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Self-Help In Combatting State-Sponsored Terrorism: Self Defense and Peacetime Reprisals

Guy B. Roberts*

I. INTRODUCTION

"I will do such things—what they are, yet I know not; but they shall be the terrors of the earth!"

—Shakespeare

The stamp of terrorism is on our times. It has become a phenomenon of almost everyday occurrence that seems to escalate continually in its violence, horror and senselessness. The recently attempted hijacking of Pan Am Flight 73 in Karachi which left seventeen dead, the massacre of twenty-two Jews in Istanbul's Neve Shalom Synagogue, bomb blasts in West Germany and the Netherlands, eight bombing incidents in Paris within ten days last September, and two more Americans kidnapped by masked gunmen in Beruit have brought terrorism vividly and graphically into the public eye. Every year seems to be marked by one or more spectacular terrorist events. In 1983, there were the car bombing of the U.S. Marine Corps battalion landing team's headquarters in Beirut which killed 241 servicemen and the detonation of two mines in the Martyrs' Mausoleum in Rangoon, Burma which claimed the lives of twenty-one South Korean and Burmese dignitaries. In 1984, the U.S. embassy in East Beirut was again targetted by terrorists (the original embassy was bombed in 1983), and an English policewoman was shot by

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The opinions expressed in this article are solely those of the author and do not necessarily represent the views of the U.S. Government or any of its agencies.

1 KING LEAR, Act II, sc. iv.
3 Fingerprints of Terror, NEWSWEEK, Sept. 22, 1986, at 52.
4 For a full discussion of this attack which resulted in more Marines being killed in a single day (239) since the assault on Iwo Jima in World War II, see GOV'T PRINTING OFFICE, REPORT OF THE DEPARTMENT OF DEFENSE COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, OCT. 23, 1983, (Dec. 20, 1983) [hereinafter Long Commission Report].
persons sequestered inside the Libyan People’s Bureau (pseudo-embassy) in London’s West End.

1985 proved to be the most violent year in the history of terrorism with more than 800 international terrorist incidents. This was a 60 percent increase over the rate of the previous two years. There were 2,177 casualties (877 dead) attributable to international terrorism, the last and most horrific being the grenade and machine gun attacks against Israel’s El Al Airlines in Rome and Vienna. At this writing, there have been well over 1,000 casualties, including over 350 dead.

1985 was a banner year in terms of terrorist attacks against United States citizens as well. More Americans were killed (28) and injured (160) than in any other year except 1983 (when the Marine headquarters in Beirut was bombed). While statistically the number of Americans attacked is low, Americans remain the number one target of terrorists worldwide.

In the past decade, there have been more than 6,200 terrorist incidents recorded worldwide. This “trail of carnage” includes some 4,700 dead, more than 9,000 injured and untold millions of dollars in property damage. Obviously, these figures do not begin to measure the human misery due to societies fragmented and families shattered by the tragedy of terrorism. Clearly, international terrorism is here to stay; and Americans will continue to be faced with its ever present danger.

The use of terrorism as a tool to obtain political goals is not new. While the practice of terrorism dates back centuries, its current resurgence, technology, and potential for extreme violence—the realm of pure
terror—are new. Although an old social and political phenomenon, terrorism has recently received renewed attention primarily because of the proliferation of terrorist activities; the dramatic, shocking and media-catching nature of most terrorist events; and, the seeming helplessness of the terrorist targets—Western democracies. These factors have allowed terrorists and their sponsors to act with relative impunity. Most importantly, government initiated or regime sponsored terror-violence has become an attractive alternative to conducting modern conventional war, particularly in a world society that, at minimum, pays lip service to general principles condemning aggressive and direct warfare. In sum, terrorism has become another “weapons system,” a cheap means of waging war against one’s enemies.

