strike before acting to protect itself. A state cannot be expected to turn cheek and allow itself to be attacked, and perhaps destroyed, especially when the Security Council is ineffective in turning back the aggressor.

In rebuttal, adherents of the restrictive interpretation stress the need for a clear, unambiguous line to determine self-defense. The existence of an armed attack before action represents such a concrete demarcation. Otherwise, vagueness invites abuse. According to this reasoning, the development of modern lethal weapons makes limitation more imperative, not less, in order to avoid miscalculated anticipatory strikes. The rationale for preemptive nuclear strikes also wanes with the development of second and third strike capabilities of the respective nuclear super-powers.[59]

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56. *See* Brownlie, *supra* note 51, at 205.
57. Waldock, *supra* note 14, at 497.
58. U.N.C.I.O. Doc. 576, III/4/2 (May 25, 1945). The representatives of Mexico, Costa Rica, Paraguay, Venezuela, Chile, Ecuador, Bolivia, Panama, Uruguay, Peru, Guatemala, El Salvador, Brazil, Honduras and Cuba associated themselves with this statement.

Further support for this view is found in the strongly reiterated position of the Soviet Union that the appropriate placement of the new paragraph (Article 51) was in Chapter VIII which deals with regional arrangements. U.N.C.I.O. Doc. 972, III/6 (June 14, 1945).

59. Louis Henkin, a prominent adherent to the restrictive interpretation, concedes that

The debate continues over the proper interpretation of Article 51. Fortunately, to understand responses to terrorism, these positions need not be reconciled. "Active defense" implies a response to prior terrorist attacks. If the terrorist acts are of a sufficient intensity to constitute an "armed attack" then "active defense" can be brought within the most restrictive interpretation of Article 51.

This is also the most acceptable argument to raise before the United Nations given that the most likely forum for debate will be the Security Council. Pursuant to Article 51, a state relying on self-defense "shall" report to the Security Council. United Nations' practice indicates a cautious approach to self-defense and a preference "not to give rein" to anticipatory self-defense.[60] This is not to say that the United Nations endorses a restrictive interpretation; rather, state resort to force is closely scrutinized by other member states for fear of creating too broad an exception.[61] Accordingly, a high standard of persuasion is demanded of a state asserting self-defense.

III. Terrorist Attacks As "Armed Attack"

Just as Article 51 does not define self-defense, so too is the phrase "armed attack" left undefined. Certainly, the adjective "armed" implies a military application of force. Economic, political and propaganda "attacks" against another nation do not give rise to the right of self-defense. What is not resolved is the type and magnitude of armed attack needed to legitimize a state response in self-defense.

The traditional instance of self-defense, an armed invasion of one state by the military forces of another state, involves the direct committal of forces by the respective states. Yet, self-defense is not confined to direct state attacks. In 1958, the Lebanese representative speaking before the Security Council addressed his country's right to self-defense in the face of alleged indirect subversion by the United Arab Republic:

> Article 51 of the Charter speaks not of direct armed attack but of armed attack pure and simple. Article 51 is thus intended to

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a nuclear holocaust represents an extreme situation beyond the realm of law: "If a nation is satisfied that another is about to obliterate it, it will not wait. . . . But surely that extreme hypothetical case beyond the realm of law should not be used to justify new rules for situations that do not involve the impending mortal thrust." L. Henkin, *supra* note 27, at 142-43.

60. R. Higgins, *supra* note 48, at 203.

61. Levenfeld, *supra* note 2, at 17.

cover all cases of attack, whether direct or indirect, provided it is armed attack. In any case, what difference is there from the point of view of their effects between direct and indirect attack if both are directed towards the destruction of a country's independence and could, in fact, threaten it? What real difference is there between armed soldiers in uniform making a frontal attack on a certain part of a certain country and these same soldiers, armed but not in uniform, secretly infiltrating into the area to regroup there and engage in the same sort of armed attack as soldiers in uniform?[62]

This proposition of law is consistent with customary state practice. For example, the British seizure and destruction of the *Caroline* was in response to acts committed by Canadian "rebels" and American "volunteers."[63] Webster's famous formula for self-defense did not require the ingredient of direct state involvement. Necessity arose from a danger—any danger. In this vein, the United States, citing self-defense, made repeated incursions into neighboring Mexico in pursuit of hostile Indians or outlaw bands in the 19th and early 20th centuries.[64]

In the post-Charter era, the United States has remained a leading proponent of the view that "indirect aggression" is contrary to the general prohibition on the use of force and that a state should not escape incrimination behind the shield of subversion.[65] The United States' perspective was, in large part, a "cold war" reaction to the fear of communist inspired subversion. Not surprisingly, American and British jurists have provided the strongest scholarly support for self-defense in response to indirect attacks.[66] Kelsen, writing in 1952, stated that

[t]he illegal attack may be the action of individuals not acting as organs of another state, but operating from the territory of another state. Then the attacked state exercises its right of self-de-

62. 13 U.N. SCOR (833d mtg.) at 3 (1958).

63. *See supra* notes 42-47 and accompanying text.

64. M. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 120-22 (1962).

65. A summary of United States pronouncements on this issue is contained in Chayes, *Nicaragua, The United States, and the World Court*, 85 COLUM. L. REV. 1445, 1456-67 (1985). Professor Chayes was counsel for Nicaragua in its case before the World Court against the United States for the latter's support of *contra* activity against Nicaragua and for the mining of Nicaragua harbors. Professor Chayes noted the irony that the concept of "indirect aggression" was now being used against the United States.

66. *See* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 62 (R. Tucker 2d ed. 1966); R. HIGGINS, *supra* note 48, at 201; Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L.Q. 712, 731 (1958); Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1638 (1984).

fense by using force against these individuals on the territory of the other state only if the latter has violated its obligations to take the measures to prevent or repress the illegal attack.[67]

The subsequent edition to Kelsen's work directly addressed the term "armed attack" as used in Article 51:

> By an armed attack may also be understood, however, the support by one state of revolutionary groups within the territory of another state. More generally, there are a number of ways in which force may be used indirectly by a state that may be interpreted as constituting an armed attack, for example, the arming by a state of organized bands for offensive purposes against another state, the sending by a state of so-called "volunteers" to engage in hostilities with another state, *the undertaking or encouragement by a state of terrorist activities in another state or the toleration by a state of organized activities calculated to result in terrorist acts in another state, and so on.*[68]

Underlying the resort to self-defense is acceptance of the reality that acts of irregulars, armed bands or terrorist groups have a serious impact, in fact having contributed to the toppling of governments in the past. The victim state is forced to allocate scarce resources in defense against such attack. Relations between the victim state and support states sour, increasing the likelihood of open conflict. Violent incidents arouse both fear and anger in the general population. The result is an unsettled and dangerous situation.

Although there is general agreement that acts of armed bands may constitute armed attacks, there is not consensus over the magnitude of force needed to trigger a state response in self-defense. One view is that self-defense by a state is justified only in the event of an invasion by armed bands such that "the territorial integrity of the invaded state is seriously impaired."[69] A contrasting position is that "[a]rmed attacks, even those small in scope, are still considered armed attack."[70] Neither of these two extremes is acceptable. The former is too restrictive, leaving self-defense available only when the very preservation of the state is at risk. No state can be expected to wait for that threshold. The latter is too open to abuse, permitting response to every instance of hostility, regardless of in-

67. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 60 (1952).

68. H. KELSEN, supra note 66, at 62 (emphasis added).

69. M. GARCIA-MORA, *supra* note 64, at 119.

70. Feinstein, *Self-Defense and Israel in International Law: A Reappraisal,* 11 ISRAEL L. REV. 516, 540 (1976).

tensity or the existence of a future danger.

