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# AMERICAN BOMBING OF LIBYA: AN INTERNATIONAL LEGAL ANALYSIS

by Gregory Francis Intoccia\*

## I. INTRODUCTION

The United States-initiated aerial bombing of targets inside the borders of the Libyan Arab Jamahiriyah which took place on April 15, 1986,<sup>1</sup> was met with substantial and immediate criticism by the world community.<sup>2</sup> The positive reaction from the U.S. congress<sup>3</sup> and the American public<sup>4</sup> was not shared by much of the world. Arab nations denounced the American action,<sup>5</sup> as did the Organization of Petroleum Exporting Countries.<sup>6</sup> In meetings of the UN Security Council,<sup>7</sup> countries denouncing the raid outnumbered those which supported it.<sup>8</sup> Even American allies responded with heated rhetoric.<sup>9</sup> However, in the weeks which followed the bombing, world opinion softened significantly. Cooperation became evident amongst the Western Allies.<sup>10</sup> While the American bombing of Libya was fading from the news, a consensus was forming in the West concerning the extent to which terrorism<sup>11</sup> posed a threat to the

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<sup>1</sup> See notes 13-29 and accompanying text.

<sup>2</sup> See *infra* notes 100-107, 115-22 and accompanying text.

<sup>3</sup> See *infra* notes 96-99 and accompanying text.

<sup>4</sup> See *infra* note 94 and accompanying text.

<sup>5</sup> N.Y. Times, April 16, 1986, at A16, col. 5.

<sup>6</sup> See *infra* note 119.

<sup>7</sup> See *infra* notes 121-22 and accompanying text.

<sup>8</sup> See *infra* note 122 and accompanying text.

<sup>9</sup> See *infra* notes 100-105 and accompanying text.

<sup>10</sup> See *infra* notes 108-14 and accompanying text.

<sup>11</sup> In this Note, the term "terrorism" is meant to refer to the threat or use of violence with the intent of causing fear among the public, in order to achieve political objectives. See MALLISON AND MALLISON, *THE CONCEPT OF PUBLIC PURPOSE TERROR IN INTERNATIONAL LAW*, 67 (M.C. Bassiouni ed. 1975); see also *WORLD BOOK DICTIONARY* 135, 2148-49 (1973). "Terrorism" has been defined in numerous ways. One author of a research guide to terrorism listed 109 different definitions of terrorism provided between 1936 and 1981. A. Schmid, *POLITICAL TERRORISM; A RESEARCH GUIDE* (1984). Members of the United Nations have yet to fully agree upon a precise working definition.

international community and the manner in which to deal with state-sponsored terrorism.

To the United States and Libya, the bombing and the circumstances which led up to the bombing confirmed previously held, albeit very different, views of each state action. To the United States, the bombing of Libya summed an emergent policy toward terrorism, a policy which had undergone significant transformation over the past several years;<sup>12</sup> representing a translation of a policy of statements into a policy of action. To Libya, the American bombing represented something quite different; it represented the culmination of months of illegal and increasingly belligerent American behavior.

Because the air strike was a short-lived event with limited political and military objectives, it is possible that the American strike on Libya will draw little historical attention. However, it is important that the legal implications of an event of this nature be analyzed in order to assess the possible long-term impact of such a military strike on the international rule of law regarding use of force. Therefore, a preliminary legal assessment of the action is offered in this note.

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<sup>12</sup> Since the 1983 bombing of an American Marine barracks in Lebanon, considerable debate existed over whether American military forces should be used to combat terrorism. Trewhitt, *A New War — And Risks*, U.S. NEWS & WORLD REP., April 28, 1986, 20, at 22. By 1984 the position advocated by some senior policy makers was that the use of military force should be considered a viable option against terrorist operations. See Shultz, *Terrorism and the Modern World*, 84 DEP'T STATE BULL., No. 2093, Dec., 1984, at 86. By February 1986, a consensus seemed to have emerged at the highest levels of Government. Then, the articulated policy was that the United States would: "act in concert with other nations or unilaterally when necessary to prevent or respond to terrorist acts"; [it would] take measures to protect its citizens, property and interests" where "there is evidence that a state is mounting or intends to conduct an act of terrorism against this country. . ."; it would "make no concessions to terrorists": and it would "act in a strong manner against terrorists without surrendering basic. . . principles." PUBLIC REPORT OF THE VICE PRESIDENT'S TASK FORCE ON COMBATTING TERRORISM, Feb., 1984, at 7. In March 1986, Vice President Bush commented that U.S. policy on combatting terrorism will be one in which there is a willingness to "retaliate" but not to "wantonly destroy human life." N.Y. Times, Mar. 7, 1986 at A3, col. 1.

Since this article was originally written during October 1986, the author has made every effort to update the manuscript in view of new developments. It should be noted that one such new development is difficult to assess as of February 18, 1987 because the facts are too limited to determine appropriate policy impact: Allegations have been made that the United States had been secretly negotiating with Iran and had arranged an exchange of American weapons for money and the promise that Iran would exert its influence in an attempt to gain the release of hostages held in Lebanon. Further, allegations have been made that moneys gained from such arms sales may have been secretly diverted to aid the anti-Communist Nicaraguan Contras in Central America carry out military objectives. See *What He Needs to Know: With Reagan Unwilling to Force Out the Facts, Oliver North's Web Spreads Ever Wider*, TIME., Dec. 22, 1986, at 14. Investigation into the above situation is still underway and facts are too sketchy to presently assess the resulting implications.

## II. THE EVENTS

A. *The Air Strikes*

In the early hours of April 15, 1986, U.S. Air Force and Naval aircraft simultaneously bombed targets within the borders of the Libyan Arab Jamahiriya.<sup>13</sup> The air strikes lasted less than one half hour. The Air Force element, launched from bases in the United Kingdom, struck targets at the Tripoli Military Air Field, Tarabulus (Aziziyah) Barracks and Sidi Balal Training Camp.<sup>14</sup> The Navy element, launched from two aircraft carriers<sup>15</sup> located in the Southern Mediterranean, struck targets at the Benina Military Air Field and Benghazi Military Barracks.<sup>16</sup>

After some delay, Libyan anti-aircraft batteries returned fire.<sup>17</sup> Approximately fourteen hours later, Libyan forces fired two missiles at a U.S. Coast Guard communications installation on the Italian island of Lampedusa;<sup>18</sup> the island, however, escaped unscathed.<sup>19</sup>

The strike force<sup>20</sup> was commended by Pentagon officials as having carried out its objectives in an "extraordinary" manner.<sup>21</sup> According to Libyan official Abdul Salam Jalloud, thirty-seven people were killed and another ninety-three were injured.<sup>22</sup> While Libyan leader Colonel Muammar el Qadhafi escaped the bombing unharmed, his stepdaughter was killed and two of his sons were wounded in the bombing of his military headquarters, which also served as his personal residence.<sup>23</sup> One American aircraft and its two-man crew were lost in the raid.<sup>24</sup> The Pentagon confirmed that U.S. planes inadvertently hit civilian areas, in-

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<sup>13</sup> For a chart listing minute-by-minute actions of United States military aircraft during the air strike on Libya see N.Y. Times, Apr. 18, 1986, at A11, col. 3.

<sup>14</sup> 86 DEP'T STATE BULL., No. 2111, June, 1986, at 8.

<sup>15</sup> *Id.* at 14. The Navy element launched from the carriers "U.S.S. Coral Sea" and "U.S.S. America."

<sup>16</sup> N.Y. Times, Apr. 15, 1986, at A1, col. 5.

<sup>17</sup> *Id.* col. 3.

<sup>18</sup> N.Y. Times, Apr. 16, 1986, at A1, col. 5.

<sup>19</sup> *Id.*

<sup>20</sup> The American strike force included the following aircraft: eighteen General Dynamix F-111F's, fourteen Grumman A-6E's, six McDonnell Douglas F/A-18's, and six LTV Aerospace A-7E's. AVIATION WEEK, Apr. 21, 1986, at 18. After permission was directly denied by France and tacitly denied by Spain to overfly the airspace of their respective lands, striking aircraft which had launched the United Kingdom were forced to fly a circuitous route to their targets in order to avoid violating the airspace of those countries. *The Response to Terror*, THE NEW REPUBLIC, May 5, 1986, at 7; N.Y. Times, Apr. 15, 1986, A1, col. 2., The path thus taken added 1,200 nautical miles each way to an otherwise direct flight from their bases to Libyan targets. *Id.*

<sup>21</sup> Manning, *The Raid: Was It Worth It?*, U.S. NEWS & WORLD REP., May 5, 1986, at 18.

<sup>22</sup> N.Y. Times, Apr. 19, 1986, at A5, col. 1.

<sup>23</sup> N.Y. Times, Apr. 16, 1986, at A17, col. 1. Libyan leader Qadhafi said that he was at home when American planes bombed Tripoli and that he helped rescue his wife and children while the house was coming down around him. N.Y. Times, June 20, 1986, at 2, col. 4.

<sup>24</sup> N.Y. Times, Apr. 17, 1986, at A22, col. 1.

cluding areas in the vicinity of the French Embassy.<sup>25</sup> However, the Pentagon also reported that only one to two percent of all bombs dropped had made an impact in those areas.<sup>26</sup> American spokesman said that two bombs from planes had missed their mark, landing about 700 yards away from the Benghazi Barracks and damaging two civilian houses and some nearby buildings. Western diplomats reported that while planes had hit a naval training center, they had also damaged an adjacent high school for cadet seamen.<sup>27</sup> American officials reported that several aircraft had not dropped their bombs because of mechanical problems,<sup>28</sup> which might pose a danger to the Libyan civilian population.<sup>29</sup>

### B. Background on Libyan Policy

In order to better understand the circumstances which ultimately lead to the American decision to bomb Libya, it is necessary to view Libyan policy in a historical perspective. Prior to 1969, Libya was an exceedingly poor country which did not play an active role in foreign affairs.<sup>30</sup> In 1969, the discovery of oil and Colonel Qadhafi's seizure of power by military coup drastically changed that situation.<sup>31</sup> Colonel Qadhafi, brought with him a socialistic vision of Arab unity,<sup>32</sup> and used revenues generated from new oil production to increase Libya's economic development, to build an army, and to support political groups around the world.<sup>33</sup>

According to numerous accounts before the air strike, Colonel Qadhafi had provided safehaven, money and arms for Palestinian groups such as the Popular Front for the Liberation of Palestine — General

<sup>25</sup> N.Y. Times, May 9, 1986, at A13, col. 1.

<sup>26</sup> *Id.* at 29, The Pentagon said that bombs which landed in the vicinity of the French Embassy in Tripoli were probably from the same plane.

<sup>27</sup> N.Y. Times, Apr. 21, 1986, at A6, col. 1.

<sup>28</sup> N.Y. Times, Apr. 30, 1986, at B6, col. 1.

<sup>29</sup> N.Y. Times, Apr. 17, 1986, at A22, col. 1.

<sup>30</sup> *The Libyan Problem*, U.S. DEPT OF STATE BUREAU OF PUB. AFFAIRS, Spec. Rep. No. 111, Oct. 1983, at 1 [hereinafter *The Libyan Problem*].

<sup>31</sup> *Libya Under Qadhafi*, U.S. DEPT OF ST. BUREAU OF PUB. AFFAIRS, Spec. Rep. No. 138, Jan. 1986 at 1 [hereinafter *Libya Under Qadhafi*], See N.Y. Times, Jan. 17, 1970 at 1, col. 5 Qadhafi led a group of young military officers who siezed power from King Idris of Libya on Sept. 1, 1969. [There are numerous variations on the spelling of "Qadhafi"].

<sup>32</sup> *Id.* at 22. See also N.Y. Times, Jan. 11, 1986, at A4, col. 1.

<sup>33</sup> Over the years Colonel Qadhafi has given support to varied groups around the world from the Irish Republican Army in Northern Ireland to the Moro National Liberation Front in the Philippines. See generally, *Libya Under Qadhafi*, *supra* note 31.

Recently, Libya's fortunes have been changing. With the world price of oil plummeting, Libya's revenues have been diminished. Libyan oil revenue has dropped from a high of \$22 billion a year in 1980 to an estimated \$5 billion in 1986—and oil accounts for more than 99 percent of Libya's export earnings. Schumacher, *The U.S. and Libya*, FOR. AFFAIRS 329, 334 (1986).