Despite numerous efforts to legislate away terrorism, to establish harsher punishments for terrorist acts, and to seek closer cooperation with other nations, acts of terrorism continue to plague us. All of the recent efforts to use law to fight terrorism have largely failed. The reasons for this are complex, but generally center around the world community’s failure to condemn terrorist acts regardless of their motivation. In order to have an effective legal regime proscribing and punishing terrorism, states must adopt and apply common standards on which acts of violence will be treated as crimes. Currently, national policy differences have prevented states from agreeing on regulation and enforcement. They have refused to adopt and apply common standards, or a legal process, that distinguishes permissible from impermissible violence. Additionally, as Judge Sofaer has noted, terrorist activities are criminal acts:

...Terrorism, in essence, is criminal activity. In applying law domestically, governments seek to punish and deter crime as effectively as possible. But they recognize that law cannot eliminate crime. They can expect even less of the law in dealing with international terrorism. The world has no international police force or judicial system.

When law and diplomacy fail, states look to other methods of protecting themselves. Foremost among these is the use of force. After the U.S. hostages in Iran were released in 1981, President Reagan declared: “Let terrorists be aware that when the rules of international behavior are

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13 See the discussion on self-defense and reprisals, infra. Arguably, all wars are illegal under the United Nations Charter, which limits justification for war to cases of self-defense U.N CHARTER art. 51 or collective security U.N. CHARTER art. 52; Dinstein, Terrorism and Wars of Liberation, 3 ISR. Y.B. HUM. RTS. 78 (1973).


15 Sofaer, Terrorism and the Law, 64 FOREIGN AFF. 901, 902 (Summer 1986).
violated, our policy will be one of swift and effective retribution."\textsuperscript{16} Despite this and other statements promising retaliation, little was done. Secretary of State George Shultz's frustrations over U.S. inaction in the face of the mounting terrorist challenge finally boiled over in the form of one of the strongest speeches on terrorism by a government official. He declared that the United States must be ready to use military force to fight terrorism and retaliate for terrorist attacks even before all the facts are known. In any event, "we may never have the kind of evidence that can stand up in an American court of law."\textsuperscript{17} Shultz concluded that we must be prepared to accept the loss of some innocent lives as a collateral result of our use of force. However, he added:

[W]e cannot allow ourselves to become the Hamlet of nations, worrying endlessly over whether and how to respond. A great nation with global responsibilities cannot afford to be hamstrung by confusion and indecisiveness. Fighting terrorism will not be a clean or pleasant contest, but we have no choice but to play it.\textsuperscript{18}

Any use of force by a nation inevitably raises questions regarding the ability of law to impose restraints on a state's recourse to force. For example, in discussing the legal aspects of the U.S. action in Grenada in 1983, a special committee study prepared for the American Bar Association's Section of International Law and Practice reported:

[T]here has been a steady erosion of the legal norms governing the use of force in international relations that did not begin with the United States' intervention in Grenada, and that this erosion has left national leaders feeling less constrained by these norms than they once were. This, we think, is a dangerous trend. History has shown that the successful use of the military instrument has a tendency to become habit forming, with the right to use armed force inferred by the victor from the fact of victory.\textsuperscript{19}

Given the dismal fact of contemporary history that international law has largely failed to develop comprehensive standards to deal with terrorism or, to take any meaningful action to counter the global terrorist threat, states will be faced increasingly with the necessity to use self-help measures and act unilaterally against the threat of terrorism. Consequently, it is necessary to examine legal justifications for the use of force which since 1945 have focused primarily centered on actions premised on self-defense. However, some actions which may be necessary to combat

\textsuperscript{18} Id.
terrorism may not always be justifiable as purely actions in self-defense. The primary focus of this article is that unilateral actions taken by a state in response to terrorism should be judged on whether such actions are necessary and appropriately restrained. These self-help measures should not be limited to acts in self-defense, but should also include the ability to conduct peacetime reprisals if the occasion warrants. The present standards regulating the use of force have proven inadequate. This was one of the conclusions of the Committee on Grenada's Report:

In some measure, existing legal norms governing the use of armed force reflect past needs and experiences more than current ones. To the extent, for example, that reasonable efforts to counter insidious forms of aggression, protect human rights, restore civil order or achieve other legitimate ends do not square with the law or our present treaty commitments, perhaps the law needs amendment and our treaty commitments need updating.\(^2\)

Last year, in a speech before the American Bar Association, President Reagan called on international lawyers to accept the challenge “to become part of the solution to the problem of terrorism.”\(^3\) If anything can be clear in the war on terrorism it is that there are glaring gaps in the legal control of this “leprosy of modern times.” Controls in the domestic setting are applied relatively easily because the domestic criminal law of the United States, for example, can amply respond through its numerous enforcement agencies to terroristic acts. This is not, however, the case internationally. International law is unenforceable; it lacks a legal system that backs its laws with the trappings of justice, courts, juries, police, prisons, etc. Consequently, great gaps exist when a response to terrorist violence is needed, particularly when states that sponsor terrorism insist their conduct constitutes a form of violence for legitimate ends, therefore acceptable under international law.

Sophisticated terrorist organizations—armed, trained and supported by radical states such as Libya—pose one of the greatest threats to Western democracies. In view of recent attacks and the continuous, grim upsurge in terrorism, the American public is beginning to question seriously an international system that is either structured or construed to provide terrorists and those who sponsor them freedom from accountability. Responses to terrorism have taken many forms, primarily quiet diplomacy. However, it is clear that any comprehensive plan to stop terrorism must include the option of using force when all else fails.

The idea of using force to combat terrorism has gained wide accept-

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20 Id. Professor Wallace, one of the committee members, has presented his thoughts on how to fill the gaps. See Wallace, International Law and the Use of Force, 19 INT′L L. 259 (1985).

ance among officials within the Reagan administration. Secretary of State Shultz observed that:

We must reach a consensus in this country that our responses should go beyond passive defense to consider means of active prevention, pre-emption and retaliation. Our goal must be to prevent and deter future terrorist acts and experience has taught over the years that one of the best deterrents to terrorism is the certainty that swift and sure measures will be taken against those who engage in it.\(^\text{22}\)

Former presidential national security advisor Robert C. McFarlane was just as explicit:

We cannot and will not abstain from forcible action to prevent, preempt or respond to terrorist acts where conditions merit the use of force. Many countries, including the United States, have the specific forces and capabilities we need to carry out operations against terrorist groups.\(^\text{23}\)

As demonstrated by the U.S. strike on Libya subsequent to the April 1986 disco bombing in Berlin, these words have been transformed into deeds.

Since the United States has committed itself to the use of military force as one option in the war on terrorism, and because the present international legal system has so far failed to provide adequate protection, it is useful to distinguish the accepted and permissible uses of force (self-defense) in the world community from impermissible uses (reprisals), and propose a more realistic and practical approach to regulation of the use of force. However, prior to analyzing self-defense and peacetime reprisals as self-help measures to combat terrorism, we must first briefly examine and determine the meaning of the word "terrorism" and the significance of state sponsorship.

II. TERRORISM, THE TERRORIST AND STATE SPONSORSHIP

A. The Definitional Anomaly

"I know it when I see it." —Justice Potter Stewart\(^\text{24}\)

Definitions of terrorism are as prolific as its many manifestations. Indeed, as with obscenity, perhaps we are trying to define that which may be indefinable. Usually the complaint is not that there are no definitions, but rather there are too many and too diverse. Some believe the term is indefinable and therefore should be eliminated. For example,

\(^{22}\) Shultz, supra note 17.