An acceptable framework lies somewhere in between the two extremes posed. Brownlie, while recognizing that armed attack "probably refers to some grave breach of the peace, or invasion by a large organized force . . .", concluded that response to lesser acts committed by armed bands could not be ruled out:

> It is extremely unlikely if negligence in permitting armed bands to operate from State territory constitutes an "armed attack" on the State which they penetrate; and isolated or sporadic operations by bands with government complicity are probably not sufficiently serious to come within the meaning of article 51. However, it is conceivable that a coordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of the State from which they operate, would constitute an "armed attack," more especially if the object was the forcible settlement of a dispute or the acquisition of territory.[71]

Higgins concurred in this view:

> Thus the question was raised: if a state has been subjected, over a period of time, to border raids by nationals of another state, which are openly supported by the government of that state, to threats of a future, and possibly imminent, large-scale attack, and to the harassments of alleged belligerent rights, may it use force in self-defense, in anticipation of the continuation of such action? The present writer is of the opinion that that question, thus phrased, must be answered affirmatively—but always with the proviso that the action in self-defense is proportionate, in nature and degree to the prior illegality or the imminent attack.[72]

Seriousness of the danger posed must be assessed first by the victim state in deciding to respond with force and subsequently by the world community deliberating on that decision. Both Brownlie and Higgins require a campaign of attacks as past and present incidents are indicative of future danger. State response to sporadic or isolated attacks is ruled out.

Are terrorist attacks sufficient to constitute "armed attack?" Justification of self-defense is easy for a state faced with a guerilla army invading from a nearby state. The source of that threat is a well organized, powerful armed band. Terrorism does not involve territorial acquisition. Its *modus operandi* is violent, unpredictable

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71. Brownlie, *supra* note 66, at 731 (footnote omitted)
72. R. HIGGINS, *supra* note 48, at 201.

destruction of property or of human lives. The source of terrorism is traditionally viewed as a fanatical fringe, perceived as small bands of terrorists.[73]

However, the present Middle East affairs offer a new situation. Quantitatively, the terrorists' threat is magnified. Terrorism is no longer the activity of isolated individuals; it is a *tactic* employed by armed bands. The various Palestinian liberation organizations, with an estimated 12,000 to 15,000 men under arms, are paramilitary in structure and training.[74] These groups constitute a real military and political factor in the Middle East. They have partisan and state support and are well armed. The danger presented by these armed bands is far in excess of isolated terrorist attacks from small terrorist bands. Therefore, in responding to terrorist incidents, the state must consider the perpetrator as well as the frequency and intensity of past attacks. A campaign of terrorist attacks undertaken by armed bands falls within the guidelines suggested by Brownlie and Higgins.

A state's right to respond extraterritorially to terrorist attacks by armed bands by asserting self-defense can be criticized in that the response is entirely anticipatory.[75] Anticipatory self-defense, presumably not permitted under Article 51, is being revived. After all, the terrorist attacks are past and any state response is purely a preventive action against possible future danger. In reply, there is a critical distinction to be made between a state response following an armed attack and a state response in a vacuum against armed threats. A state, the victim of terrorist attacks, is reacting to these past incidents and is acting to prevent their reoccurrence. The *aminus*, the intention to use force, has been manifested by the terrorist organizations. Actions have gone beyond preparation or threats and there is no doubt as to past, present or future violent

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73. Coming to mind are the activities of the Weathermen of the United States, the FLQ (Le Front de Liberation du Quebec) in Canada, the Baader-Meinhof gang in West Germany and the Red Brigades in Italy.

74. MACLEAN'S, Oct. 21, 1985, at 39. Twelve major Palestinian factions are noted: Al Fatah—headed by Yasser Arafat, 8,000 fighters; Palestine Liberation Front—a small pro-Arafat wing under Abdul-Abbas and a pro-Syrian wing under Talatt Yaloub, 100 fighters; Arab Liberation Front—backed by Iraq and headed by Abdul-Rahim Ahmed; Black June—headed by Abu Nidal and opposed to Arafat; Democratic Front for the Liberation of Palestine—Syrian supported, headed by Nayif Nawatmch; Al Intifada—based in Syria under Colonel Saed (Abu) Musa, 2,500 fighters; Popular Front for the Liberation of Palestine—pro Syrian, headed by George Habash, 1,000 fighters; Popular Front for the Liberation of Palestine—General Command—pro Syrian, led by Ahmed Jabril, 800 fighters; Popular Struggle Front—Syrian backed, under Samir Ghusha. Others estimate *22* radical Palestinian groups. NEWSWEEK, Apr. 7, 1986, at 26.

75. M. GARCIA-MORA, *supra* note 64, at 119.

intent.[76] Moreover, the issue of proportionality of response has a fixed reference; the past attacks provide a gauge to assess the reasonableness of any state action. In the absence of prior attacks, proportionality must be vaguely determined in light of ambiguous threats to use force.[77]

A requirement that states respond only to existing, present terrorist attacks is also unreal. The very purpose of terrorist tactics is to avoid direct confrontation with state forces. Quite simply, states rarely succeed in catching terrorists in the act. To limit state response to only existing attacks results in a mute application of Article 51. The requirement in Article 51 is "if an armed attack occurs." There is no stipulation that the response in self-defense be confined to an immediate armed attack. As Brownlie suggests, "[i]n all probability the question which should be posed is not when is anticipatory action justified but, when has an attack occurred?"[78] The following conclusion from a recent article by Schachter presents a logical proposition of law:

> [I]t does not seem unreasonable, as a rule, to allow a state to retaliate beyond the immediate area of attack, when that state has sufficient reason to expect a continuation of attacks (with substantial military weapons) from the same source. Such action would not be "anticipatory" because prior attacks occurred; nor would it be a "reprisal" since its prime motive would be protective, not punitive. . . . Thus, "defensive retaliation" may be justified when a state has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action.[79]

It is one thing to justify state action against the actual perpetrators of terrorist attacks; however, terrorists cannot be dealt with in isolation. Any extraterritorial attack on terrorists *per se* or on terrorist bases necessitates a forceful incursion into the territory of another sovereign state which the intruding state must justify.

In taking action directly against the terrorists, justification is

76. For a discussion dealing with state intention, *see* R. TAOKA, THE RIGHT OF SELF-DEFENSE IN INTERNATIONAL LAW 117-20 (1978). Taoka writes:

> A man's intention which has not yet been translated into actual conduct may be abandoned by him at any time. Furthermore, to determine, before it is translated into action, the intention of a foreign government only by imagination, often leads to error. A theory which relies upon the presumption of intention may increase the possibility of unnecessary war.

Id. at 119.

77. Brownlie, *supra* note 51, at 227.

78. *Id.* at 258.

79. Schachter, *supra* note 66, at 1638.

found in the terrorist incidents themselves. Certain acts such as murder, hostage taking or bombings are universally recognized as criminal, regardless of the motive prompting the acts.[80] The United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents refers to the crimes of "murder, kidnapping or other attack" against internationally protected persons.[81] And hostage taking was specifically addressed in the Convention Against the Taking of Hostages.[82] At a regional level, the European Convention on the Suppression of Terrorism, without defining terrorism, listed a number of acts as crimes including "an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons." [83]

With respect to an incursion into the territory of another state, justification rests on establishing a link between that state and the perpetrators of the terrorist acts. Under international law, a state may be held responsible for the act of private individuals. In the interests of reciprocity between states, the right of a state to independence creates a corresponding duty to respect the sovereign integrity of other states. There is a further duty imposed on states to prevent harmful acts against other states. One school of thought imposes absolute liability on states for injurious acts of private individuals operating from its territory.[84] The underlying premise for this view is that states are morally bound to promote world peace.[85] Absolute liability is not, however, generally accepted in international law. Although it may be a tolerable theory on which to base a claim for state compensation, it is an unacceptable basis to justify an action in self-defense. Sovereignty and the territorial integrity of nation states are paramount principles of international law and ought not lightly be supervened.