Command, the Fatah, and the Abu Nidal organization.<sup>34</sup> Some of these groups share the aim of the destruction of Israel, and all have been known to utilize terrorist methods.<sup>35</sup> American officials indicate that in the two years prior to the American bombing, the Abu Nidal organization moved its headquarters to Libya.<sup>36</sup> Prior to the strike, reports showed that Libya supported over one dozen camps where about 1,000 persons were trained in guerrilla warfare, explosives, and arms for use in sabotage operations.<sup>37</sup> Libya allocated an estimated equivalent of one hundred million dollars a year for such operations.<sup>38</sup>

Libyan foreign policy under Colonel Qadhafi has included an effort to control through violence, Libyan dissident activity in other countries.<sup>39</sup> For example, in 1984, Egyptian officials led Libya into believing that its hired agents had assassinated former Libyan Prime Minister Bakoush. After the Libyan press acknowledged Tripoli's responsibility for the killing, Egypt revealed that four Libyan agents were in custody and that pictures of the alleged victim were a fake.<sup>40</sup> Also in 1984, Libyan exiles were the objects of assassination efforts in England. In one such event, a British policewoman was caught in cross fire outside the Libyan Embassy in London and was shot to death by Libyan assailants.<sup>41</sup> In that same year, Libyans were also arrested in the United States for attempting to buy silenced handguns. In 1985, a Libyan diplomat at the United Nations was declared *persona non grata* in connection with a plot to kill Libyan dissidents in the United States.<sup>42</sup>

During the several years prior to the American air strike, Colonel Qadhafi made frequent public statements about the United States as the chief obstacle in the way of resolving peace in the Middle East.<sup>43</sup> In a 1984 speech he told a Libyan audience "we are capable of exporting ter-

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<sup>34</sup> *Id.*, *supra* note 31, at 2. See also *Id.* for a review of the Abu Nidal organization's activities.

<sup>35</sup> *Id.* at 2.

<sup>36</sup> *Id.*

<sup>37</sup> *The Libyan Problem*, *supra* note 30, at 2.

<sup>38</sup> *The Sources of Terror*, U.S. NEWS & WORLD REP., Apr. 28, 1986, at 28.

<sup>39</sup> In 1980 and 1981, 11 Libyan dissidents living abroad were murdered. *Libya Under Qadhafi*, *supra* note 31, at 1. For a chronology of Libyan support for terrorism from 1979 through 1985 as asserted by the U.S. Department of State see *Id.* 5-8. Also, in 1979, Libya was officially designated by the United States as a country that has repeatedly supported acts of terrorism. 86 DEP'T STATE BULL. No. 2111, *supra* note 14, at 79.

<sup>40</sup> *Libya Under Qadhafi*, *supra* note 31, at 1.

<sup>41</sup> For a detailed accounting of events and a discussion of some of the international legal implications, see Goldberg, *The Shootout at the Libyan Self-Styled People's Bureau: A Case of State-Supported International Terrorism* 30 S.D.L. REV. 1 (1984).

<sup>42</sup> *Libya Under Qadhafi*, *supra* note 31, at 1.

<sup>43</sup> See N.Y. Times, Jan. 11, 1986, at A4, col. 1. On February 7, 1980, the U.S. Government closed its embassy in Tripoli, Libya. N.Y. Times, Feb. 8, 1980 at A2, col. 3. The U.S. effectively closed its embassy as a security precaution following the mob attacks against two French missions earlier that week.

rorism to the heart of America."<sup>44</sup> During another speech, Colonel Qadhafi remarked in response to an attack by the United States:<sup>45</sup> "We have the right to fight America, and we have the right to export terrorism to them."<sup>46</sup>

### C. *The Critical Events Prior to the Air Strike*

The critical events which ultimately led to the American decision to bomb Libya can be traced back to the simultaneous bombings of airline offices in Rome and Vienna on December 27, 1985. Those attacks left twenty<sup>47</sup> innocent people dead, including five Americans, and left over eighty people injured.<sup>48</sup> Passports used by Arab attackers could be traced to Libya.<sup>49</sup>

After the Rome and Vienna bombings, U.S.-Libyan relations worsened. President Reagan accused Libya of aiding the Abu Nidal organization which, he said, carried out the assaults.<sup>50</sup> Although he denied Libyan involvement,<sup>51</sup> Colonel Qadhafi referred to the attacks as "heroic."<sup>52</sup> Approximately one week after the bombings, President Reagan ordered a U.S. carrier group into the Mediterranean Sea.<sup>53</sup> Because of the alleged connection found between Libya and the Rome and Vienna bombings, on January 7, 1986 President Reagan ordered that no Americans could travel to or conduct transactions in Libya without a license; effectively ordering Americans to leave Libya.<sup>54</sup> The President also ordered the severing of economic ties between the two nations<sup>55</sup> and urged

<sup>44</sup> *Libya Under Qadhafi*, *supra* note 31, at 2.

<sup>45</sup> Department of Defense Security Review.

<sup>46</sup> *Id.*

<sup>47</sup> Trewhitt, *supra* note 12, at 23.

<sup>48</sup> N.Y. Times, Dec. 31, 1985, at A1, col. 4.

<sup>49</sup> *Libya Under Qadhafi*, *supra* note 31, at 1.

<sup>50</sup> N.Y. Times, Dec. 31, 1985, at A1, col. 6.

<sup>51</sup> N.Y. Times, Jan. 11, 1986, at A5, col. 1.

<sup>52</sup> Trewhitt, *supra* note 12, at 23.

<sup>53</sup> N.Y. Times, Jan. 4, 1986, at A4, col. 4.

<sup>54</sup> Libyan Sanctions Regulations, 51 Fed. Reg. 1354 (1986) (codified as amended at 31 C.F.R. § 50.101-807 (1986) (U.S. Department of Treasury regulations prohibiting imports, exports, transportation or travel to or from Libya; performance of contracts supporting projects in Libya; and extension of any credit or loans to the Government of Libya). Also for a text of President Reagan's executive order prohibiting trade with Libya see N.Y. Times, Jan. 8, at A7, col. 1.

<sup>55</sup> *Id.* The Reagan administration later modified its economic sanctions against Libya to allow American oil companies to operate until June 30, 1986, thus preventing a financial windfall to the Libyan government. N.Y. Times, May 6, at A4, col. 3.

The international legal implications of the American imposition of economic sanctions on Libya is beyond the scope of this note. For an excellent article discussing the international legal implications of economic sanctions imposed by the United States against Libya see Bialos & Juster, *Libyan Sanctions: A Rational Response to State-Supported Terrorism?*, 26 VA. J. INT'L 799 (1986). For several other useful articles on the international legality of using economic sanctions see generally, Dempsey, *Economic Aggression and Self-Defense in International Law: The Arab Oil Weapon and*

other nations of the world to join the U.S. in imposing economic sanctions.<sup>56</sup> President Reagan indicated that if Colonel Qadhafi did not end Libyan support to terrorist groups and their training camps, the U.S. would not lift the economic sanctions.<sup>57</sup>

While Canada announced a series of steps in support of the American economic sanctions,<sup>58</sup> Western European countries and Japan rejected this approach.<sup>59</sup> West Germany's Helmut Kohl invoked national interest and the safety of German expatriates to explain his Government's refusal to impose economic sanctions.<sup>60</sup> Italian leaders rejected the use of economic sanctions because, it would harm chances for a Middle East peace settlement.<sup>61</sup> Great Britain's Margaret Thatcher categorically ruled out the use of economic sanctions because it was not an effective way of countering terrorism.<sup>62</sup> The Swiss government said that it would not join the sanctions but reiterated its readiness to participate in general measures against terrorism.<sup>63</sup> Norway announced support for economic sanctions, but stopped short of agreeing to apply them.<sup>64</sup>

The imposition of economic sanctions by the United States, further aggravated relations between Libya and the United States. Colonel Qadhafi responded to the American sanctions by urging Libyans to "wage economic warfare" against the United States.<sup>65</sup> On January 13, 1986, two Libyan fighter planes reportedly flew within 200 feet of a U.S. Navy surveillance plane over the Mediterranean Sea.<sup>66</sup> Two weeks later, the U.S. Navy began a week long exercise in the Gulf of Sidra, which is commonly regarded as international waters, but an area which Libya regards as its own territorial waters.<sup>67</sup> American officials stated intent was

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*Alternative American Responses Thereto*, 9 CASE W. RES. J. INT'L L. 253 (1977); Bowett, *International Law and Economic Coercion*, 16 VA. J. INT'L L. 245 (1976); and Joyner, *The Transnational Boycott as Economic Coercion in International Law: Policy, Place and Practice*, 17 VAND. J. TRANS-NAT'L L. 205 (1984).

<sup>56</sup> N.Y. Times, Jan. 3, 1986, at A1, col. 6.

<sup>57</sup> N.Y. Times, Jan. 12, 1986, at A12, col. 3.

<sup>58</sup> N.Y. Times, Jan. 11, 1986, at A5, col. 1.

<sup>59</sup> N.Y. Times, Jan. 4, 1986, at A4, col. 1. The U.S. was unable to obtain multilateral sanctions. It should be noted that Western European economic ties are far greater than U.S. economic ties with Libya. In 1984, Libyan trade with the U.S. amounted to less than \$230 million, while trade between Libya and the EEC amounted to more than \$10 billion. *Direction of Trade Statistics*, 1985 I.M.F.Y.B. 258-59.

<sup>60</sup> N.Y. Times, Jan. 10, 1986, at A6, col. 1.

<sup>61</sup> *Id.* at col. 3.

<sup>62</sup> N.Y. Times, Jan. 11, 1986, at A1, col. 3.

<sup>63</sup> N.Y. Times, Jan. 23, 1986, at A1, col. 2.

<sup>64</sup> N.Y. Times, Jan. 14, 1986, at A4, col. 3.

<sup>65</sup> N.Y. Times, Jan. 15, 1986, at A4, col. 2.

<sup>66</sup> N.Y. Times, Jan. 15, 1986, at A4, col. 1.

<sup>67</sup> The Gulf of Sidra is that portion of the Southern Mediterranean Sea which has the Libyan coast as its southern boundary has an imaginary line between the cities of Tripoli and Benghazi as its



to demonstrate "U.S. resolve to continue to operate in international waters and airspaces."<sup>68</sup> In response to the American naval operations, Libya placed its armed forces on "full alert."<sup>69</sup> Despite an extremely tense atmosphere, the American exercise ended with no hostile action reported between the two nations.<sup>70</sup>

In March 1986, U.S. Department of Defense officials announced that a naval exercise was planned in the Gulf of Sidra during the week of March 23, 1986. The purpose of the exercise was to "gather intelligence, assert the right of innocent passage, and the right to sail in international waters."<sup>71</sup> On March 24, 1986, with American operations underway, Libyan forces fired six missiles at U.S. planes operating more than twelve miles away from the Libyan coastline but within waters which Libya considered its own.<sup>72</sup> The U.S. Navy responded by attacking two Libyan patrol boats and one missile site.<sup>73</sup> Hours later, U.S. naval forces

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northern boundary. The United States and Libya have been at odds over Libyan claims to the Gulf since 1973, when Libya announced it considered all of the Gulf to be of its territorial waters. The United States has maintained that Libya cannot claim 150,000 square miles of the Gulf under international law. N.Y. Times, Mar. 25, 1986, at A11, col. 1. While the United States and most nations of the world regard a 12-mile wide coastal strip as generally the limits of a nation's territorial waters, Libya rejects this view. N.Y. Times, Feb. 3, 1986, at A3, col. 2. Libya claims as the beginning of its territorial waters (the 32 degrees 30 minutes line of latitude—demarcating the area where the Gulf meets the Mediterranean—plus a twelve-mile band of territorial sea. Ratner, *The Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements* 10 YALE J. INT'L L. 59, 62 (1984). The international community generally does not support the Libyan position. See *World Peace Council Denounces U.S. Aggression*, FBIS (No. Africa), Aug. 21, 1981, at A1.

For a discussion of the impact of the Law of the Sea on the peacetime use of force and military activities, see Francioni, *Peacetime Use of Force, Military Activities, and the New Law of the Sea*, 18 CORNELL INT'L L.J. 203 (1985).

<sup>68</sup> See N.Y. Times, Jan. 25, 1986, at A1, col. 3. The policy behind this action was adopted in the 1970's as the Freedom of Navigation Program. *Those Maritime Exercises, Letter to the Editor*, Wash. Post, Aug. 4, 1984, at A22, col. 3.

<sup>69</sup> *Id.* at 4, col. 1. Boarding an armed Libyan patrol boat, Colonel Qadhafi sailed into the Gulf of Sidra to stage what he called a "confrontation" with the United States Navy. Colonel Qadhafi said he made the trip to stress the Libyan claim to the entire Gulf as Libyan territorial waters. N.Y. Times, Jan. 26, 1986, at A1, col. 4.

<sup>70</sup> See N.Y. Times, Feb. 13, 1986, at A5, col. 1.

<sup>71</sup> N.Y. Times, Mar. 19, 1986, at A1, col. 5.

<sup>72</sup> N.Y. Times, Mar. 25, 1986, at A1, col. 6. The legal implications of naval exercises and the ensuing military clash between the United States and Libya in the Gulf of Sidra will not be discussed in this Note. These facts are provided in order for the reader to better appreciate the months of growing tension between the two nations before the bombing of Libya by American forces. For a discussion of some of the international legal questions raised by the incident, see Blum, *Current Developments, The Gulf of Sidra Incident*, 80 AM. J. INT'L L. 668 (1986).