Judge Baxter believed that "[w]e have cause to regret that a legal concept of ‘terrorism’ was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose."25 Another critic remarked: "Terror and terrorism are not words which refer to a well defined and clearly identified set of factual events. Neither do the words have any widely accepted meaning in legal doctrine. Terror and terrorism, consequently, do not refer to a unitary concept in either law or fact."26

Despite these criticisms, attempts to define and thus condemn terrorism continue.27 Certainly terrorism is not a legal term of art. It has been defined for national purposes; and it is generally recognized without difficulty. But for the lawyer, particularly the international lawyer, the term presents a number of definitional problems which highlight the dependence of law on the political order in which it operates. A successful definition must be based upon agreement as to the nature of the phenomenon to be described. Unfortunately, at an international level there is wide disagreement concerning the circumstances when it is legitimate to use violence for political ends.

The difficulty in defining terrorism has led to the cliché that one man's terrorist is another man's freedom fighter. But to confuse the terrorist with a freedom fighter is to allow those groups and states that support terrorism to define away the term. For Senator Jackson the distinction between the two is self-evident:

The idea that one person's “terrorist” is another “freedom fighter” cannot be sanctioned. Freedom fighters or revolutionaries don't blow up buses containing non-combatants; terrorist murderers do. Freedom fighters don't set out to capture and slaughter school children; terrorist murderers do. Freedom fighters don't assassinate innocent businessmen, or hijack and hold hostage men, women, and children; terrorist murderers do. It is a disgrace that democracies would allow the treasured word “freedom” to be associated with the acts of terrorists.28

28 Jackson, Terrorism as a Weapon in International Politics, in INTERNATIONAL TERRORISM 33, 36 (1981). President Reagan recently made much the same comparison between freedom fighters and terrorists when he said: “Freedom fighters do not need to terrorize a population into submission. Freedom fighters target the military forces and the organized instruments of repression keeping dictatorial regimes in power. Freedom fighters struggle to liberate their citizens from oppression and to establish a form of government that reflects the will of the people. Radio Address, May 31, 1986 reported in 86 DEP'T ST. BULL 23 (Sept. 1986).
Several experts, most recently Judge Sofaer, have noted how terrorist organizations have shrewdly sought to come under the umbrella of legitimacy by asserting that they seek self-determination, and are engaged in a war of "liberation" to free the "people" from a "colonialist," or "racist" regime. They often use the name of "People's Army," or "Liberation Army," and style themselves as "freedom fighters," or "guerillas." In 1973, the United Nations General Assembly adopted Resolution 3103 proclaiming that "armed conflicts involving the struggle of peoples against colonial and racist regimes are to be regarded as international armed conflicts . . . ." No distinction was made between liberation wars and terrorist acts; and this Resolution has often been invoked by terrorist organizations to support their activities. Other United Nations actions have further blurred the distinction between "freedom fighters" and terrorists. In 1972, after the Lod Airport attack by Japanese terrorists, United Nations Secretary General Waldheim attempted to push a resolution through the General Assembly condemning these acts of terror. Instead, many nations rejected out of hand any proposal of "rules for the purpose of assigning legal limits" to so-called revolutionary armed struggle. For example, the delegate from Madagascar stated:

Acts of terrorism inspired by base motives of personal gain were to be condemned. Acts of political terrorism, on the other hand, undertaken to vindicate hallowed rights recognized by the United Nations, were praiseworthy. It was, of course, regrettable that certain acts in the latter category affected innocent persons.

And the statement of the delegate from Algeria:

His delegation did not agree with the statement of the Secretariat's report that the legitimacy of a cause did not in itself justify recourse to certain forms of violence. Those serving the cause in question should have a choice of the means to be used.

One noted authority has criticized U.N. measures as, in essence, having the effect of "encouraging third party intervention on behalf of self-proclaimed liberationists and condoning terrorist activity conducted under color of claims to self-determination."

Despite the unlimited quantity of definitions and the lack of a global consensus on what terrorism is—due in no small part to the difficulty of

29 Sofaer, supra note 15, at 904.
31 Sofaer, supra note 15, at 904.
32 Id.
33 Id. See also Statements of Cameroon and Somali, GAOR, 6th Comm., 27th Sess., L.J. 493, 495 (1982).
formulating an acceptable definition because of the political character of
the conduct—\(^{35}\) it is, nevertheless, useful to create a working definition.