The more generally accepted doctrine is that which links state responsibility to its own fault, that is, its own acts of omission or commission.[86] The principle that no state is responsible for acts of

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80. *See* statements of Austrian representative to *Ad Hoc* Committee on Terrorism, 40 U.N. GAOR, Sixth Comm. (20th mtg.) at 2, U.N. Doc. A/C.6/40/SR.20 (1985).

81. Annex to G.A. Res. 3166, 28 GAOR, Supp. (No. 30), art. 2(1)(a), U.N. Doc. A/9030 (1973) [hereinafter Convention on the Prevention and Punishment of Crimes].

82. G.A. Res. 146, 34 GAOR, U.N. Doc. A/34/819 (1983) [hereinafter International Convention against the Taking of Hostages].

83. Europ. T.S. No. 97, art. 1(e).

84. M. GARCIA-MORA, *supra* note 64, at 1-35.

85. *Id.* at 11.

86. H. KELSEN, *supra* note 67, at 121.

its citizens without state culpability has firm roots in customary international law and can be traced to the writings of Grotius and Vattel.[87] Garcia-Mora, an advocate of absolute liability, concedes that "[g]overnmental complicity is a well-recognized ground of international liability."[88] International state practice applies this fault principle. A classic case is *St. Albans' Claim*, an international arbitration between the United States and Britain.[89] The United States sought compensation from Britain for an attack on the town of St. Albans, Vermont, in 1864 by a small band of Confederate sympathizers who assaulted the town via Canadian territory. In the unanimous arbitration decision, the claim was denied on the ground that the expedition was planned and carried out in such secrecy that the harboring state could not be expected to know of its existence. Compensation was not awarded in the absence of state fault.

The *Corfu Channel Case*[90] is cited as further confirmation of this principle in the post-United Nations context.[91] An interesting point in that case was that the British never relied on an argument of absolute liability in advancing its claim against Albania. The case arose from a 1946 incident in which British warships were damaged by mines in the Corfu Channel, within Albanian territorial waters. Britain sought compensation from Albania. The British alleged three alternative grounds for Albanian responsibility: Albania actually laid the mines; Albania in collusion with Yugoslavia laid the mines; or Albania knew of the mine field and failed to warn. Insufficient evidence was adduced to persuade the International Court of Justice as to grounds one and two. The Court founded responsibility on ground three, concluding that the laying of the mine field "could not have been accomplished without the knowledge of the Albanian government."[92] In imputing knowledge, the Court ruled:

> But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. The fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts

87. M. Garcia-Mora, *supra* note 64, at 17-21.
88. *Id.* at 17.
89. *Id.* at 64.
90. 1949 I.C.J. 4.
91. M. Garcia-Mora, *supra* note 64, at 22.
92. *Corfu Channel Case*, 1949 I.C.J. at 22.

the burden of proof.[93]

Similarly, in terms of terrorist acts, state responsibility will not flow simply from the fact that the terrorists originated from or operated from a particular state. Complicity must be established between the state and the terrorists.

The International Law Commission specifically addressed the issue of armed bands and terrorist acts in the Draft Code of Offenses against the Peace and Security of Mankind.[94] The following offenses against the peace and security of mankind were included in the draft:

> Article 2, paragraph 4: The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.
>
> Article 2, paragraph 6: The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

The articles reassert customary international law. The net of responsibility attributed to a state is cast wide to include "encouragement" or "toleration." Implicit in this is that, at a minimum, state complicity means that a state has knowledge of the activities and does not act to prevent them.

The Draft Code notably provided separate offenses for armed bands and terrorists, differentiating between guerilla type "incursions" and unspecified terrorist "activities." The distinction is not so apparent. What happens when armed bands either lack the power to mount full scale "incursions" into a state, although such remains their ultimate purpose, and the "incursions" that are carried out amount to hit and run terrorist strikes or there is a strategic decision to resort to a terrorist campaign? In these circumstances, the distinction between armed bands and terrorist organizations disappears; they are the one and the same. State culpability can be grounded in either Paragraph 2(4) or Paragraph

93. *Id.* at 18.
94. 9 U.N. GAOR Supp. at 9, U.N. Doc. A/2693 (1954).

2(6) of the Draft Code. This, then, is the situation in the Middle East where armed bands have fused into terrorist organizations.[95]

In a more recent pronouncement, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States explains in considering Article 2(4) of the Charter:

> Every state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[96]

In accord with Article 2(7) of the Charter, which concerns non-intervention in the domestic jurisdiction of states, the following prohibition applies to member states: "Also, no State shall organize, assist, ferment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State." The Declaration, seven years in the making, was adopted by consensus in the General Assembly. Of importance is that, notwithstanding the growth of the United Nations and the change in composition of the membership, the illegality of support for armed bands and terrorism was reaffirmed.

The Definition of Aggression Resolution followed four years later.[97] The definition, like draft precursors dating back to 1933, included reference to armed bands.[98] Among the acts listed as aggression is "[t]he sending by or on behalf of a State or armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to

95. *See supra* note 74 and accompanying text.

96. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations].

97. G.A. Res. 3314, 29 GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

98. For a complete summary of various draft definitions of aggression, *see* J. STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION app. (1958). In 1933, the League of Nations Committee on Security Questions drew up a draft Definition of the Aggressor which included "provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invading State, to take in its own territory all the measures in its power to deprive those bands of all assistance or protection." *Id.* at 35.

the acts listed above, or its substantial involvement therein."[99] This clause is consensually ambiguous. It begins by confining state aggression to the "sending" of armed bands. "Sending" implies state control over the armed bands, in essence making them irregulars of the state. This requirement is a more restrictive criterion than that found in customary international law and not in agreement with prior United Nations practice. But, the clause ends with the phrase "or its substantial involvement therein." Presumably, "its" refers to the state. What is not clear is whether "substantial involvement" modifies "sending" or broadly speaks to basic support for the armed bands. The latter interpretation conforms to prior international law.

Israel vehemently condemned the definition as "unsatisfactory," "inadequate," "incomplete" and "deceptive."[100] The definition should not be considered entirely negatively from Israel's perspective. It reaffirms, as the Canadian representative pointed out, that the "distinction between direct and indirect aggression was artificial."[101] Moreover, it recognizes that acts of armed bands can reach a magnitude to constitute aggression. Although Israel would have preferred a draft proposal by a number of Western States, the definition adopted does not go as far in restricting state response as the one proposed by a group of non-aligned states[102] which held that

> [w]hen a State is a victim in its own territory of subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State, it may take all reasonable and adequate steps to safeguard its existence and its institutions, without having recourse to the right of individual or collective self-defence against the other State under Article 51 of the Charter.[103]

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99. Definition of Aggression Resolution, *supra* note 97, art. 3, ¶ g.

100. 29 U.N. GAOR, Sixth Comm. (1480th mtg.) at 94, U.N. Doc. A/C.6/SR 1480 (1974).

101. Report of the Special Committee on the Question of Defining Aggression, 29 U.N. GAOR Supp. (No. 19) at 35, U.N. Doc. A/9619 (1974) [hereinafter Report].