<sup>73</sup> N.Y. Times, Mar. 25, 1986, at A3, col. 1. This was not the first such engagement between Libyan and American Aircraft. On March 21, 1973, Libyan interceptors fired three missiles at a C-130 cargo plane which flew inside a "restricted area" which Libya had created within a one-hundred mile radius of Tripoli. On August 17, 1981, U.S. F-14 fighter aircraft engaged in combat with two Libyan Sukhoi-22 fighter aircraft above the Gulf, approximately 60 miles off the Libyan coast. Ratner, *supra* note 67, at 59-61.

launched additional attacks against a Libyan missile site and against two Libyan patrol boats. U.S. officials reported that the additional attacks came only after Libyan forces approached with what were apparently "hostile intentions."<sup>74</sup> When the U.S. military operation ended, Colonel Qadhafi claimed a "triumph."<sup>75</sup>

On April 5, 1986, a new round of tension grew as a result of a bomb explosion in a West German discotheque frequented by American servicemen. The explosion immediately killed a Turkish woman and an American serviceman.<sup>76</sup> Another American later died.<sup>77</sup> 154 persons were wounded, of which 50 to 60 were Americans.<sup>78</sup> Hours later, France announced the expulsion of two Libyan diplomats and at least two other Arabs, who were purportedly communicating with people believed to be planning attacks against American installations and personnel in Europe.<sup>79</sup> Commenting on the bombing of the discotheque, American officials said that the bombing appeared to have been part of a "pattern of indiscriminate violence" against Americans by Libya. U.S. officials charged that Qadhafi had singled out thirty U.S. installations abroad and had targeted American diplomats as possible terrorist targets.<sup>80</sup> Almost a week after the attack, Reagan administration officials said that there was "incontrovertible evidence" that Libya was linked to the discotheque bombing.<sup>81</sup>

After the discotheque bombing, renewed efforts were undertaken by Americans to press for allied sanctions against Libya.<sup>82</sup> UN Ambassador Vernon Walters was dispatched to European capitals to seek support for possible American action against Libya and to discuss Libyan involvement in terrorism.<sup>83</sup> On April 10, 1986, President Reagan, referring to Colonel Qadhafi as a "mad dog of the Middle East," indicated that the United States was prepared to strike militarily should evidence directly point to Libyan support of the recent terrorist attacks.<sup>84</sup>

Responding to this latest round of charges, Qadhafi denied his government was involved in terrorist attacks, and said that should the United States attack Libya, he would issue orders for attacks against U.S. targets worldwide.<sup>85</sup>

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<sup>74</sup> N.Y. Times, Mar. 26, 1986, at A1, col. 6.

<sup>75</sup> N.Y. Times, Mar. 29, 1986, at A3, col. 1.

<sup>76</sup> N.Y. Times, Apr. 6, 1986, at A1, col. 6.

<sup>77</sup> One American amongst those injured later died. Department of Defense Security Review.

<sup>78</sup> *Supra* note 76.

<sup>79</sup> N.Y. Times, Apr. 6, 1986, at A19, col. 1. *See also* N.Y. Times, Apr. 16, 1986, at A18, col. 1.

<sup>80</sup> N.Y. Times, Apr. 6, 1986, at A1, col. 5.

<sup>81</sup> N.Y. Times, Apr. 11, 1986, at A1, col. 6.

<sup>82</sup> N.Y. Times, Apr. 7, 1986, at A1, col. 3.

<sup>83</sup> N.Y. Times, Apr. 10, 1986, at A1, col. 6.

<sup>84</sup> *Id.*

<sup>85</sup> N.Y. Times, Apr. 10, 1986, at A8, col. 5.

Italy, concerned about the possibility of military action by the United States against Libya, called an urgent meeting of the European Community's foreign ministers on April 14, 1986. Shortly before the American strike, European Community countries publicly placed blame on Libya for recent terrorist attacks, and stated that measures would be taken to reduce the size of Libyan embassies in Europe and to restrict the movement of Libyan diplomats.<sup>86</sup>

### III. REACTION TO THE AMERICAN BOMBING

Colonel Qadhafi condemned the attack and Britain's role in its execution.<sup>87</sup> Libyan officials ordered more than 200 foreign journalists to leave the country, only to retract the order several hours later.<sup>88</sup> Apparently in retaliation for the deportation of Libyans from Britain, Spain and Italy, Libya also ordered the expulsion of more than 100 people from those countries.<sup>89</sup> Thirty-six staff members of seven Western European embassies were also expelled by Libya in retaliation for "oppressive" Western measures.<sup>90</sup>

In the two weeks that followed the raid, acts of violence occurred which were apparently retaliation for the bombing of Libya. At least five killings were attributed to groups with Libyan sympathies. Several bombings and attempted bombings were thought to be retaliatory measures taken in response to the American bombing.<sup>91</sup> Explosions ripped through American business offices in France and British business offices in Lebanon.<sup>92</sup> Throughout the world, threats were made on American

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<sup>86</sup> N.Y. Times, Apr. 15, 1986, at A12, col. 1.

<sup>87</sup> N.Y. Times, Apr. 17, 1986, at A1, col. 5. For Great Britain's role in the bombing, see DEPT. ST. BULL. No. 211, *supra* note 14 and accompanying text.

<sup>88</sup> N.Y. Times, Apr. 24, 1986, at A8, col. 1.

<sup>89</sup> N.Y. Times, May 13, 1986, at A8, col. 4. See also *infra* notes 109-12 and accompanying text.

<sup>90</sup> N.Y. Times, May 13, 1986, at A12, col. 5.

<sup>91</sup> An American communications specialist at the U.S. Embassy in the Sudan was killed by an unknown assailant. N.Y. Times, Apr. 16, 1986, at A1, col. 4. In Lebanon, the bodies of two Britons and one American were found near Beirut with a note claiming the three were killed because of the raid and Britain's role in the raid. N.Y. Times, Apr. 19, 1986, at A1, col. 6. Additionally, a British freelance journalist who had previously been taken hostage by a pro-Libyan group in Lebanon reportedly killed the Briton in retaliation for the raid. N.Y. Times, Apr. 24, 1986, at A1, col. 4. British officials arrested an Arab who was wanted in questioning about a bomb found in a woman's luggage at Heathrow Airport; newscasts in London linked the planting of the bomb to the American raid. N.Y. Times, Apr. 19, 1986, at A1, col. 4. With an anarchist group claiming responsibility, pre-dawn blasts damaged stores on London's busiest shopping street. The group stated the blast was in retaliation for Britain's role in the raid. N.Y. Times, Apr. 25, 1986, at A6, col. 1. Four Libyans were arrested in Turkey in connection with what was apparently a plot to attack a United States Officer's club in Ankara. N.Y. Times, Apr. 20, 1986, at A1, col. 4.

<sup>92</sup> N.Y. Times, Apr. 27, 1986, at A14, col. 4.

installations.<sup>93</sup>

American public opinion overwhelmingly supported the air strike, but believed that the strike heightened international tension. A poll taken by the *New York Times* and the Columbia Broadcasting System found that seventy-seven percent of the American public supported the bombing of Libya, but forty-three percent predicted that the action would lead to more tension.<sup>94</sup> Thousands of American travelers cancelled their travel plans to Europe and took vacations elsewhere.<sup>95</sup>

American Congressional reaction overwhelmingly supported the decision to bomb Libya. Even Congressional members who ordinarily are quite critical of Reagan administration policies supported the strike.<sup>96</sup> New bills were introduced which dealt with terrorism, including one bill authorizing the President to respond to future acts of terrorism without consulting Congress in advance.<sup>97</sup> Another bill proposed allowing the President to order the assassination of a foreign head of state under certain circumstances.<sup>98</sup> The raid seemed to also give new impetus to Senate action on a U.S.-Great Britain treaty limiting certain acts of violence which may be treated as "political offenses" and thus exempt from extradition.<sup>99</sup>

Positive American reaction to the raid was not shared by other Western nations. Most American allies in Western Europe criticized the attack.<sup>100</sup> Greece and Italy denounced the air strike as "set[ting] dynamite to peace"<sup>101</sup> and "provoking explosive reactions of fanaticism. . .,"<sup>102</sup> respectively. Though French, Belgian and West German officials expressed more understanding regarding American frustration over what they perceived as Libyan terrorism,<sup>103</sup> France called the bombing "reprisals that itself revives the chain of violence",<sup>104</sup> Belgium "regret[ted] . . . American . . . recourse to a military action", and West Germany asserted that "a violent solution will not be successful and is

<sup>93</sup> N.Y. Times, Apr. 18, 1986, at A8, col. 6.

<sup>94</sup> N.Y. Times, Apr. 17, 1986, at A23, col. 1. Many New York area high school students competing in a Foreign Policy Association contest wrote essays on terrorism; most favored international sanctions against nations harboring terrorists. N.Y. Times, June 9, 1986, at D10, col. 1.

<sup>95</sup> N.Y. Times, Apr. 20, 1986, at A14, col. 1.

<sup>96</sup> N.Y. Times, Apr. 15, 1986, at A10, col. 1. Democrats Thomas O'Neil and Edward Kennedy backed the raid even before President Reagan addressed the nation from the Oval Office. *The Libyan Equation*, NATIONAL REVIEW, May 23, 1986, at 13.

<sup>97</sup> N.Y. Times, Apr. 18, 1986, at A9, col. 5.

<sup>98</sup> *Id.*

<sup>99</sup> N.Y. Times, Apr. 30, 1986, at B6, col. 3.

<sup>100</sup> N.Y. Times, Apr. 16, 1986, at A16, col. 3.

<sup>101</sup> See Manning, *In Western Europe, Strains among Friends*, U.S. NEWS & WORLD REP., Apr. 28, 1986, at 24.

<sup>102</sup> *Id.* at 25.

<sup>103</sup> *Id.* at 24-25.

<sup>104</sup> *Id.*

not very promising."<sup>105</sup> Tens of thousands of demonstrators marched and burned American flags in West Germany, Italy, Sweden, and Great Britain.<sup>106</sup> The British reaction was especially surprising in view of Foreign Minister Howe's finding that there was "sound, solid evidence" of previous acts and future plans of terrorism by Libya.<sup>107</sup>

Despite an initial anti-American reaction to the raid, Western nations began to apply sanctions against Libya in the weeks that followed. Foreign ministers of the European Economic Community vowed to press ahead with a new set of anti-terrorist measures aimed at limiting Libya's ability to sponsor terrorist activities.<sup>108</sup> Those measures included an increased exchange of information on terrorism with the United States, and other nonmember nations. The foreign ministers also agreed to order reductions in staff of Libyan embassies in their capitals, and to impose diplomatic sanctions against Libya.<sup>109</sup> In Great Britain, twenty-one Libyan students were expelled for suspected involvement in "student revolutionary activities,"<sup>110</sup> and 200 other students who were studying aviation were ordered to leave the country for security reasons.<sup>111</sup> Italy's Prime Minister Craxi stated that Italy would respond with severity to any new Libyan attacks on Italian territory.<sup>112</sup> Japan announced that it would limit its business ties with Libya.<sup>113</sup>

The most cooperative effort against Libya was taken by Western industrial nations at their annual economic summit, held less than a month after the raid. At the Summit, a statement issued by Great Britain, Canada, France, Italy, Japan, the United States, and West Germany named Libya as a sponsor of international terrorism and condemned terrorism as an international scourge that "must be fought relentlessly and without

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<sup>105</sup> *Id.* at 25.

<sup>106</sup> See *supra* note 95. In Great Britain, Opposition members of Parliament assaulted what they called Margaret Thatcher's "political infatuation" with President Reagan. Three opinion polls indicated the British public's strong disapproval of their Prime Minister's decision to allow American planes to launch from British bases in the strike operation. See *N.Y. Times*, Apr. 27, 1986, at D2, col. 1; See also *N.Y. Times* Apr. 18, at A1, col. 5.

<sup>107</sup> *N.Y. Times*, Apr. 15, 1986, at A11, col. 2.

<sup>108</sup> *N.Y. Times*, Apr. 18, 1986, at A8, col. 1. British Secretary Geoffrey Home, speaking at the United Nations for the EEC, urged the General Assembly to act to combat the "scourge of international terrorism." *N.Y. Times*, Sept. 24, 1986, at A1, col. 4.

<sup>109</sup> *N.Y. Times*, Apr. 25, 1986, at A6, col. 1.

<sup>110</sup> *N.Y. Times*, Apr. 23, 1986, at A1, col. 3.

<sup>111</sup> *N.Y. Times*, Apr. 26, 1986, at A1, col. 6.

<sup>112</sup> *N.Y. Times*, Apr. 20, 1986, at A1, col. 5. See also *supra* notes 18, 19, and accompanying text.