The U.S. State Department defines terrorism as follows:

- **Terrorism**: The threat or use of violence for political purposes by
  individuals or groups, whether acting for, or in opposition to, established
  governmental authority, when such actions are intended to shock, stun
  or intimidate a target group wider than the immediate victims.

- **International Terrorism**: Terrorism conducted with the support of a
  foreign government or organization and/or directed against foreign
  nationals, institutions, or governments. Terrorism has involved groups
  seeking to overthrow specific regimes to rectify national or group
  grievances or to undermine international order as an end in itself.\(^{36}\)

One expert defined terrorism as acts that in themselves may be classic forms of crime—murder, arson, the use of explosives—but differ from typical crimes because they are executed “with the deliberate intention of causing panic, disorder, and terror within an organized society.”\(^{37}\)

Terrorism can be defined objectively by the quality of the act, not by the identity of the perpetrators or the nature of their cause. All terrorist acts are crimes, and many would also be war crimes or “grave breaches” of the rules of war if we were to accept the terrorist’s assertion that they are waging war.\(^{38}\) All terrorist acts involve violence or the threat of violence, sometimes coupled with explicit demands. These acts are often directed against civilian targets, and often carried out in a way that will achieve maximum publicity. The purposes are political. The actors are usually members of organized groups which are by necessity secretive; but, unlike other criminals, terrorists often claim credit for their acts. Finally, the hallmark of terrorism is that the acts are intended to produce psychological effects far beyond the immediate physical damage.\(^{39}\) Terrorism becomes “international” when the terrorist incidents have clear


international consequences. Terrorism transcends national boundaries through the choice of a foreign victim or target, the commission of a terrorist act in a foreign country, or an effort to coerce or intimidate a foreign government into changing its policies.\(^{40}\)

While these criteria do not eliminate all ambiguity, they enable us to draw some limits and answer some questions. Terrorism differs from ordinary crime in its political purpose and its primary objective. Its distinction from an ordinary criminal act is clear. It is not synonymous with guerrilla war or any other kind of war. In fact, "one man's terrorist is everyone's terrorist."\(^{41}\) Terrorists primarily specialize in attacking targets that are forbidden to military belligerents. When they occasionally attack military or police targets, their primary purpose is to strike fear into the target society rather than defeat military forces. Terrorism emphasizes attacking persons and targets without the justification of ordinary military necessity, since the purpose is to terrorize rather than to perform ordinary military tasks.

While some writers and a number of states have argued that the purpose behind the act determines its morality and thus legitimacy,\(^{42}\) the definitional discussion above rejects that argument in favor of focusing on the degree of emphasis placed on attacking nonmilitary targets for the purpose of terrorizing a society. Nevertheless, it is an unfortunate fact of life in our world community that until states can reach consensus on what is acceptable and unacceptable international conduct, we will have no respite from this phenomena defined as terrorism. As Solzhenitsyn once wrote:

> The great world organization of man was unable to bring forth even a moral condemnation of terrorism. A selfish majority in the United Nations countered such a condemnation with yet another effort at dubious distinction by asking whether any form of terrorism was in fact harmful. And what is the definition of terrorism, anyway? They might well have suggested in jest: 'when we are attacked, it's terrorism, but when we do the attacking, it's a guerilla movement of liberation.' But let's be serious. They refuse to regard as terrorism a treacherous attack in a peaceful setting, on peaceful people, by military men carrying concealed weapons and often dressed in plain clothes, as terrorism. They demand instead that we study the aims of terrorist groups, their bases of support and their ideology, and then perhaps

\(^{40}\) B. Jenkins, International Terrorism: The Other World 4 (1985).

\(^{41}\) B. Jenkins, About Terrorism, 12 Annals 463 (Sept. 1983).