102. Draft proposals were presented by the Soviet Union, by a non-aligned group (Columbia, Cyprus, Equador, Ghana, Guyana, Haiti, Iran, Madagascar, Uganda and Yugoslavia) and by a group of Western States (Canada, Italy, Japan, the United Kingdom and the United States). In the draft advanced by the Western States, among the aggressive means listed were

> —organizing, supporting or directing armed bands or irregular or volunteer forces that make incursions or infiltrate into another State;
> —organizing, supporting or directing violent civil strife or acts of terrorism in another State; or
> —organizing, supporting or directing subversive activities aimed at the violent overthrow of the Government of another State.

United Nations: Proposals on Defining Aggression, 8 INT'L LEG. MATS. 661 (1969).

103. *Id.* at 664.

One can rationalize the use of the word "sending" as a reaction to fear of anticipatory or pre-emptive strikes in that if support for armed bands is an act of aggression, then victim states could use that "aggression" to strike first. In demanding that a state "send" forces into another state before a state may respond, attack by armed bands must first occur. Thus, the potential abuse of anticipatory attacks is avoided. Such a view is consistent with the position advanced previously that in "active defense" a state is merely responding to prior armed attacks.

The definition of aggression is intended as a useful guide for the Security Council in determining acts of aggression pursuant to Article 39 of the Charter.[104] Aggression invariably includes a prior determination of the question of self-defense in that states invariably justify their use of force as a defensive measure. Thus, self-defense is a related factor to armed aggression. A definition of aggression which includes political and economic coercion is too broad a brush to paint the right of self-defense. But, armed aggression does bestow on the victim state a right to defend itself against that aggressor.

During the six years of discussion leading to the definition, notice was taken of the relevance of the definition to the concept of self-defense. The Netherlands' representative agreed with the Committee's decision to restrict the notion of aggression to the use of armed force: "That [restriction] reduced the 'discordance' between the choice of the word 'aggression' used in Article 39 of the Charter and that of the term 'armed attack' in Article 51."[105] The Romanian representative in plainer terms stated that

> [t]he fundamental purpose of the definition was to safeguard the rights and lawful interests of the victim of aggression and to assist it in defending itself against the aggressor. Every case of aggression constituted at the same time a case of self-defense, which was a lawful use of force. The definition of aggression thus contributed to clarification of the right of self-defense in response to armed aggression, as enunciated in Article 51 of the Charter.[106]

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104. Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713 (1971).

105. 29 U.N. GAOR Sixth Comm. (1473d mtg.) at 50, U.N. Doc. A/C.6/SR 1473 (1974).

106. 29 U.N. GAOR Sixth Comm. (1475th mtg.) at 60-61, U.N. Doc. A/C.6/SR 1475 (1974). *See also* the statement of the representative from West Germany, 29 U.N. GAOR Sixth Comm. (1478th mtg.) at 75, U.N. Doc. A/C.6/SR 1748 (1974); the statement of the representative from Cyprus, 29 U.N. GAOR Sixth Comm. (1479th mtg.) at 82, U.N. Doc A/C.6/SR 1479 (1974); and the statement of the representative from Zambia, 29 U.N.

Not all of the delegates concurred in this view: For example, the United States' representative cautioned that the definition "neither restricted nor expanded the inherent right of self-defense."[107] Admittedly, the definition does not provide a definition of self-defense; nevertheless, the definition of aggression is relevant to the question of self-defense and can be seen as contributing "toward the application of Article 51."[108]

This analysis is in accord with the expressed intentions and concerns of the original drafters of the United Nations Charter. The United Nations and the Security Council were very much creations to combat aggression. A definition of aggression was beyond the capabilities of the drafters then and in a broad sense remains elusive today. But, a right to respond to aggression was fundamental to Article 51. In supporting the adoption of Article 51, the delegate from Columbia, speaking for other Latin American states, equated the "victim of aggression" with the "country directly attacked."[109] Armed attack and armed aggression were deemed synonymous.[110] In this way, the definition of armed aggression contained in Resolution 3314 provides a complementary guidepost in the determination of "armed attack" under Article 51.

Detractors note that General Assembly resolutions are without legal binding effect which taints any legal significance attached to the resolutions.[111] States are characterized not as voting in terms of principles, but primarily in terms of embellishing their world images free from consequences.[112] Yet, a theory that resolutions are merely pure political posturing denies the extensive efforts expended to achieve them and the subsequent reference and regard afforded, both inside and outside of the United Nations, to General Assembly resolutions.

True, resolutions are not listed among the traditional sources of

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GAOR Sixth Comm. (1482d mtg.) at 112, U.N. Doc. A/C.6/SR 1482 (1974).

107. 29 U.N. GAOR Sixth Comm. (1480th mtg.) at 95, U.N. Doc. A/C.6/SR 1480 (1974).

108. Statement of the representative from Greece, 29 U.N. GAOR Sixth Comm. (1482d mtg.) at 111, U.N. Doc A/C.6/SR 1482 (1974); statement of the representative from the United Kingdom, 29 U.N. GAOR Sixth Comm. (1477th mtg.) at 70, U.N. Doc. A/C.6/SR 1477 (1974).

109. U.N.C.I.O. Doc. 576, III/4/2 at 2 (May 25, 1945).

110. *See* J. STONE, *supra* note 98, at 75 and Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 877-78 (1947).

111. Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, 137 RECUEIL DES COURS 434 (1972).

112. *Id.* at 457.

international law.[113] Nor is the General Assembly a legislative body empowered to create international law.[114] But this is not to say that General Assembly resolutions are of no value. The Declaration on Friendly Relations and the Definition of Aggression Resolution in less formal ways do have effects which are recognized. The International Court of Justice in the *Western Sahara Case*,[115] for example, referred extensively to General Assembly resolutions in ascertaining the law concerning non-self-governing territories. And, relying on the General Assembly resolutions, the Court concluded that self-determination was the governing principle for such territories. In the *Restatement of the Foreign Relations Law of the United States (Revised)*, the following reporter's note speaks to the "effect" of "declaratory resolutions of international organizations:"

> Nevertheless, given the universal character of many of these organizations and the forum they provide for the expression by states of their views regarding legal principles, such resolutions may provide important evidence of law. What states have done is, of course, more weighty than their declarations or the resolutions they vote for, but especially in the absence of other practice, a resolution declaring the law is probative evidence of what the states voting for the resolution regard as the state of international law.[116]

Schachter referred to the "authority" of resolutions in expressing the "general will" of the international community[117] and the extent of "general will" should be tested against the composition and degree of state support.[118] Both the Declaration on Friendly Relations and the Definition of Aggression Resolution were adopted by consensus. No state was prepared to put the matter to a vote and then cast a vote in the negative. Henkin wrote: "Nations that vote for a particular statement of law cannot act quite as though they had not done so. Those who do not agree with resolutions cannot wholly disregard the views of a majority."[119] In the case of these resolu-

113. Statute of the International Court of Justice, T.S. No. 993 art. 38.

114. The General Assembly is authorized only to make recommendations under the functions and powers accorded it by Articles 10-17 of the U.N. Charter.

115. 1975 I.C.J. 12.

116. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) ¶ 103 reporter's note 2 (Tent. Draft No. 1, 1980)

117. Schachter, *supra* note 66, at 1622.

118. For an excellent example of the weighing of the voting composition behind the General Assembly resolutions and the search for a "representative" consensus, *see* the arbitration decision *Texaco Overseas Petroleum v. Libyan Arab Republic*, 17 INT'L LEG. MATS. 1-37 (1978).