<sup>113</sup> *N.Y. Times*, Apr. 29, 1986, at A7, col. 1. After the raid, Spain expelled a high-ranking Libyan diplomat and arrested a Spanish Army officer for allegedly arranging the Libyan financing of right-wing activities in Spain. *N.Y. Times*, May 10, 1986, at A1, col. 3. After several months of pro-Libyan statements following the raid, Greece significantly reduced the number of Libyan diplomats in Athens. *N.Y. Times*, July 10, 1986, at A2, col. 3.

compromise."<sup>114</sup>

The Soviet Union reacted to the bombing by cancelling a May conference previously scheduled between American Secretary of State George Shultz and Soviet Foreign Minister Eduard Shevardnadze.<sup>115</sup> Soviet Premier Mikhail Gorbachev said that arms control talks with Americans would only be held if the Reagan administration altered its foreign policy which was "poisoning" the international atmosphere.<sup>116</sup> He also characterized the strike on Libya as part of a "militaristic and aggressive" policy that he warned would damage relations between the Soviet Union and the United States.<sup>117</sup>

Reaction from the Third World uniformly condemned the bombing of Libya. Foreign ministers of the Movement of Non-Aligned Nations condemned the raid at their meeting in New Delhi, India, which was coincidentally held the same day of the air strike.<sup>118</sup> Though the Organization of Petroleum Exporting Countries rejected a Libyan appeal for an oil embargo against the United States in the wake of the bombing, eight of thirteen members voted to strongly condemn the raid.<sup>119</sup> Vietnam, citing the air strike, suspended talks on resolving the question of American MIA's.<sup>120</sup>

In the United Nations, reaction to the air strike was decidedly against the United States. The United States, Great Britain and France vetoed a Security Council resolution that would have "condemn[ed] the armed attack by the United States of America in violation of the Charter of the United Nations."<sup>121</sup> The resolution was sponsored by the Congo, Ghana, Madagascar, Trinidad and Tobago, and the United Arab Emirates. Also voting in favor of the resolution were Bulgaria, China, the Soviet Union, and Thailand. In addition to the United States, Great Britain and France, Australia and Denmark also voted against the resolution. Venezuela abstained.<sup>122</sup> Reaction in the UN General Assembly was similar. The Assembly adopted a resolution condemning the American raid by a vote of 79 to 28, with 33 abstentions.<sup>123</sup>

<sup>114</sup> N.Y. Times, May 6, 1986, at A1, col. 6.

<sup>115</sup> N.Y. Times, Apr. 16, 1986 at A1, col. 3.

<sup>116</sup> *Id.* However, talks were ultimately held between President Reagan and Premier Gorbachev in October, 1986 in Reykjavik, Iceland. See Jackson, McGear, Searman, *Sunk by Star Wars*, TIME, Oct. 20, 1986 at 20.

<sup>117</sup> N.Y. Times, Apr. 19, 1986, at A3, col. 3. Also, Soviet Foreign Ministry spokesman dismissed as "cynical lies" American assertions that the Soviet Union could have averted the terrorist bombing in the West German discoteque. N.Y. Times, Apr. 18, 1986, at A9, col. 1.

<sup>118</sup> N.Y. Times, Apr. 16, 1986, at A16, col. 4.

<sup>119</sup> *Id.* at A20, col. 1.

<sup>120</sup> N.Y. Times, Apr. 19, 1986, at A4, col. 4.

<sup>121</sup> N.Y. Times, Apr. 22, 1986, at A1, col. 3.

<sup>122</sup> *Id.*

<sup>123</sup> N.Y. Times, Nov. 22, 1986, at A14, col. 4.

## IV. A PRELIMINARY LEGAL ANALYSIS

A. *American Justification*

Shortly after the strike, President Reagan formally informed the American public of the military mission. Reagan stated that the United States had conducted strikes against "terrorist centers" and military bases in response to actions by Colonel Muammar Qadhafi's regime, which had waged a "reign of terror" against the United States.<sup>124</sup> Reagan said the United States had proof of a "direct" Libyan role in the bombing of the West German discotheque frequented by American servicemen. Referring to diplomatic messages between Libya and its East German Embassy,<sup>125</sup> President Reagan said:

On March 25, more than a week before the [West German discotheque] attack, orders were sent from Tripoli to the [Libyan] People's Bureau in East Berlin to conduct a terrorist attack against Americans, to cause maximum and indiscriminate casualties. Libya's agents then planted the bomb. On April 4, the People's Bureau alerted Tripoli that the attack would be carried out the following morning. The next day they reported back to Tripoli on the great success of their mission.<sup>126</sup>

President Reagan also stated that the United States had "solid evidence about other attacks Qadhafi has planned against the United States' installations and diplomats and even American tourists."<sup>127</sup>

The President squarely justified the attack on grounds of self-defense, and impliedly indicated that the retaliation<sup>128</sup> was another justification for the attack. Reagan announced that "this pre-emptive action" would cause Colonel Qadhafi to "alter his criminal behavior."<sup>129</sup> Reprisal overtones were also evident when the President stated:

[w]hen our citizens are abused or attacked anywhere in the world, on the direct orders of a hostile regime, we will respond . . . Self-defense is not only our right, it is our duty.<sup>130</sup>

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<sup>124</sup> N.Y. Times, Apr. 15, 1986, at A1, col. 6.

<sup>125</sup> President Reagan's reference was clarified by U.S. Ambassador Vernon Walters to mean diplomatic cables sent between the Libyan Embassy in East Berlin and Tripoli. 86 DEPT STATE BULL. 2111, *supra* note 14, at 8.

<sup>126</sup> Speech by Ronald Reagan, *International Terrorism*, U.S. DEPT OF STATE BUREAU OF PUB. AFFAIRS Spec. Rep. No. 24, 1986, at 1. [Hereinafter *International Terrorism*.]

<sup>127</sup> U.S. officials later said that Libyan agents had planned a daytime grenade and machine-gun attack on an American visa office in Paris. N.Y. Times, Apr. 16, at A17, col.5.

<sup>128</sup> Use of the word "retaliation" in this Note is meant to be synonymous with "armed reprisal" or "reprisal."

<sup>129</sup> *International Terrorism*, *supra* note 126, at 1.

<sup>130</sup> *Id.*

President Reagan came closest to articulating a theory of retaliation as justification when he said:

I warned that there should be no place on earth where terrorists can rest and train and practice their skills. I meant it. I said that we would act with others if possible and alone if necessary to insure that terrorists have no sanctuary anywhere.<sup>131</sup>

Interpreting the strike as a legitimate act of retaliation is further supported in light of the Vice President George Bush's comments the month before the raid, that American policy on combatting terrorism would be one of a willingness to "retaliate."<sup>132</sup>

The bombing was reported to the United Nations by U.S. Ambassador Vernon A. Walters.<sup>133</sup> Ambassador Walters said that U.S. forces had struck targets which were part of Libya's military infrastructure — "command and control systems, intelligence, communications, logistics, and training facilities."<sup>134</sup> Walters also stated that those sites had been used to carry out "Libya's harsh policy of terrorism, including ongoing attacks against U.S. citizens and installations."<sup>135</sup> Regarding impending attacks, The Ambassador said:

[There is]. . . compelling evidence of Libyan involvement in other planned attacks against the United States in recent weeks, several of which were designed to cause maximum casualties similar to the Berlin bombing.<sup>136</sup>

Ambassador Walters defended the American raid in the UN as being in accordance with international law. Absent from his statement was the use of any language which could be construed to justify the raid under a reprisal theory. Rather, Walters relied solely on the theory of self-defense. Referring to the bombing of the West German discotheque, he said:

In light of this reprehensible act of violence — only the latest in an ongoing pattern of attacks by Libya — and clear evidence that Libya is planning a multitude of future attacks, the United States was compelled to exercise its rights of self-defense.<sup>137</sup>

Thus the legal grounds used to justify the air strike in the various

<sup>131</sup> *Id.*

<sup>132</sup> See Trehwhitt, *supra* note 12.

<sup>133</sup> The report was made on April 15, 1986. 86 DEP'T STATE BULL. No. 2111, *supra* note 14, at 19.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* The White House later issued new statements saying that its assertions that Qadhafi was planning new acts of terrorism were based on a realistic assessment by American officials, N.Y. Times, Aug. 28, 1986, at A1, col. 6.

<sup>137</sup> *Id.*



statements made by President Reagan, Vice President Bush and Ambassador Walters may be broadly outlined as follows: (1) Libya incurred liability because of its commission of terrorist acts against Americans. (2) The American bombing of Libya constitutes legitimately imposed sanctions or retaliation for Libyan-supported terrorism. Moreover, retaliation serves to deter future terrorist acts. (3) Alternatively, an ongoing threat of Libyan-supported terrorism necessitated self-defensive measures. The legal issues presented by these positions will be examined here.

### B. *Libyan Liability and State-Supported Terrorism*

It was not until after the establishment of the United Nations that codified principles concerning terrorism emerged.<sup>138</sup> Presently, the international convention is heavily relied upon as a source of international law<sup>139</sup> to establish standards concerning terrorism. Conventions have condemned terrorist attacks on civil aviation, diplomats, and the taking of hostages.<sup>140</sup> While debate continues as to whether terrorism is pro-

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<sup>138</sup> (League of Nations) Convention for the Prevention and Punishment of Terrorism, *opened for signature* Nov. 16, 1937 (not entered into force), 7 INTERNATIONAL LEGISLATION 862 (M Hudson Ed. 1941), 862 LEAGUE OF NATIONS O.J. 23 (1938), A. GRAHL-MADSEN, TERRITORIAL ASYLUM 119 (1980).

<sup>139</sup> The sources of law are stated in Article 38 of the Statute of the International Court of Justice as the following:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted at law;
- (c) the general principles of law recognized by civilized nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

*Statute of the International Court of Justice*, art. 38, para. 1, *reprinted in* I. BROWNLIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 397 (1983).

<sup>140</sup> For instance, several conventions have been adopted regarding aviation hijacking. The 1963 Tokyo Convention requires parties to the convention to return any hijacked plane and passengers. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963 [1969] 10 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219. Also, the 1970 Hague Convention indicates that states parties must either extradite or prosecute hijackers. Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, [1971] 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105. The 1971 Montreal Convention contains the same provisions with respect to individuals who engage in any kind of sabotage of aviation. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *opened for signature* Sept. 23, 1971, T.I.A.S. No. 7570, 974 U.N.T.S. 177.

The General Assembly has addressed the problem of terrorism directed against diplomats. In 1974, it adopted, by consensus, The Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents. This Convention provides for international co-operation in preventing and punishing attacks against diplomats and other persons enjoying status under international law. G.A. RES. 3166, 28 U.N. GAOR Supp. (No. 30), U.N. Doc. A/9030 (1973).

The General Assembly has also condemned hostage-taking. In 1979, it adopted, without objection, the International Convention Against the Taking of Hostages. G.A. Res. 34/146, 34 U.S.

scribed by *jus cogens*,<sup>141</sup> increasingly more evidence exists suggesting a widening of the principles that the world community seeks to protect: human life, liberty and property.<sup>142</sup> Recently, the United Nations dealt with the general subject of terrorism. In December, 1985, the UN General Assembly unanimously passed a resolution condemning as criminal all practices of terrorism.<sup>143</sup> At the same time a UN Security Council resolution was passed, which condemned all acts of hostage-taking and urged members to cooperate with one another against acts of terrorism.<sup>144</sup>

There is little doubt that the bombing of a West German discotheque was a terrorist act. The bombing of a crowded nightclub is a type of violence that "speaks for itself."<sup>145</sup> The three persons killed and the large number of persons injured, were indiscriminately chosen. Victims included many civilian members of the local community, indicating an intention to cause terror in the mind of the public. The fact that the nightclub was frequented by American servicemen and the intercepted diplomatic cables, indicates a political purpose by the perpetrators.<sup>146</sup> Similarly, the Rome and Vienna<sup>147</sup> bombings were terrorist acts. If, as President Reagan indicated, other impending attacks were planned

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GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979). The object of the convention is to ensure that those who take hostages will be subject to punishment if they are apprehended within any state's jurisdiction that is a party to the Convention. States that are parties to the Convention must cooperate in the prevention of acts of terrorism. The Convention rejects the concept that pursuit of equal rights and self-determination can justify terrorist acts. Parties must prosecute or extradite hostage-takers under the Convention, unless bound to do so under the 1949 Geneva Convention on the Law of Armed Conflict and the 1977 Additional Protocols.

<sup>141</sup> Whiteman, *Jus Cogens in International Law, With a Project List 7* GA. J. INT'L & COMP. L. 609, 625 (1977).

<sup>142</sup> McCredie, *Contemporary Uses of Force Against Terrorism: The United States Response to Achille Lauro—Questions of Jurisdiction and Its Exercise*, 16 GA. J. INT'L & COMP. L. 435, 451 (1986).

<sup>143</sup> On December 9, 1985, the U.N. General Assembly resolution passed a resolution on *Measures to Prevent International Terrorism*, G.A. Res. 40/61, 40 U.S. GAOR Supp. (No. 53) at 301, U.N. Doc. A/40/53 (1986), U.N. Press Rel. GA/7272, at 607 (Jan. 13, 1986).

<sup>144</sup> S.C. RES. 579 U.N. Doc. S/INF/41 (1985).

<sup>145</sup> Not meant in the legal sense of the doctrine of *res ipsa loquitur*, which does not apply here.

<sup>146</sup> See *supra* notes 125-26 and accompanying text. At this point it is appropriate to note the difficulty in ascertaining the factual circumstances in an international dispute of this nature. Besides governments, few sources exist with broad fact-gathering capabilities of relevant material. Therefore, information often relied upon must be gathered from interested parties — governments which have a stake in presenting their position in the most favorable light and which must guard against intelligence leaks. This difficulty should not prevent an effort toward a thorough analysis. An example of this phenomenon exists amidst charges that the Reagan administration engaged in a "disinformation" campaign against the Libyan government by leaking false information to Qadhafi in the hopes he would believe he was about to be attacked by the United States or be overthrown. N.Y. Times, Oct. 3, 1986, at A1. col. 1. Verification of these charges is virtually impossible without information released from an interested party — the American government.

<sup>147</sup> See *supra* notes 47-49 and accompanying text.

against American installations, diplomats, and tourists,<sup>148</sup> or, as Ambassador Walters indicated, other impending attacks were planned to cause casualties similar to the German bombing, such plans would constitute more than a substantial beginning of the commission of a terrorist act. Consequently, aside from the question of state responsibility, the *acts* Libya is accused of constitute various forms of terrorism and the individuals who carried out those acts violated international law.<sup>149</sup>

To determine whether Libya is liable for these acts of terrorism perpetrated by individuals, the principle of external responsibility must be examined. According to that principle, a state's violation of another state's external political or territorial sovereignty, is a delinquency which imposes liability on the offending state.<sup>150</sup> All states have an obligation to refrain from making threats or perpetrating acts of aggression against another state.<sup>151</sup> This obligation extends to all private individuals who act on behalf of a state in which they are located. Several theories exist which impute responsibility to a state for a violation of an internationally imposed duty: direct liability, accomplice liability, vicarious liability, and agency liability.

Direct liability, implicitly recognized in the Draft Articles on State Responsibility, holds a nation liable for acts of organs of its own government.<sup>152</sup> Under this theory, officials of a state who, while acting in their official capacity, engage in acts of terrorism, act with the authority of the state; therefore, the same state is liable.

Under the theory of accomplice liability,<sup>153</sup> a state is held liable when it tolerates any person within its borders who calculates criminal activity in another state. When a person engages in such a criminality, a state has the responsibility to either punish the wrongdoer or to compel him to make retribution.<sup>154</sup>

<sup>148</sup> See *supra* note 127 and accompanying text.

<sup>149</sup> The question of whether those acts violated municipal law will not be addressed as this Note addresses only international legal implications. However, certainly the bombing would be considered murder by the laws of all civilized nations of the world.

<sup>150</sup> The concept of sovereignty encompasses two aspects of independence. First, under the principle of "internal independence," the manner in which a state uses its territory is generally not the subject of international law, provided such use does not endanger other states. Second, under the principle of "external independence," a state may not unilaterally alter that external, or internationally imposed responsibility which each state owes to every other state. I. OPPENHEIM, INTERNATIONAL LAW 254-56 (H. Lauterpacht ed. 1948).

<sup>151</sup> See *infra* note 185 and accompanying text.

<sup>152</sup> Part I of Draft Articles on State Responsibility [1980] 2 Y.B. INT'L L. COMM'N art. 5, at 31, U.N. Doc. A/CN.4/SER.A/1980/Add. 1 (Part 2) [hereinafter *Draft Articles*].

<sup>153</sup> For a discussion of accomplice theory in criminal law see W. LAFAVE & A. SCOTT, CRIMINAL LAW 495-522 (1972).

<sup>154</sup> Gross, *The Legal Implications of Israel's 1982 Invasion into Lebanon*, 13 CAL. W. INT'L L.J. 458, 468-70 (1983).

On several occasions the United Nations has stated that the act of organizing or assisting terrorist groups is illegal under its Charter. The Declaration on the Inadmissibility of Intervention,<sup>155</sup> and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>156</sup> state that it is a violation of the Charter to organize, assist, foment, finance, incite or tolerate terrorist activities as a means to intervene in the affairs of another state.<sup>157</sup>

The International Law Commission<sup>158</sup> has also spoken on the matter of state complicity. The Commission's article 2(6) of the Draft Code of Offenses Against the Peace and Security of Mankind prohibits:

[t]he 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.<sup>159</sup>

The concept of vicarious liability has enjoyed enormous support over the years under customary principles of international law, and is implicitly stated in the *Corfu Channel* case.<sup>160</sup> In that case, two British warships ran afoul of moored mines during passage of the Straits of Corfu, a channel located in the territorial waters of Albania. The incident caused severe damage to the vessels and also claimed the lives of seamen. The United Kingdom contended that its vessels had been exercising the right of innocent passage, and was therefore entitled to compensation for damages sustained. The Court held that a state's mere control over its territory does not necessarily establish state responsibility.<sup>161</sup> However, the Court underscored the principle that a state is liable if it knowingly permits its territory "to be used for acts contrary to the rights of other states."<sup>162</sup> Concluding that the laying of the minefield could not have been accomplished without Albania's knowledge, the Court held Albania internationally liable.<sup>163</sup>

Agency theory, implicitly recognized by the Draft Articles on State

<sup>155</sup> Declaration on the Inadmissibility of Intervention, G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14), U.N. Doc. A/6014 (1965) [hereinafter *Declaration on Inadmissibility*].

<sup>156</sup> *Declaration on International Law concerning Friendly Relations and Co-operation among States in accordance with the United Nations Charter*, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) U.N. Doc. A/8028 (1970) [hereinafter *Declaration Concerning Friendly Relations*].

<sup>157</sup> *Declaration on Inadmissibility*, *supra* note 155, at 11 and *Id.* at 121.

<sup>158</sup> The Commission is a body of legal experts whose purpose is to codify canons of international law through the drafting of treaties, and whose drafts are given much probative weight with regard to the state of the law.

<sup>159</sup> 45 AM. J. INT'L SUPP. 128 (1951).

<sup>160</sup> *Corfu Channel* Case (U.K. v. Alb.), 1949 I.C.J. 4.

<sup>161</sup> *Id.* at 22-23.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

Responsibility, holds a state liable for offending conduct of persons acting on behalf of the state.<sup>164</sup> Rather than focusing upon the stated or formal relationship between an individual that performs an illegality and the state, agency theory looks to see if the state somehow consented, even tacitly, to the offending behavior.<sup>165</sup> The implication of adopting this theory is that if a state accepts the benefits derived from actions of persons it knows have perpetrated a criminal act against another state, even after the fact, it may ratify the act and be held liable.

Applying these principles to American allegations of Libyan-supported terrorism, it must be noted that public information on Libyan involvement with the Rome and Vienna bombings<sup>166</sup> is too limited to engage in a thorough analysis of Libyan liability. Yet *if* the Abu Nidal organization carried out these bombings as President Reagan charged,<sup>167</sup> and *if* the link between Libya and the Abu Nidal organization is conclusively established to have been material in those instances, then it may be concluded that Libya incurred liability. Given the Abu Nidal organization's known involvement in international terrorist activities,<sup>168</sup> and given that organization's relocation of its headquarters to Libya prior to the attacks,<sup>169</sup> Libya incurred liability by tolerating the presence within its borders of an organization calculated to engage in criminal acts in another state. Also, evidence that Libyan passports were used by individuals in the bombing suggests a possible official Libyan involvement in the bombing. This evidence taken in conjunction with comments made after the attack by Colonel Qadhafi that he considered the attacks "heroic," arguably makes the Libyan regime liable under an agency theory. It may be argued that Colonel Qadhafi's comments constitute a ratification of the bombings by consenting to the offending behavior. Nonetheless, given the limited information available to the public, it remains difficult to draw more than a tentative conclusion.

Libyan responsibility for the West Berlin nightclub bombing<sup>170</sup> may be imputed under the several theories mentioned above. Communications intercepted between Tripoli and its East German Embassy<sup>171</sup> indicate that Tripoli issued directions and received reports on the bombing.

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<sup>164</sup> *Draft Articles*, supra note 152, art. 8.

<sup>165</sup> *Id.* This approach is reflected in art. 19 of the *Draft Articles* supra note 152, which divides international wrongs into "crimes," and the less serious international "delicts." The two concepts are used to distinguish between different degrees of seriousness in violation of international law by a state; the most serious violations have been termed — international "crimes," and the less serious international "delicts."

<sup>166</sup> See supra notes 47-49.

<sup>167</sup> See supra note 50 and accompanying text.

<sup>168</sup> See supra notes 34, 35, and accompanying text.

<sup>169</sup> See supra note 36 and accompanying text.

<sup>170</sup> See supra note 76 and accompanying text.

<sup>171</sup> See supra notes 125-26 and accompanying text.

Such communications suggest an exercise of significant control by the Libyan government over the individuals who perpetrated the bombing. From an objective standpoint, perpetrators of the bombing might very well be considered Libyan officials acting in their official capacity.

Because Libyan communication channels within Libyan borders were used to direct the West German nightclub bombing, Libya organized, assisted, fomented, and incited terrorist activity in violation of the Declaration of Intervention and the Declaration concerning Friendly Relations. Therefore, Libya incurred liability under an accomplice theory.

Given the Tripoli communication to its East German Embassy, Libya knowingly used its territory in a manner contrary to the rights of West Germany and the United States. By ordering the indiscriminate bombing which caused injury to West German and American nationals, Libya incurred liability under a vicarious theory.

Finally, liability attaches to Libya under an agency theory since the communications directing the bombing constitute at least tacit consent by Libya to the actions by the perpetrators. In short, Libya incurred international liability for the West German discotheque bombing under all commonly accepted theories imputing state responsibility.

### C. *Retaliation in Response to Terrorist Acts*

While retaliation was not a carefully articulated justification for the air strike, comments were made by President Reagan concerning the importance of removing sanctuary to terrorists.<sup>172</sup> Also, a short time before the raid, Vice President Bush made comments advocating the use of retaliation as part of a counter-terrorism policy.<sup>173</sup> Such comments indicate retaliation was one theory, albeit a secondary one, justifying the bombing of Libya.

Prior to the adoption of the UN Charter, the use of reprisal as a manner of conducting state affairs was accepted. Those circumstances which allowed states to use force were construed so broadly that at least until the early Twentieth Century, a state could wage war for virtually any reason without violating international law.<sup>174</sup> Under widely accepted international principles,<sup>175</sup> armed reprisal was viewed as a matter

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<sup>172</sup> See *International Terrorism*, *supra* note 126, 131 and accompanying text.

By use of the words "retaliation" or "reprisal" in this Note, this writer refers not to "wartime reprisal" but to that which much of the literature refers to as "peacetime armed reprisal." The distinction between the two is that while a belligerent reprisal intends to reaffirm the laws of war, peacetime reprisal intends to reestablish a broken peace.

<sup>173</sup> Trewhitt, *supra* note 12, at 23.

<sup>174</sup> For customary law prior to the adoption of the U.N. Charter see I.L. OPPENHEIM, *INTERNATIONAL LAW* 34-35 (1906). See also Dempsey, *supra* note 55, at 310.

<sup>175</sup> Sources of customary international law are: (1) [D]iplomatic relations between states; (2) the practice of international organs; and (3) State laws, decision or State Courts and State mili-

of permissible self-help<sup>176</sup> within the guidelines of the *Naulilaa* case.<sup>177</sup> Prior to the UN Charter, the *Naulilaa* case was generally recognized as the authoritative standard for legitimate armed reprisal.<sup>178</sup> In setting out the applicable law, the *Naulilaa* court enunciated the essential requirements for legitimate armed reprisal: first, there must have been a prior illegal act; second, the injured state must have attempted to obtain redress from the offending state for the alleged violation; and lastly, implementation of the reprisal must not be patently offensive, that is, disproportionate to the wrong done.<sup>179</sup>

In contrast to the concept of self-defense, the concept of reprisal does not require an absence of any requirement that a response be limited to the degree necessary to repulse any immediate threat.<sup>180</sup> This difference may be attributed to the different aims or purposes of each. While the purpose of self-defense is to protect the security and essential rights of a state, the purpose of reprisal is to impose punishment.<sup>181</sup> Traditionally, the primary purpose of reprisal has been described as a means to avenge past wrongs or to vindicate legal rights, rather than one of deterrence. Other purposes of reprisal have been described as compelling a satisfactory settlement of a dispute created by an initial illegal act, and compelling a delinquent state to abide by the law in the future.<sup>182</sup>

Despite the existence of some persuasive arguments to the contrary,<sup>183</sup> the strong prevailing view is that the *Naulilaa* standard has been

tary or administrative practices. G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 35 (9th ed. 1984).