119. L. HENKIN, *supra* note 27, at 181.

tions, the majorities encompassed all. "Great importance" was attached by the various state representatives to securing adoption by consensus, thereby making it more difficult for a state to brush aside the impact of the resolutions.[120]

The General Assembly is perceived also as having a persuasive function in declaring existing international norms and in achieving the international community's acceptance of these norms.[121] The Declaration on Friendly Relations is such an example. Article 3 of the declaration contains that very proposition in which the General Assembly declared that

> [t]he principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeal[ed] to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of strict observance of these principles.[122]

The imperative use of the word "shall" reiterates throughout the declaration that the principles enunciated declare *existing* law which states are expected to observe.[123]

Further "authority" vests with the General Assembly, as an organ of the United Nations, to interpret provisions of the Charter. This is not to say that the General Assembly's interpretations are authentic or binding on other organs of the United Nations. Rather, the original drafters realized that each United Nations organ would inevitably interpret parts of the Charter applicable to its particular function.[124] To have binding force within the organ, the interpretation must be generally accepted by the member states.[125] The Declaration on Friendly Relations purports to interpret various principles derived from the Charter. For example, the principles pertaining to support for armed bands evolve from Articles 2(4) and 2(7) of the Charter. In the same fashion, the Definition of Aggression Resolution interprets "aggression" as used in Article 39 of the Charter. The definition is recognized as not binding the Security Council. The resolution is presented as a guide for the Security Council, reflecting the interpretation agreed to by the members of

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120. Report, *supra* note 101, at 35.
121. J. CASTANEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 19 (1969).
122. Declaration on Friendly Relations, *supra* note 96.
123. Rosenstock, *supra* note 104, at 715.
124. Report of the Rapporteur of Committee, U.N.C.I.O. Doc. 933 IV/2/42 at 7 (June 12, 1945).
125. Id. at 8. For a further discussion of this point, *see* Lachs, *The Law in and of the United Nations*, 1 INDIAN J. INT'L L. 429 (1960).

the General Assembly.[126]

Within the context of the United Nations, the above resolutions of the General Assembly have substantial authoritative force. The Declaration on Friendly Relations, in particular, is viewed as a declaration of existing international law. The Definition of Aggression Resolution purports to reaffirm the provisions of this declaration. Together they provide a powerful framework to justify state action against terrorist and against terrorists supporting states: The Declaration on Friendly Relations makes states' support for subversive acts an international delict and the Definition of Aggression Resolution accepts that such a delict can be viewed as aggression.

IV. Defense of Nationals

Most terrorist acts are directed at United States' interests and nationals abroad and a policy of "active defense" is directed principally at the protection of Americans abroad. The question is raised: Does the doctrine of self-defense extend to the defense of nationals abroad?

Customary international law recognized a right of rescue to save endangered nationals.[127] State practice is replete with instances of protective actions—both pre- and post-United Nations era.[128] Bowett characterized such intervention as a traditional part of customary self-defense, and self-defense undeniably is the framework applied to these cases.[129] Waldock, in assessing the propriety of protective interventions, relied on the criteria proposed in the *Caroline* case: "There must be (1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting them against injury."[130] Correspondingly, Israel, in defending its Entebbe action before the Security Council, relied on its inherent right of self-defense.[131]

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126. Rosenstock, *U.N. Special Committee Approves Draft Definition of Aggression*, 70 Dep't St. Bull. 498 (1974).

127. A summary of authorities supporting this position is contained in Margo, *The Legality of the Entebbe Raid in International Law*, 94 S. Afr. L.J. 306, 318 (1977).

128. For pre-U.N. instances, *see* D. Bowett, Self-Defense in International Law 97 (1958); for post-U.N. instances, *see* Schachter, *supra* note 66, at 1628-33.

129. Bowett, *The Interrelation of Theories of Intervention and Self-Defense*, 38, 44 *in* Law and Civil War in the Modern World (J. Moore ed. 1974).

130. *See*, Waldock, *supra* note 14, at 467.

131. 31 U.N. SCOR (1939th mtg.) at 12-16, U.N. Doc. S/PV (1939). Following debate, a draft resolution, S/12139, condemning the Israeli raid sponsored by Benin, Libya and Tanzania, was withdrawn prior to a vote. The draft resolution sponsored by the United King-

What is recognized from the rescue cases is that a state does have an obligation to protect its citizens abroad. Bowett refers to the theory of social contract between state and subject which accepts the contentions

> [t]hat an injury to the nationals of a state constitutes an injury to the state itself, and that the protection of nationals is an essential function of the state. On this reasoning it is feasible to argue that the defense of nationals, whether within or without the territorial jurisdiction of the state, is in effect the defense of the state itself.[132]

In this way, defense of nationals and defense of the state are one and the same.

Nor does Article 51 restrict this view. Its sole requirement is an armed attack "against a Member of the United Nations." The armed attack is not limited to that occurring within the territory of the member state. Had the drafters so wished to confine self-defense, the guiding words of Article 2(4) could have been duplicated in requiring an armed attack against "the territorial integrity or political independence" of a state.[133] Thus, an extended interpretation of self-defense is not inconsistent with Article 51.

Moreover, a right of self-defense in protecting nationals goes beyond any theoretical notion of social contract. The reality of terrorist action is that, although nationals are the victims, the true target is the state itself. Terrorism is politically motivated to coerce and intimidate particular state governments. It represents a violent attempt to influence the domestic and foreign policies of the victim state. In such a situation, a state is being coerced by illegal external uses of force.

Obviously, a threshold of coercion is demanded to justify a defensive reaction.

> To imperil the safety of a single national abroad is not to imperil the security of the state; and yet there may be occasions when the threat of danger is great enough, or wide enough in its application to a sizable community abroad, for it to be legitimately construed as an attack on the state itself.[134]

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dom and the United States which condemned hijacking failed to receive the necessary nine affirmative votes: six in favor, none against and two abstentions—seven members did not vote. 31 U.N. SCOR, (1943d mtg.) at 18, U.N. Doc. S/PV (1943).

132. D. BOWETT, *supra* note 128, at 92.

133. Knisbacher, *The Entebbe Operation: A Legal Analysis of Israel's Rescue Action*, 12 J. INT'L L. & ECON. 57, 76 (1977).

134. D. BOWETT, *supra* note 128, at 93.

The danger posed by a particular threat corresponds to the extent of the terrorists' campaign and its effect on the target state and its nationals. It is in this context that a right of self-defense may inure to the target state.

V. Necessity for Resort to Force

Any state resort to force in response to terrorist attack must be done out of necessity. Necessity comprises two elements: 1) the existence of a danger, and 2) the non-existence of reasonable peaceful alternative measures.

The presence of a danger sufficient to warrant a response is very much linked to the question of what constitutes an armed attack.[135] There is, however, a change in emphasis to the future. The state must justify to the world community that the menace of continued armed attacks still persists. Future danger is a function of proof. States will have to adduce evidence to show that a particular terrorist organization perpetrated prior armed attacks as a part of an organized campaign of terror against the state and that the organization remains in place to carry out similar future acts. The task is a difficult one. Such is the concern regarding any use of force and with any incursion into the sovereign territory of another state. The world community will demand to see the evidence. The question of the imminence of the danger, a fact which is virtually impossible for the state to prove, is not a critical matter once the armed attack occurs. The fact that a terrorist organization has attacked the state and retains the means to continue the attacks makes the threat of future violence ever imminent.

Besides the need to establish evidence of a sufficient danger, the world community must also be convinced that the use of force is a *last* resort. All reasonable peaceful alternatives, both domestically and internationally, must have been exhausted.