<sup>176</sup> Self-help involves the "unilateral protection and enforcement of rights: by force. Bryde, *Self-Help*, in 4 *ENCYCLOPEDIA OF PUBLIC LAW* 215 (R. Bernhardt ed. 1982). Self help tends to be remedial in character. D. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 11 (1958).

<sup>177</sup> 2 R. INT'L ARB. AWARDS 1012. In that case, three German soldiers were killed by Portugese soldiers at a Portugese post. The attack was largely the result of misunderstandings between the same German and Portugese soldiers. In response, German forces attacked Portugese outposts in Angola, a Portugese colony.

<sup>178</sup> See generally M. McDOUGAL & F. FELICIANO, *LAW & MINIMUM WORLD PUBLIC ORDER* 136-42 (1960).

<sup>179</sup> *Nautilaa* case, *supra* note 177.

<sup>180</sup> See *infra* notes 203-208 and accompanying text.

<sup>181</sup> Salpeter, *Armed Reprisal During Intermediacy — A New Framework for Analysis in International Law*, 17 *VILL. L. REV.* 270, 277-78 (1971).

<sup>182</sup> *Id.*

<sup>183</sup> The strongest arguments in favor of once again legitimizing "reasonable" reprisals may be summarized in the following manner. First, the UN Charter does not rule out armed reprisal as a measure of self-help. The Charter makes no mention of the word "reprisal" or "retaliation." Second, later authoritative interpretation does not rule out armed reprisal as a measure of self-help. The *Corfu Channel* case, *supra* note 160 indicates that a residual right of reprisal remains in modern international law since that case apparently ratified a resort to forceful self-help by allowing a battle-ship to traverse legally disputed waters. Third, while the UN Charter is essential to the understanding of the right to implement forceful actions, the Charter should not function as a straight-jacket to analysis. Salpeter, *supra* note 181, at 288. Interpreting the UN Charter as outlawing all forms of

rejected by the UN Charter, and that armed reprisal is no longer permissible.<sup>184</sup> Though the words "reprisal" and "retaliation" are not found in the Charter, great reliance has been placed on Article 2, which states in pertinent part:

The Organization and its Members, in pursuit of the Purposes Stated in Article 1, shall act in accordance with the following principles. . .

3. All Members shall settle their disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

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 manner inconsistent with the Purpose of the United Nations.<sup>185</sup>

In 1970, this same view was reaffirmed in the UN Declaration concerning Friendly Relations. That Declaration maintains that "[s]tates have a duty to refrain from acts of reprisal involving the use of force."<sup>186</sup> This strong language exemplifies the intensity with which retaliation has been rejected as a principle of international law. The Chairman of the U.S. Delegation to the Geneva Diplomatic Conference of 1974-1977 observed, "reprisal" is considered a dirty word throughout most of the world.<sup>187</sup> So widely accepted is the belief that reprisal is rejected, that few propositions in international law have enjoyed more support.<sup>188</sup>

In recent practice, the justification for reprisal seems to have changed from that of punishment for past harm done to deterrence of future acts of aggression.<sup>189</sup> While this represents a narrowing between

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reprisals ignores the realities of a vast array of conduct short of war. For instance, a state facing incessant threat of terrorist attack has no alternative but to use force to protect its territorial integrity and its nationals. It is preferable to maintain legal standards to govern the use of all armed coercion short of war, than to condemn the use of all kinds of force. Levenfeld, *Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law*, 21 COLUM. J. TRANSNAT'L L. 1, 35 (1982). Fourth, forbidding all types of reprisal creates a split between the norm of international law and the actual practice of states. In the long-run, by creating this divergence, civilized society runs the risk that the substance of international law will become little more than aspirational slogans. In the short-run, subscribing to a view of international law which does not conform to the reality of the practice of states places international law in the position of acquiring its own "credibility gap." *Id.*

<sup>184</sup> I. OPPENHEIM, *supra* note 174, at 156.

<sup>185</sup> U.N. CHARTER, art. 2, ¶ 3, 4.

<sup>186</sup> M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 161-74 (1971).

<sup>187</sup> G. ALDRICH, REPORT OF THE UNITED STATES DELEGATION TO THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS. FOURTH SESSION 32 (Mar. 7-June 10, 1977).

<sup>188</sup> See Reisman, *Sanctions and Enforcement*, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 332-33 (C. Black & R. Falk eds. 1971).

<sup>189</sup> This practice has further blurred the distinction between the concepts of reprisal and self-defense.



the concepts of reprisal and self-defense by bringing reprisal more closely into line with the future and threat-oriented aim of self-defense, it should not be expected that the Security Council will ever accept this justification.<sup>190</sup> Although the Security Council's failure to condemn as illegal that which under customary international principles would have been considered "reasonable" reprisals constitutes at least a *de facto* recognition of the continued vitality of the reprisal doctrine,<sup>191</sup> the chief argument against reading any legal significance into such action lies in the well-settled, unambiguous *de jure* rejection of the reprisal doctrine.

To conclude, contemporary international standards regarding use of force no longer allow states to resort to armed retaliation.<sup>192</sup> This appears to be a settled doctrine although some evidence exists that the international community is increasingly tolerant of some types of reprisals.<sup>193</sup>

The rejection of reprisal as a recognized principle of international law requires that any attempt to justify the American air strike under that same theory must be rejected as "a matter of law." Perhaps the world community's rejection of the doctrine of reprisal, is one explanation for the ambiguous manner in which the United States has used the reprisal concept in its counter-terrorism policy.<sup>194</sup> In view of the rejection of the concept, President Reagan's desire "to insure that terrorists have no sanctuary,"<sup>195</sup> and his desire to deter or "alter [Colonel Qadhafi's] . . . criminal behavior,"<sup>196</sup> are not sufficient reasons, by themselves, to justify the aerial attack.

#### D. Ongoing Terrorist Threat Necessitated Self-Defensive Measures

Whether the aerial bombing may be justified on the ground of self-defense must be determined independently of the retaliation question. The doctrine of self-defense recognizes the right of a state to protect itself against real and immediate threats. As Bowett noted, the purpose of the right is to "justify action, otherwise illegal, which is necessary to protect certain essential rights of the state against violation by other states."<sup>197</sup> The doctrine has ancient roots and has long been of fundamental impor-

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<sup>190</sup> See Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 21 (1972).

<sup>191</sup> *Id* at 10-11.

<sup>192</sup> OPPENHEIM, *supra* note 174, at 156.

<sup>193</sup> Levenfeld, *supra* note 183.

<sup>194</sup> Compare Trehitt, *supra* note 12, (accompanying text.) Shortly before the aerial strike, Vice President Bush articulated a policy of "retaliation," however, shortly after the aerial strike, Ambassador Walters justified the bombing solely on grounds of self-defense.

<sup>195</sup> See *International Terrorism*, *supra* note 131 and accompanying text.

<sup>196</sup> See *International Terrorism*, *supra* note 129 and accompanying text.

<sup>197</sup> BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 270 (1958). See also U.N. CHARTER, art. 51. For the text of Article 51 see text accompanying *infra* note 212.

tance to the preservation of minimum world public order.<sup>198</sup> The concept of self-defense contributes to the maintenance of world order on two different levels. On one level, the concept legitimizes actions to defend oneself—to respond to a present threat of harm. On a second level, the concept also contributes to the deterrence of future acts of aggression by raising the risk attendant to the commission of acts of aggression.<sup>199</sup>

Several requirements must be met for a state to properly take actions in the name of “self-defense.” First, all practical peaceful measures must have been exhausted; second, there must exist a compelling necessity to act in response to an immediate threat; and third, force must be proportionate to the threat and cannot exceed measures strictly necessary to repel the threat.

The traditional formulation of the doctrine of self-defense, which incorporated measures taken in anticipation of an attack, may be found in the often quoted words of American Secretary of State Daniel Webster in the 1842 *Caroline* case.<sup>200</sup> The *Caroline* case is generally recognized by commentators as authoritative precedent that self-defense is international legal doctrine.<sup>201</sup>

In 1842 Americans had been giving military aid to Canadian rebels across the Niagara River by way of the American steamer named the “Caroline.” The American government was either unwilling or unable to prevent the flow of such aid to Canadian rebels. When it appeared to Canadian officials that assistance would continue and that the “Caroline” posed a threat to Canadian authority, Canadian soldiers crossed to the American side of the river, destroyed the steamer, and caused casualties among American citizens defending the vessel.<sup>202</sup> During the ensuing diplomatic confrontation between the two nations, Secretary Webster articulated specific standards for the use of self-defense. In correspondence with Lord Ashburton, Webster wrote that in order for an act to qualify

<sup>198</sup> PLATO, *THE LAW OF PLATO* 5 (A. Taylor trans. 1934), Cicero, Gentili, and Grotius all recognized the right of self-defense. See Note, *National Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U.L. REV., 187, 189-90 (1984). For discussion of the right to use force in self-defense under Greek and Roman law see C. PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME*, 173-95, 349-66 (1911).

So deeply rooted in customary international law was self-defense that assurance of its continued vitality as a principle was made a condition precedent to the signing of the Kellogg-Briand Pact. Dempsey, *supra* note 55, at 310.

The doctrine of self-defense is a fundamental principle in any legal system. For a general discussion of aggression and self-defense, see M. MCDUGAL & W. REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 964-98 (1981).

<sup>199</sup> Maizel, *Intervention in Grenada*, 35 NAVAL L. REV. 47, 71 (1986).

<sup>200</sup> 30 BRITISH & FOREIGN STATE PAPERS 193 (1843), reprinted in Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938).

<sup>201</sup> *Id.* at 82.

<sup>202</sup> *Id.*

as an exercise of self-defense, a state must be able to show a "necessity of self-defense, instant, overwhelming, leaving no moment for deliberation."<sup>203</sup>

Traditionally, in order for an action to be deemed "necessity of self-defense," the use of military coercion as a defensive measure must be in reaction to the presence of an imminent threat, and must be limited to circumstances in which no effective peaceful alternative is available given the time constraints involved.<sup>204</sup> It must be questioned whether the Webster formulation is unduly restrictive from the standpoint of protecting humanitarian and national interests, by requiring that military coercion may be used only in cases in which there is "no moment for deliberation."<sup>205</sup> Present day weapons of mass destruction, such as nuclear weapons and powerful delivery systems limiting warning time, may not give a target state time to determine whether there is "no moment for deliberation." Such weapons have made opposite sides of the world closer in time than neighboring states would have been in Secretary Webster's era.<sup>206</sup> Too narrow of an interpretation of the Webster formulation without looking at its underlying rationale is self-defeating. To require "no moment of deliberation" may in certain situations eliminate any chance for justifiable self-defensive measures.

The temporal nature underlying the Webster formulation, is an element which requires a response to be made close in time to an attack or imminent threat.<sup>207</sup> Without such an element, self-defense would sanction armed attacks for countless prior acts of aggression and conquest. The difficulty in defining a precise time limit—either before or after the execution of an aggressive act—does not impugn the fundamental principle.<sup>208</sup> What emerges from the temporal aspect of the traditional formulation is the requirement that a forceful response be made in reaction to an immediate threat, after practical peaceful options have been expended.

The UN Charter has codified the customary international law of self-defense. The Charter establishes a minimum world order system by requiring the use of peaceful means in settling disputes,<sup>209</sup> condemning aggression,<sup>210</sup> and authorizing the right to resort to the use of the inherent right of self-defense.<sup>211</sup>

<sup>203</sup> *Id.* at 89.

<sup>204</sup> *See* Maizel, *supra* note 199, at 71-72.

<sup>205</sup> *Id.* at 72-73.

<sup>206</sup> *Id.*

<sup>207</sup> Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 132 (1986).

<sup>208</sup> *Id.*

<sup>209</sup> *See supra* text accompanying note 185.

<sup>210</sup> *Id.*

<sup>211</sup> *See infra* text accompanying note 212. The General Assembly's 1974 Resolution on the Definition of Aggression as "the use of armed force by a State against another sovereignty, territorial

Under the Charter, recourse to the use of force by defensive measures is directly addressed in Article 51 of the Charter. That article provides:

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 order to maintain or restore international peace and security."<sup>212</sup>

The phrase "if an armed attack occurs" has led some commentators to conclude that the drafters of the Charter intended a self-defense formulation that is more restrictive than the full "inherent right" recognized by customary international law. Consequently, the question of whether the Charter carried forward the established customary principle of anticipatory self-defense or whether the Charter has restricted applicability of the self-defense principle has been the subject of much debate.<sup>213</sup> Some commentators assert that the right of self-defense may be exercised only while an armed attack is actually taking place, but not before or after an armed attack.<sup>214</sup>

Publicists taking the position that self-defense may be exercised only during an armed attack would be entirely justified in their interpretation if the UN security organs had either established the collective machinery to oppose aggression, or could and would respond quickly on an *ad hoc* basis.<sup>215</sup> However, for the most part, this machinery does not exist. War between nations did not end with the signing of the UN Charter.<sup>216</sup> Furthermore, Article 51 envisions self-defense as an interim right, to be exercised only until the Security Council assumes responsibility for resolving the dispute and restoring peace. Experience has shown the Security Council to be incapable of maintaining peace and security due to political pressures.<sup>217</sup> Scholars who believe that a response is limited only to "actual attack," seriously underestimate the potential of technically sophisti-

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integrity or political independence or another State, or in any manner inconsistent with the Charter of the United Nations." G.A. RES. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974).