A state has an obligation to safeguard its internal security before turning to external solutions. In this regard, the United States has been relatively free from international terrorist attacks. One can cite a number of reasons: improved airport and customs entry security, increased funding of the FBI and increased funding of external intelligence gathering means.[136]

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135. *See supra* notes 69-74 and accompanying text.

136. A summary of United States measures to counter terrorism is contained in Oakley, *supra* note 3, and Oakley, *International Terrorism: Current Trends and the U.S.*

The United States also has utilized domestic legislation to exert diplomatic pressure on other states to join in the prevention of international terrorism. For example, following the T.W.A. hijacking in the summer of 1985, pressure was directed at Lebanon to secure the Beirut airport. The Federal Aviation Act was used to suspend United States and Lebanese carriers from engaging in air transportation to and from Lebanon.[137]

Terrorist activity has spawned improved security for United States' missions abroad. More security officers are being dispatched overseas and the missions are being redesigned with security in mind.[138] The recently passed Act to Combat International Terrorism[139] not only authorizes substantial funds to enhance security at foreign missions, but also provides for payment of rewards for information concerning terrorist acts.

With these measures implemented, the United States has done much to improve its domestic security. Yet, the attacks continue and, if anything, have become more lethal in that the tactic of taking hostages to negotiate for the securing of demands has been replaced by a tactic of indiscriminate violence.[140]

At the international level, there has been some success in addressing particular aspects of terrorism. The most noteworthy success has been in combatting airline hijacking. The Tokyo Convention of 1963, the Hague convention of 1970 and the Montreal Convention of 1971 represent a trilogy of multilateral agreements, garnering wide state support, designed to deal with violence on and against civil aircraft.[141] The Tokyo Convention was the starting point and confined itself to clarifying the powers of the aircraft commander and the issue of jurisdiction over criminal acts committed on board aircraft.[142] The Hague Convention dealt with illegal

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Response, statement made before the Senate Committees on foreign Relations and on the Judiciary, Washington, D.C., May 15, 1985, distributed through the Department of State Bureau of Public Affairs [hereinafter *International Terrorism: Current Trends and the U.S. Response*].

137. Sofaer, *supra* note 8, at 40.

138. *International Terrorism: Current Trends and the U.S. Response*, *supra* note 136, at 6.

139. Pub. L. 98-533, 98 Stat. 2706 (1984) (codified at 18 U.S.C. §§ 3071-3077 (Supp. III 1985)); *see* President's accompanying statement, 84 DEP'T ST. BULL., Dec. 1984, at 86.

140. Oakley, *supra* note 3, at 62.

141. Excellent overviews of these conventions are found in S. WILLIAMS AND J.G. CASTEL, CANADIAN CRIMINAL LAW INTERNATIONAL AND TRANSNATIONAL ASPECTS 210-22 (1981) and Margo, *supra* note 127, at 310-14. As of January 1, 1985, 121 states were party to the Tokyo Convention, 126 states were party to the Hague Convention and 127 states were party to the Montreal Convention.

142. Convention on Offenses and Certain Other Acts Committed on Board Aircraft,

seizures of aircraft.[143] Hijacking was made a crime punishable by "severe penalties."[144] Signatory states were obliged to apprehend such offenders present in their jurisdiction and then, most importantly, either prosecute or extradite the offender.[145] To facilitate extradition, the Convention could be relied on by parties in lieu of a formal extradition treaty.[146] The Montreal Convention built on the prior two conventions. Whereas the Hague Convention covered onboard incidents, the Montreal Convention addressed sabotage and off-board violence directed at civil aviation.[147] The obligations of apprehension, prosecution and extradition were included as were found in the Hague Convention.[148] Bilateral agreements followed these multilateral accords. Most prominent were the bilateral agreements between Cuba and the United States[149] and between Cuba and Canada involving the hijacking of aircraft.[150] These diplomatic efforts, combined with improved airport security, have resulted in a significant decrease in the number of hijacking incidents.[151]

Reflecting similar concerns and hoping to emulate the successes of the civil aviation conventions, the United Nations sponsored two international agreements dealing with other aspects of terrorism. In 1973, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents was adopted by the United Nations General Assembly.[152] And in 1979, the General Assembly adopted the International Convention against the Taking of Hostages.[153] Like the civil aviation conventions, these agreements contain provision for the signatory

Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

143. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1977, 22 U.S.T. 1641, T.I.A.S. No. 7192.

144. *Id.* art. 2.

145. *Id.* art. 6 and art. 7.

146. *Id.* art. 8.

147. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

148. *Id.* art. 6, art. 7 and art. 8.

149. Agreement on the Hijacking of Aircraft and Vessels and Other Offenses, Feb. 15, 1973, United States—Cuba, 24 U.S.T. 737, T.I.A.S. No. 7559.

150. Canada—Cuba Agreement, 1973 Can. T.S. No. 11.

151. In 1969, there were 89 reported hijacking incidents and 88 in 1970. By 1976, the number was reduced to 22. *See* Evans, *Aircraft and Aviation Facilities*, 3, 5 *in* LEGAL ASPECTS OF INTERNATIONAL TERRORISM (A. Evans & J. Murphy eds. 1978).

152. Convention on the Prevention and Punishment of Crimes, *supra* note 81. As of January 1, 1985, 63 states were party to the Convention.

153. International Convention against the Taking of Hostages, *supra* note 82. As of January 6, 1985, 26 states were party to the Convention.

states either to prosecute or to extradite offenders.[154]

International accords will not be successful in combatting terrorism, however, without international cooperation. Here lies the *need* for a state to resort to unilateral measures. So-called "safe haven" states, in defiance of international norms, provide financial, political and military assistance to terrorist organizations. The United States named Libya, Iran, Syria, Cuba, Nicaragua, South Yemen and North Korea as alleged "safe havens" providing secure sanctuaries of operation for terrorists.[155] The United States' list reflects ideological bias; nevertheless, Iran and Libya appear to be two prime antagonists implicated in a number of terrorist actions.[156] Libyan culpability is most apparent and goes beyond indirect support to direct state participation in acts of terrorism. Libyan leader, Colonel Moammar Khadafy, openly speaks of being in a position to order terrorist networks to attack "American targets, civilian and noncivilian, all over the world."[157] Further, various radical Palestinian terrorist leaders readily admit to a Libyan connection.[158] If we accept these statements, Libya is acting outside of international law; unfortunately, there exists no viable international means to force compliance.

Recourse to the United Nations will not provide any immediate solution. In reaction to an acknowledged terrorist threat to world order, the United Nations established the *Ad Hoc* Committee on International Terrorism in 1972.[159] The committee's mandate was, and is, broad—too broad. In the 1973 committee meeting, three main topics were canvassed: a definition of international terrorism, a study of the underlying causes of terrorism and a determination of means to prevent terrorism.[160] The attempt to define terrorism appears to have been abandoned, or at least it has been deleted as a

154. Convention on the Prevention and Punishment of Crimes, *supra* note 80, art. 6 and art. 7; International Convention Against the Taking of Hostages, *supra* note 81, art. 8

155. Address by President Reagan, *supra* note 10; *International Terrorism: Current Trends and the U.S. Response*, *supra* note 136, at 5.

156. *International Terrorism: Current Trends and the U.S. Response*, *supra* note 136, at 3.

157. Boston Globe, Apr. 10, 1986, at 1, col. 4.

158. NEWSWEEK, Apr. 7, 1986, at 25. George Habash, leader of the Popular Front for the Liberation of Palestine, is quoted as referring to Libyan "moral, political and financial support." Bilal Abu Jihad, military leader of the Palestine Popular Struggle Front, is quoted as saying: "Of course, Libya is a base for us, and a very important one for the Palestine cause."

159. G.A. Res. 3034, 27 U.N. GAOR Supp. (No. 30), U.N. Doc. A/8730 (1972) [hereinafter *Ad Hoc* Committee on International Terrorism].

160. Report of the *Ad Hoc* Committee on International Terrorism, 28 GAOR Supp. (No. 28), U.N. Doc. A/9028 (1973).

topic of debate. The committee has made little progress on the other issues. It is ideologically deadlocked over the question of priority. On the one hand, Libya argues: "The best way to combat terrorism [is] to study its underlying causes and pay adequate attention to practical measures for eliminating them."[161] Syria shares this view: "It [is] only by studying the underlying causes of terrorism and combatting them that it would be possible to combat terrorism itself, for instance by allowing the Palestinian people to exercise its right to self-determination in an independent state."[162] On the other hand, Israel refers to the "*ad nauseam*" debate and states that the committee has been "sabotaged" by broad, insoluble causal questions.[163] The representative from the United States in a similar vein complains: "Asserting that nothing should be done about terrorism until all violence in inter-State relations has been eliminated [is] simply a smoke-screen to hide an unwillingness to act."[164] The Canadian representative, in explaining Canada's decision to vote against the initial draft resolution creating the committee some thirteen years earlier, expressed the same opinion:

> The relationship between criminal or terrorist acts and the underlying causes from which those acts spring is easily recognizable. Both aspects demand urgent attention and action. However, in our respective national jurisdictions are there any of our governments which refrain from taking measures on the one problem—violence—while other problems are outstanding? We do not wait for solutions to complex underlying causes of violence and crime in our own societies before adopting laws and penal systems to combat individual acts of violence and crime.[165]

So the committee debates. But time has shown a substantial change in attitude within the committee towards terrorism. Originating resolution 3034 (XXVII) of 18 December 1972 targeted for condemnation the "repressive and terrorist acts by colonial, racist and alien regimes."[166] In the most recent resolution,

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161. 40 U.N. GAOR, Sixth Comm. (20th mtg.) at 16, U.N. Doc. A/C.6/40/SR. 20 (1985).

162. *Id.* at 18.

163. 40 U.N. GAOR, Sixth Comm. (19th mtg.) at 3, U.N. Doc. A/C.6/40/SR 19 (1985).

164. *Id.* at 10.

165. 27 U.N. GAOR (2114th mtg.) at 22 (1972). Canada proposed a draft resolution providing for an *Ad Hoc* Committee to study the causes of international terrorism and the International Law Commission would be requested to draft a convention on measures to prevent international terrorism.

166. *Ad Hoc* International Committee on International Terrorism, *supra* note 159, ¶ 4. Subsequent resolutions to renew the committee mandate were 31/102 of 15 December

condemnation of such regimes has given way to exhortation as in it, the General Assembly

> *[f]urther urges* all states, unilaterally and in co-operation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of the causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security.[167]

Further, there was no condemnation of terrorist *per se* in originating resolution 3034. In contrast, in the 1985 resolution, the General Assembly

> *[u]nequivocally condemns*, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security.[168]

Resolution 3034 did not address state support for terrorist acts. In this regard, the 1985 resolution reaffirms the principles of international law as the General Assembly

> *[c]alls upon* all States to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts.[169]

Thus, progress is being made in the sense that there is a growing recognition that terrorism is unacceptable. Yet, to date, the *Ad Hoc* Committee has been unable to reconcile its differences sufficiently to reach a consensus on concrete measures for reducing terrorism. The topic has been deferred to the agenda of the United Nations Forty-Second Session in 1987.[170] In the interim, the victim states will remain targets.

Where does this leave the victim states? Under Article 2(3) of the Charter, a state has a duty to settle international disputes by peaceful means. The duty is not absolute. Self-defense is permissi-

1976, 32/147 of 16 December 1977, 34/145 of 17 December 1979, 36/109 of 10 December 1981, 38/130 of 19 December 1983 and 40/61 of 9 December 1985.

167. G.A. Res. 40/61, 40 U.N. GAOR Doc. A/Res/40/61 (1985).

168. *Id.* at 1.

169. *Id.* at 6.

170. *Id.* at 15.

ble when peaceful efforts are not practical. "As a matter of principle, exhaustion of remedies cannot be required when the 'remedies' are likely to be futile."[171] Unfortunately, the United Nations reflects the same divisions that exist in the *Ad Hoc* Committee. Quite simply, the United Nations is not prepared to deal with terrorism. The United Nations mirrors the political realities of the Middle East, in particular, and of the omnipresent ideological rift between Western democracies and the Communist world. Until *both* sides—Israel and Arab, American and Soviet—have the political resolve to deal with terrorism, there will be no solution. In this vacuum, the only effective remedy of last resort is unilateral action.

VI. PROPORTIONALITY IN THE USE OF FORCE

Proportionality, a traditional hallmark of self-defense, remains unchanged by Article 51.[172] Proportionality is a question of fact. Its test is reasonableness: State use of force in self-defense must be reasonable in view of *all* of the circumstances.[173]

McDougal and Feliciano in their book, *Law and Minimum World Public Order*, write that proportionality "requires functional reference to all the various factors relating to the opponent's allegedly aggressive coercion a well as to all the other factors relating to the claimant's coercion, which together comprise a detailed context."[174] In terms of terrorist activities, three reference points are commonly alluded to: the immediate armed attack, the past campaign of attacks and the potential danger of future attacks. None of these reference points, standing alone, provides a complete formula to assess proportionality.

Security Council practice, although far from coherent, appears to favor a narrow reference to the immediate attack leading to the state response.[175] Comparison is easy—specific attack to specific response. Such an analysis, however, is too simplistic and fails to adequately appreciate the reality of terrorist warfare. A state cannot be expected to respond on an incident by incident basis. In fact, such a policy has the inverse effect of encouraging more state incur-

171. Schachter, *supra* note 66, at 1631.

172. R. HIGGINS, *supra* note 48, at 205.

173. Rohlik, *Some Remarks on Self-Defense and Intervention: A Reaction to Reading Law and Civil War in the Modern World*, 6 GA. INT'L & COMP. L. 395, 416 (1976).

174. M. MCDOUGAL AND F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 243 (1961).

175. Bowett, *supra* note 29, at 7.

sions, albeit of lesser magnitude.[176]

The preferred practice is to consider all three of the reference points. The immediate provocation establishes a degree of urgency; the campaign of past attacks provides an indication of the type of danger presented; and the danger of future attacks provides a rationale for protective action.

Protection is the essence of proportionality. McDougal and Feliciano refer to the state response being "limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense."[177] Moreover, an action in self-defense, justifiable at inception, may become tainted by lingering occupation.[178] A case in point is the recent United States action in Grenada which was condemned by an overwhelming majority in the United Nations General Assembly.[179] The message from the community of nations is clear: Self-defense ought not be used as a pretense for state intervention.

Of critical importance is that the force is prudently applied to avoid civilian casualties. Terrorists deliberately kill civilians; states must not.[180] Certainly, this proposition is in accord with accepted principles of international law as reiterated in the 1949 Geneva Convention dealing with non-combatants.[181] Terrorism incites moral outrage because of the indiscriminate killing of innocent people. The state acting in response to the "evil" of terrorism must not commit the same atrocities which it is attempting to prevent. It is essential that the state preserve this "ethical edge." Otherwise, it too is guilty of terrorism. The state's obligation goes beyond merely not directing their weapons at civilian targets. The obligation extends to reducing collateral harm to civilians when terrorist targets

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176. Israel repeatedly has urged, without success, that the Security Council consider the total context of quasi-belligerence prevailing in the Middle East. This argument is termed the "accumulation of events" doctrine. The reasons for the Security Council rejecting this doctrine are not clear. There may well be fear that such a position unduly broadens and complicates matters or that an emphasis on past acts raises the spectre of reprisal. *See generally*, Bowett, *supra* note 29, at 5-8; and Levenfeld, *supra* note 2, at 39-41.