<sup>212</sup> U.N. CHARTER art. 51.

<sup>213</sup> See Pedersen, *Controlling International Terrorism: An Analysis of Unilateral Force and Proposals For Multilateral Cooperation*, 8 TOLEDO L. REV. 209 (1976).

<sup>214</sup> See Maizel, *supra* note 199, at 73.

<sup>215</sup> Dempsey, *supra* note 55, at 309.

<sup>216</sup> *Id.*

<sup>217</sup> Levenfeld, *supra* note 183, at 20.

cated military systems and of the contemporary techniques of paramilitary operations.<sup>218</sup> In short, the fundamental flaw of a "narrow" view of self-defense is that it allows for and contributes to situations where justice cannot prevail.<sup>219</sup>

A sounder interpretation of the UN Charter is that the Charter merely codifies the right of self-defense as it existed before the Charter. In response to those who use Article 51 to assert that the right of self-defense has been restricted since the adoption of the UN Charter, it is appropriate to point out that Article 51 indicates that the right will remain unchanged when it reads "[n]othing in the Charter shall impair the inherent right of self-defense."<sup>220</sup> Also, the Charter neither expressly prohibits nor allows anticipatory self-defense; therefore, all relevant rules of treaty construction must be considered in its interpretation. It is axiomatic that treaties only limit the rights of nations to the extent that those nations have explicitly agreed to be so limited.<sup>221</sup> Since the UN Charter does not create new rights, a state's right to engage in those acts which ensures its own survival is preserved.

The UN Charter negotiating history is consistent with this view. The *travaux preparatoires* to which one may turn in the case of ambiguity, suggest only that Article 51 should safeguard the existing right of self-defense and not restrict it.<sup>222</sup> Professor Mallison, in testimony before members of the Senate Foreign Relations Committee, has stated that a restrictive interpretation of Article 51 is inconsistent with the article's negotiating history:

The English language text . . . [of Article 51] is neither well drafted nor consistent with the negotiating history of the San Francisco Conference, which reveals that reasonable and necessary anticipatory self-defense was retained and that self-defense is not limited to an "armed attack." The more carefully drafted and equally authentic French text uses the term "*aggression armee*" [as opposed to "*attaque armee*"] and this is completely consistent with the negotiating history. The words "inherent right" in the English text also include anticipatory self-defense, since the term refers to the pre-existing customary law which is incorporated by reference.<sup>223</sup>

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<sup>218</sup> Maizel, *supra* note 199, at 73.

<sup>219</sup> Levenfeld, *supra* note 183, at 20.

<sup>220</sup> U.N. CHARTER *supra* note 212.

<sup>221</sup> BOWETT, *supra* note 197, at 184-85, states that "[W]e must presume that rights formerly belonging to member states continue except in so far as obligations inconsistent with those existing rights are assumed under the Charter.

<sup>222</sup> Gross, *supra* note 154, at 480.

<sup>223</sup> *The Israeli Air Strike: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 1st Sess. 218, 226 (1981) (testimony of Prof. W.T. Mallison) *reprinted in* Maizel, *supra* note 199, at 76.

Furthermore, a reading of Article 51, when taken in conjunction with other provisions of the Charter, indicates that the customary principle of self-defense was meant to remain unchanged. Article 2, paragraph 4, prohibits the use of force,<sup>224</sup> while Article 2, paragraph 3, obligates states to settle their disputes by peaceful means.<sup>225</sup> These principles cannot be divorced from one another. A state can hardly be entitled to the protection of the general principles of nonuse of force in international relations, when it prefers to use harassing methods of force rather than peacefully settle its disputes. Any approach that undermines the intricate connection between these principles can only encourage violations of international law.<sup>226</sup>

The view that the UN Charter has not altered the customary right of self-defense is also supported by several post-Charter events. In the 1949 *Corfu Channel* case, the International Court of Justice indicated that it was permissible to use force in the face of a strong probability of attack.<sup>227</sup> Other examples in which preemptive actions were accepted by the international community as legitimate situations requiring self-defense include the 1962 American naval "quarantine" of Cuba to prevent the arming of Soviet nuclear missiles on Cuban soil,<sup>228</sup> and the 1967 Israeli air strike against Egypt when Israeli intelligence gave clear indication that an Egyptian attack was impending.<sup>229</sup>

In the final analysis, it may be concluded that the customary right of self-defense has remained unaltered by the UN Charter. In determining whether a given response is a justified situation of necessity, Professors McDougal and Feliciano have suggested that the requirement "can ultimately be subject only to the most comprehensive and fundamental test of all law, reasonableness in particular context."<sup>230</sup>

While the self-defense requirement of necessity has been subject to various interpretations, the requirement of proportionality has never been the subject of substantial disagreement. As indicated previously, the right of self-defense is limited by the requirement that the force used must be proportionate to the threat and cannot exceed measures strictly necessary to repel a threat.<sup>231</sup> Even if the requirement of actual necessity

<sup>224</sup> See text accompanying U.N. CHARTER *supra* note 175.

<sup>225</sup> *Id.*

<sup>226</sup> B. NETANYAHU, *TERRORISM HOW THE WEST CAN WIN* 134 (1986).

<sup>227</sup> *Corfu Channel* Case, *supra* note 160.

<sup>228</sup> Mallison, *Limited Naval Blockade of Quarantine Interdiction: National or Collective Defense Claims Valid Under International Law*, 3 *GEO. WASH. L. REV.* 335 (1962).

<sup>229</sup> N. SAFRON, *FROM WAR TO WAR: THE ARAB ISRAEL'S CONFRONTATION 1948-1968*, 268 (1969).

<sup>230</sup> Nydell, *Tension Between International Law & Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor* 24 *VIRG. J. INT'L L.* 459 (1984).

<sup>231</sup> Maizel, *supra* note 199, at 73. The implication is that the threatening source is where a response should be directed. One UN Resolution expresses this sentiment: "In the conduct of mili-

is satisfied, a claim of self-defense must be rejected if the nature and amount of force used is disproportionate to the character of the initiating coercion.

Although the proportionality requirement appears to be based upon a quantitative standard,<sup>232</sup> the doctrine of self-defense does permit use of force necessary to remove any danger which initially warrants the self-defensive action.<sup>233</sup> McDougal and Feliciano have suggested that like the "necessity" standard, the proportionality standard can be subject only to a reasonableness test.<sup>234</sup> Schwartzenberger has said that a reasonableness test is precisely what the International Court of Justice relied upon in the *Corfu Channel* case, in determining the legality of British naval actions against Albania in the Corfu Channel.<sup>235</sup> In short, the principle of proportionality requires only that such a level of force be exercised, as is necessary to reasonably deter or abate offending aggressive action.<sup>236</sup>

Debate does exist over whether measurement of the danger is limited to immediately preceding illegal acts, or whether measurement may include an "aggregation" of past illegal acts or an "accumulation of events" reflecting long-term threats.<sup>237</sup> Some argue that the legality of a response should not be judged by reference to action just prior to response, but rather should be judged by reference to the whole context of the relationship between involved parties.<sup>238</sup>

Notwithstanding contextual arguments, the Security Council's position on this matter is clear. The Security Council has formally condemned any attempt to justify totality of violence based upon an "accumulation of events as an illegal reprisal."<sup>239</sup> Therefore, at least for the time being, any response to an act of aggression which employs a level of violence which is greater than is necessary to counter any continuing immediate threat must be viewed as impermissible.

Turning the discussion to an analysis of the facts under a theory of self-defense, the question arises whether the United States exercised all practical peaceful measures in an attempt to resolve the problem of Lib-

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tary operations every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be made to avoid injury, loss or damage to civilian populations." G.A. Res. 2675 (XXV), Resolution On Protection of Civilians, *reprinted in* 1 THE LAW OF WAR 755 (Friedman ed. 1972).

<sup>232</sup> *Id.*

<sup>233</sup> Gross, *supra* note 154, at 487.

<sup>234</sup> Nydell, *supra* note 230, at 478.

<sup>235</sup> See Schwartzenberger, *The Fundamental Principles of International Law*, 87 Hague Recueil 195, 334 (1955).

<sup>236</sup> Maizel, *supra* note 154, at 73.

<sup>237</sup> Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 4 (1972).

<sup>238</sup> *Id.* at 4.

<sup>239</sup> *Id.* at 6-7.

yan-supported terrorism prior to the April 15, 1986 air strike. Of course, since the United States engaged in armed conflict with Libya before April 15, 1986 when U.S. naval forces clashed on March 24 with Libyan forces in the Gulf of Sidra,<sup>240</sup> the issue may be misstated. In January, 1986, the two nations had also squared off in a military showdown which ended without violence.<sup>241</sup>

In order to understand the tenor of relations between the two nations during this time, it is important that events which transpired just prior to and during the Gulf incidents, be viewed together with events which transpired just prior to and during the April air strike. However the "Gulf of Sidra events" should be conceptually separated from the "April air strike events" for purposes of legal analysis. Before engaging in naval activity in the Gulf during January and March, the United States had claimed that by conducting naval operations, it was asserting its right to operate in international waters.<sup>242</sup> Responding to the naval activity, Libya further framed the issue by reasserting its own territorial claim to the Gulf.<sup>243</sup> Thus the central issue at stake in the Gulf of Sidra confrontations — where to draw international boundaries—differs from the issues involved in the April air strike—state responsibility and terrorism. Therefore, for purposes of determining whether there was an exhaustion of all practical peaceful methods before force was used in April, the Gulf of Sidra events should not be considered.

Arguably, the United States did not employ all peaceful methods available to it in resolving the problem of Libyan terrorism. The subject of the role of Libya in state-supported terrorism was not a matter of substantial UN debate just prior to the air strike. However, international law requires only that *practical* peaceful measures be exhausted before there is a resort to force. Indecisive UN responses, such as those following the hijacking to Entebbe<sup>244</sup> and the militant takeover of the Ameri-

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<sup>240</sup> See *supra* note 73 and accompanying text.

<sup>241</sup> See *supra* notes 67-70 and accompanying text.

<sup>242</sup> See *supra* notes 68, 71 and accompanying text.

<sup>243</sup> See *supra* note 69 and accompanying text.

<sup>244</sup> On June 27, 1976, Four Arab terrorists hijacked an Israeli commercial jet just after take-off from Athens. The plane was carrying 250 passengers, including 96 Israeli citizens. The hijackers forced the pilot to fly the airplane to Entebbe, Uganda. There, the passengers were held hostage in the airport terminal. Non-Israelis were released. After much evidence showed that the President of Uganda was supporting the hijacking operation, and after hopes to solve the matter appeared futile, Israeli commandos flew to the airport and rescued the hostages. After the raid, the Organization of African Unity (OAU) submitted a complaint to the UN Security Council. The OAU complaint condemned the Israeli rescue attempt to save hostages as an "act of aggression." Despite strong evidence that the Ugandan government assisted in the hostage-taking operation, Uganda escaped formal action from the Security Council. The Security Council would not support a United States/United Kingdom resolution which did not condemn Uganda, but only the hijacking itself. See J. MURPHY, *THE UNITED NATIONS AND THE CONTROL OF VIOLENCE, A LEGAL AND POLITICAL ANALYSIS* 186-87, 190 (1982).



can embassy of Teheran,<sup>245</sup> and UN inaction despite Israeli requests for Security Council condemnation of terrorist Fedayeen activity<sup>246</sup> all indicate an unwillingness or incapability on the part of the United Nations to apply its general pronouncements and condemnations of terrorism to specific cases. Given the United Nations' dismal record of applying its own standards to specific incidents of terrorism, the United States had no reasonable expectation that the Libyan problem could be adequately resolved through the UN apparatus. Thus, the United States had no obligation to wait for a UN resolution of the issue of Libyan support of terrorism before it took upon itself measures of self-help. Where the United States clearly had a clear obligation to formally inform the Security Council of its exercise of force in the name of self-defense, that obligation was met by an American presentation to that body shortly after the strike.<sup>247</sup>

In the four months prior to the attack, the United States initiated a number of diplomatic and economic measures aimed at addressing the problem of Libyan-supported terrorism. In response to evidence<sup>248</sup> linking Libya to the December 27, 1985 Rome and Vienna bombings,<sup>249</sup> the United States severed economic ties with Libya, and conditioned the removal of those sanctions upon Libya's cessation of support for terrorist activities.<sup>250</sup>

Recognizing that effective economic sanctions against Libya could only take place in a multilateral framework, the United States also engaged in multilateral diplomatic efforts to encourage other nations to join in severing economic relations with Libya.<sup>251</sup> With reluctant and indecisive reaction to the American economic sanctioning,<sup>252</sup> the American ef-

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<sup>245</sup> In January, 1979, the Shah of Iran was deposed and left Iran, replaced by the Ayatollah Khomeini. The United States permitted the Shah entry into the United States for medical treatment. In protest of the entry, Iranian militants, with the tacit approval of the Iranian government, seized the American embassy in Iran, taking 66 members of the embassy staff hostage, and demanding that the United States return the Shah and his wealth to Iran. The United States brought the case to the Security Council and before the International Court of Justice. However Iran did not comply with the Security Council's resolution calling for the release of the hostages nor did it recognize the jurisdiction of the court. After American diplomatic efforts failed to obtain the release of the hostages, the United States launched a military rescue, which aborted due to helicopter failure. Though, concededly, United Nations reaction to the incident created an atmosphere which enabled the adoption of the International Convention Against Hostage-Taking, the United Nations proved largely irrelevant to the resolution of the crisis. *Id.* at 191-93.