177. M. McDougal and F. Feliciano, *supra* note 174, at 242.

178. *See* Schachter, *supra* note 66, at 1630-31. Schachter cites as other examples the Stanleyville "rescue" operation and Dominican Republic intervention.

179. G.A. Res. 38, 38 U.N. GAOR Supp. (No. 47) at 19, U.N. Doc. A/Res. 38 (1983). One hundred eight states voted in favor of the resolution "deploring" the Grenada action, nine states voted against and there were twenty-seven abstentions.

180. M. Walzer, Just and Unjust Wars 217 (1977).

181. Geneva Convention Relative to the Prosecution of Civilian Persons in Time of War, Aug. 12, 1949—Feb. 12, 1950, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (1949). Article 3 applies to non-combatants and prohibits violence directed at the civilian population and the taking of civilian hostages.

are attacked. In *Just and Unjust Wars*, Walzer speaks of the principle of "double effect"—in pursuit of laudable objectives, foreseeable "evils" must be minimized.[182] In Walzer's analysis, one prerequisite for "double effect" is that "[t]he intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself."[183] Walzer's principle finds authority in Webster's famous formulation in the *Caroline* case. Webster demanded of the British government the following:

> It must be shown that admonition or remonstrance to the persons on board the *Caroline* was impracticable, or would have been unavailing; it must be shown that daylight could not be waited for; *that there could be no attempt at discrimination between the innocent and the guilty*; that it would not have been enough to seize and detain the vessel; but that there was a necessity, present and inevitable, for attacking her in darkness of the night, while moored to the shore, *and while unarmed men were asleep on board*, killing some and wounding others, and then drawing her into the current, above the cataract, setting her on fire, and, *careless to know whether there might not be in her the innocent with the guilty, or the living with the dead, committing her to a fate which fills the imagination with horror.*[184]

What is looked for is a "positive commitment to save civilian lives."[185] Reliable intelligence is needed to accurately target terrorist sites and the force, when used, must be confined as much as possible to these targets. For example, high altitude aerial bombing ought to give way to a more surgical and precise strike. Consideration is taken of the military sophistication at the disposal of the responding state. Presumably, the greater the degree of sophistication, the wider the range of military options enabling avoidance of civilian harm. There will be instances where proximity of terrorist targets to civilian population makes a military response unacceptable. It is no answer for the responding state to pass blame on to the terrorists for purposely hiding among the civilian population.[186] In such situations, military actions, if they cannot pinpoint the ter-

182. M. Walzer, *supra* note 180, at 155.
183. *Id.* For an application of Walzer's theory to Israel's invasion of South Lebanon, *see* Levenfeld, *supra* note 2, at 41-45.
184. Jennings, *supra* note 42, at 89 (emphasis added).
185. M. Walzer, *supra* note 180, at 156.
186. Levenfeld, *supra* note 2, at 45.

rorist targets, should not be undertaken.

Nor is it acceptable, in the alternative, to use military force directed at non-terrorist targets in the harboring state. These actions take on the form of reprisals; the intention is to coerce the harboring state and the action is removed from being purely defensive. Such responses are violations of Article 2(4) of the Charter in that force is directed "against the territorial integrity or political independence" of the harboring state and is not a legitimate act of self-defense.

Thus, the guiding determination in assessing the proportionality of a state response is *confinement*. The state response should be confined to a protective action; the military force relied on should be confined to the achievement of this objective; and the force should be confined to terrorist targets with active measures taken to avoid civilian casualties. To be sure, the above criteria pose rigid qualifications, but they do not amount to a policy of "paralysis" as is suggested by Secretary of State Shultz.[187] Rather, such caution in the deployment of force shows respect for international law and respect for the loss of civilian lives.

VII. Summary And Guidelines

Richard Falk is of the opinion that the primary role for international law, and international law scholarship, is to assist decision makers and to help governments plan "how to act."[188] For Falk, international rules, as represented in the Charter of the United Nations, are too rigid to provide "realistic" guidance for states in addressing indirect subversion.[189] Accordingly, Falk looks outside of the United Nations' norms in developing a framework for the "Law of Retaliation."[190] In a complementary work, Bowett builds on Falk's framework to formulate "Criteria for Reasonableness of Reprisals," once again, outside conventional United Nations law.[191]

187. Secretary of State Shultz as quoted in the Boston Globe, Jan. 21, 1986, at 18, col. 1. Secretary of State Shultz is a vocal advocate for a military option. In an earlier speech, he cautioned: "But we cannot allow ourselves to become the Hamlet of nations, worrying endlessly over whether and how to respond." Schultz, *supra* note 9, at 16. In contrast, Secretary of Defense Weinberger is wary of resorting to military force. *See* Arnold, *Rewriting the Rules of Engagement*, 175, 180 *in* FIGHTING BACK (N. Livingston & T. Arnold eds. 1986).

188. Falk, *supra* note 2, at 442.

189. *Id.* at 438.

190. *Id.* at 415.

191. Bowett, *supra* note 29, at 25-27.

The guidelines proposed in this Article are designed both to aid in the decision making function and to provide a legal framework, *within* the United Nations' norms, to assess the "Law of State Response." As a general conclusion, state use of force in response to international terrorism is permissable under the doctrine of self-defense. There is no need to opt out of the United Nations' order. This conclusion is premised on the narrowest parameter of self-defense: the requirement of an "armed attack" under Article 51. Once terrorist activities reach systematic proportions to constitute an "armed attack," a state may respond with force provided that the dictates of necessity and proportionality are met. The burden of persuasion rests with the state to bring its action under self-defense.[192]

The following principles are proposed to guide in the decision to use force in response to international terrorist acts and to guide in the subsequent review of this decision:

1) The avowed intention advanced to justify resort to military force is self-defense.
2) There exists a concerted campaign of terrorist attacks against the state or its nationals abroad and the terrorist organization responsible is identified.
3) The harboring state, in whose territory military force is used against the terrorist organization, supported, encouraged or knowingly tolerated the terrorist organization and its terrorist activities.
4) All responsible means of peaceful redress are exhausted.
5) The responsive force is directed at terrorist targets.
6) The force used is proportional to the terrorist provocation and measures are taken to minimize collateral harm to innocent civilians.[193]

"Active defense," therefore, is not inherently illegal. International law is flexible enough to accommodate such an application of force. The danger created by terrorist acts is recognized and, in the absence of effective international cooperation, a state may look to its own devises for protection. However, "active defense" must be a policy of last resort demanding reasoned restraint. It is a policy fraught with the potential for abuse and the world community will

192. Brownlie, *supra* note 51, at 195.

193. For a comparison of other guidelines, *see* Falk, *supra* note 2, at 441-42; Bowett, *supra* note 29, at 25-27; Taulbee, *Retaliation and Irregular Warfare in Contemporary International Law*, 7 INT'L L. 195, 203 (1973); Toensing, *The Legal Case for using force*. 145, 154 *in* FIGHTING BACK (N. Livingston & T. Arnold eds. 1986); and Arnold, *supra* note 180, at 180 (quoting guidelines suggested by Defense Secretary Weinberger).

be ever scrupulous in assessing the decision to employ a military option. The state responding must be equally scrupulous in its decision to employ a military option.