<sup>246</sup> See generally Y. TEKOAH, IN THE FACE OF THE NATIONS: ISRAEL'S STRUGGLE FOR PEACE (1976).

<sup>247</sup> See DEP'T ST. BULL. no. 2111, *supra* note 133 and accompanying text.

<sup>248</sup> See *Libya Under Qadhafi*, *supra*, note 49; see Trewhitt *supra* note 12, at 23.

<sup>249</sup> See *supra* note 48 and accompanying text.

<sup>250</sup> See *supra* note 57 and accompanying text.

<sup>251</sup> See *supra* note 56 and accompanying text.

<sup>252</sup> See *supra* note 58, 59 and accompanying text.

fort to influence illegal Libyan behavior by peaceful measures was substantially reduced. Given the strength of economic ties between Western European nations and Libya,<sup>253</sup> and given the statements issued by those nations' leaders such as Thatcher's statement which categorically ruled out economic sanctions as an effective way of countering terrorism,<sup>254</sup> it was apparent that any change in economic policy by those nations was unlikely.

American efforts to alter Libyan support of terrorism through diplomatic and economic sanctioning efforts apparently failed when on March 25, 1986, Libya directed<sup>255</sup> the bombing of the West German discotheque which killed three persons and injured another 154 persons.<sup>256</sup> Nonetheless, the United States used further diplomatic efforts through discussions held by U.S. Ambassador Walters and other Western nations' leaders<sup>257</sup> concerning ways to deal with the Libyan terrorism, before resorting to armed force the tenth day after the West German bombing.

Perhaps the United States should have waited until the outcome of the April 14, 1986 meeting by the European Community's foreign ministers<sup>258</sup> before resorting to the armed strike. However in view of the European Community nations' previous disapproval of economic sanctions and the absence of any intervening event which would indicate a change in their position, and failure to make promises that definitive measures would result from the meeting,<sup>259</sup> it is unreasonable to have expected the United States to wait for further developments in the remote chance that the Libyan threat could be quelled in a peaceful manner. The United States expended all practical peaceful measures to resolve the problem of Libyan support of terrorism before it resorted to the air strike.

Turning to the question of whether there was a compelling necessity for the United States to use force in response to an immediate Libyan threat, it should be noted that Libya had within its borders over twelve centers for training sabotage operations,<sup>260</sup> to which over one hundred million dollars a year had been allocated.<sup>261</sup> With numerous reliable reports of Libyan terrorism,<sup>262</sup> it is reasonable to conclude that Libya had

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<sup>253</sup> For example, from 1978 to 1980 the European Community accounted for more than sixty percent of Libya's total imports. *Economic Sanctions to Combat International Terrorism*, U.S. DEP'T OF STATE BUREAU OF PUB. AFFAIRS, spec. rep. no. 149, July 1986, at 2. *See also supra* note 59.

<sup>254</sup> *See supra* note 62 and accompanying text.

<sup>255</sup> *International Terrorism*, *supra* note 126 and accompanying text.

<sup>256</sup> *See supra* note 76 and accompanying text.

<sup>257</sup> *See supra* note 83 and accompanying text.

<sup>258</sup> *See supra* note 86 and accompanying text.

<sup>259</sup> *Id.*

<sup>260</sup> *The Libyan Problem*, *supra* note 30, at 2.

<sup>261</sup> *See supra* note 38 and accompanying text.

<sup>262</sup> *See supra* notes 39-42 and accompanying text.

adopted terrorism as a *modus operandi* in its conduct of foreign policy. Libya had used its sovereign powers to offer safehaven to terrorists whose operations were made much more powerful because of its help from those sovereign functions.

Evidence exists indicating that American installations, diplomats, and tourists were the targets of future Libyan terrorist operations.<sup>263</sup> Colonel Qadhafi has publicly stated his belief that Libya had the right to export terrorism to the United States in response to an attack by the United States,<sup>264</sup> showing the determination of Libya to execute such attacks. That belief was manifested in the considerable number of Americans who had been the objects of terrorist attacks in the Rome and Vienna bombings,<sup>265</sup> and the West Berlin discotheque bombing.<sup>266</sup> While the previous Rome and Vienna bombings should not be considered when determining what is an appropriate level of American response to the discotheque bombing,<sup>267</sup> such evidence is probative and permissible in an assessment of the future plans of attack. That evidence is particularly probative in light of Libya's adoption of terrorism as a *modus operandi* in the conduct of its foreign affairs. In sum, by public statements and by its own specific conduct, Libya made threatening manifestations toward the United States just prior to the American bombing of Libya in April.

France's expulsion of four Libyans who were alleged to have been communicating with people planning attacks on American installations and personnel just ten days prior to the American strike,<sup>268</sup> supports the conclusion that at the time of the April 15 air strike, the Libyan threat directed against the United States was an ongoing one. The French evidence was corroborated by American accounts that at the time of the American strike on Libya, a "multitude" of future attacks had been planned<sup>269</sup> against American persons and property.<sup>270</sup>

At the time of the American attack on Libya, the Libyan threat posed by terrorist actions was an immediate one which compelled the United States to resort to the only action that would rectify the situation—the use of force. The United States was placed in a situation where there was no moment for deliberation. The U.S. had to act at that particular time or suffer further terrorist acts, acts which Libya had repeatedly demonstrated a willingness to use. American action was reasonable in

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<sup>263</sup> See *supra* note 127 and accompanying text.

<sup>264</sup> *Department of Defense, supra* notes 45, 46.

<sup>265</sup> See *supra* note 48.

<sup>266</sup> See *supra* note 76.

<sup>267</sup> See Bowett, *supra* note 226, at 4.

<sup>268</sup> See *supra* note 79.

<sup>269</sup> See *supra* note 137 and accompanying text.

<sup>270</sup> See *supra* note 127 and accompanying text.

the particular context<sup>271</sup> since any future diplomatic or economic actions could not have prevented expected irreparable harm to American citizens and property.

The last issue which must be addressed is whether the American attack on Libya was proportionate to the threat imposed by Libya. The vast majority of areas struck by American bombs in the April strike were military targets—targets of command and control, intelligence, logistic, and training centers.<sup>272</sup> The four major areas of attack were two airfields and two military training centers.<sup>273</sup> American forces used due care to avoid nonmilitary damage by withholding aircraft bombs which were found to be experiencing mechanical problems.<sup>274</sup> Due care was also shown by the one to two percent of bombs dropped which had made an impact in civilian areas.<sup>275</sup> At least some civilian casualties were due to Libyan military structures placed so close to civilian sites. For example, while some of Colonel Qadhafi's family members were among the casualties, the family members were struck during the attack against the legitimate target of Colonel Qadhafi's military headquarters, as the headquarters was also used as the Qadhafi family residence.<sup>276</sup> While each nation is under an obligation to conduct military operations in a manner which minimizes damage to civilians, no international rule exists which obligates a nation to forgo a legitimate military target simply because injury to civilian personnel might take place. It appears that American forces were directed to targets strictly necessary to repel the terrorist threat.

A quantitative comparison of the relative damage inflicted by the American force in contrast to damage inflicted and expected to be inflicted by Libya, is difficult to make due to a nondetailed description released to the public concerning the level of threat that Libya posed in relation to the United States. However, it may be noted that the level of damage caused by the American striking force, thirty-seven killed and ninety-three wounded,<sup>277</sup> may be measured against the discotheque bombing just days before the air strike which resulted in 154 wounded and three killed<sup>278</sup>, the threat of several future attacks similar to the Ber-

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<sup>271</sup> See U.N. CHARTER, *supra* note 185.

<sup>272</sup> See DEP'T ST. BULL. no. 2111, *supra* note 14, at 19.

<sup>273</sup> See *supra* notes 14-16 and accompanying text.

<sup>274</sup> See *supra* note 28 and accompanying text.

<sup>275</sup> See *supra* note 26 and accompanying text.

<sup>276</sup> See *supra* note 23 and accompanying text.

<sup>277</sup> See *supra* note 22 and accompanying text.

<sup>278</sup> Eventually, a total of three persons, two Americans and one Turk, died as a result of the discotheque bombing. Department of Defense Security Review. While the first American and the Turk died immediately after the explosion and therefore before the American bombing of Libya, the death of the second American did not occur until some time after the American raid on Libya. *Department of Defense Security Review* (quoting U.S. Army Casualty Statistics).

lin bombing which were planned by Libya<sup>279</sup> and accounts that a "multitude" of future attacks had been planned by Libya.<sup>280</sup> In view of the magnitude of damages sustained on both sides, and in view of American efforts to limit targets to areas capable of supporting terrorist activity, it is concluded that the American level of response was proportional and reasonable. By limiting targets to Libyan military infrastructure capable of aiding terrorist activity—damage was limited to the removal of the danger which initially warranted self-defensive action.<sup>281</sup>

In sum, the United States legitimately acted in self-defense when it responded to ongoing Libyan-supported terrorism by striking targets within Libya, which had some connection to Libya's capabilities to engage in additional terrorist acts. The United States tried unsuccessfully to resolve the issue of Libyan-supported terrorism by utilizing all practical diplomatic and economic methods. Only when faced with immediate ongoing terrorist threats did the United States use force against targets whose elimination would help in the removal of the terrorist threat.

## V. CONCLUSION

Libyan efforts to employ terrorist methods to accomplish its own national objectives represents a dangerous and new phenomenon—the willingness of a sovereign state to shape international events by searching out groups who share common political sympathies, and then empowering those groups to strike violently at indiscriminate targets in order to further shared political concerns. The consequences of this state-supported terrorism are that the terrorist is able to take advantage of all of the rights and privileges of a sovereign. The terrorist is given access to considerable economic and military resources, and is able to cloak his activity under the guise of legitimate state security. This new color of terrorism coupled with increasingly sophisticated weapons and other improved technological capabilities, suggest that "hit-and-run" violence by groups for which accountability is difficult to establish is a form of violence which is here to stay.<sup>282</sup>

The challenge to the international community is to effectively respond to such violence while keeping within the boundaries of international legal constraints designed to ensure world peace and order.<sup>283</sup> A

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<sup>279</sup> See *supra* note 136 and accompanying text.

<sup>280</sup> See *supra* note 137 and accompanying text.

<sup>281</sup> See Maizel, *supra* note 232 and accompanying text.

<sup>282</sup> One university study reported that even if conflicts in the Middle East should be resolved, Americans should not expect the incidents of terrorism to decline because it has become too useful a tool to be discarded easily by groups seeking political leverage. N.Y. Times, July 4, 1986, at A8, col. 1. For an interesting article addressing some policy concerns caused by terrorism, see Laqueur, *Reflections on Terrorism*, 786 FOR. AFFAIRS, 85.

<sup>283</sup> For an excellent book which overviews a number of the policy issues posed by terrorism,

state which chooses to substantially involve itself with terrorist activity must not be allowed to escape accountability. Given the international community's clear rejection of retaliatory measures, any state which employs force in response to state-supported terrorism must be prepared to convincingly justify its actions to the world community utilizing the standards of self-defense.

In the final analysis, the legality of the American bombing of Libya will not be judged by short-term political reaction. Rather, it will be judged by the long-standing principles of the law of nations. Given substantial Libyan involvement in terrorist bombings, Libya assumed liability for those terrorist acts. Given the measured steps that the United States undertook against Libya before it resorted to force, the American government's obligation to defend its citizens in light of impending attack, and the deliberate efforts made by the American government to limit its armed response to those actions which would repel an immediate threat, the United States abided by international law in using force in self-defense against Libya.

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*see generally* B. NETANYAHU, *TERRORISM: HOW THE WEST CAN WIN* (1986). For a more emotional treatment of the same subject, *see generally* G. RIVERS, *THE WAR AGAINST THE TERRORIST: HOW TO WIN* (1986). Writes the author in one passage from the latter book: "I profoundly believe that lawyers and courts, by and large, have been a deterrent to winning the war against terrorism and in some places have made such a mockery of justice as to make my blood boil." *Id.* 155-56.