\(^{42}\) Young, Revolutionary Terrorism, Crime and Morality, 4 Soc. Theory and Prac. 287 (1977); O. Oruka, Legal Terrorism and Human Rights, 1985 Praxis Inter. 376 (Jan.). See generally, The Morality of Terrorism, Religious and Secular Justifications, supra note 38.
acknowledge them to be sacred "guerillas."  

B. State Sponsored Terrorism

"In principle we have never rejected, nor can we reject, terror. Terror is one of the forms of military action that may be perfectly suitable, even essential, at a definite juncture in the struggle."

—V. Lenin

Americans generally assume that others will agree that international terrorism or at least terroristic acts are unacceptable. Unfortunately, as noted previously, acceptance of terrorism is not confined to the fanatics who carry out these acts. Indeed, many nations have recognized the great potential of terrorism. The terrorist is now the spearhead of a developing theory and practice of surrogate warfare. Primarily the support of various states has caused terrorism to become a world problem of such magnitude. While terrorist acts are criminal and are treated accordingly, support for those state actions in and against the sovereignty of another state is nothing less than warfare, albeit covert and relatively cheap. As described by the State Department, "[t]errorism is every bit as much a form of war against a nation's interest and values as a full-scale armed attack. And it is a weapon wielded particularly against innocent civilians, against free nations, against democracy, against moderation and peaceful solutions."

A former Deputy Ambassador to the United Nations called state sponsored terrorism "a weapons system that is devastatingly effective. With very few exceptions, all terrorism is state-sponsored, state-implemented, or state condoned." A growing number of governments also are using terrorist tactics themselves or employing terrorist groups as a mode of surrogate warfare. As modern, traditional warfare becomes increasingly impractical—it is expensive, excessively destructive and world opinion may impose "inconvenient" restraints—nations, particularly those which cannot mount a conventional military challenge, increasingly see terrorism as the only viable alternative.

Why is state-sponsored terrorism more dangerous than the more "traditional" terrorism? With state support, terrorist groups can be

45 See, text accompanying supra notes 28 through 37.
much more lethal and have far greater operational reach. Money, sanctuary, weapons and munitions, intelligence, training and technical expertise are much more readily available to terrorist than to traditional groups. Likewise, there are fewer constraints on such groups; they plan large-scale operations without unduly worrying "about alienating perceived constituents or provoking public backlash," since they need not depend on the local population for support.\textsuperscript{48}

With the advent of state sponsorship, international terrorism has come to resemble the workings of a multinational corporation. For example, "an operation would be planned in West Germany by Palestinian Arabs, executed in Israel by terrorists recruited in Japan with weapons acquired in Italy but manufactured in Russia, supplied by an Algerian diplomat, and financed with Libyan money."\textsuperscript{49} While groups like the Abu Nidal terrorist organization may not be under the direct control of a state, an overwhelming amount of evidence substantiates that these groups receive money, training, equipment, passports and state controlled safe havens such as Lebanon's Bekaa Valley, presently controlled by Syria.\textsuperscript{50} Perhaps the challenge that state supported international terrorism poses for Western democracies is best summarized in a recent Joint Chiefs of Staff Report:

State support for wars of national liberation and international terrorist organizations will be a special concern. Support from the Soviet Union, North Korea, Cuba and their allies and the provision of financial aid, weapons and training from Syria, Iran, Libya, and the People's Democratic Republic of Yemen will likely continue. Terrorists may or may not be centrally controlled by their patrons. Nevertheless, the instability they create in industrialized Western and Third World nations undermines the security interests of the United States and its allies.\textsuperscript{51}

While "we may never have the kind of evidence that can stand up in an American court of law,"\textsuperscript{52} the evidence of state support is nevertheless compelling. It is rare that terrorist attacks can be so directly linked to their state sponsor as in the 1983 Rangoon bombing,\textsuperscript{53} or the Libyan instigated attack on the Berlin disco in April 1986.\textsuperscript{54} Yet, there is plenty

\textsuperscript{48} Jenkins, \textit{The U.S. Response to Terrorism: A Policy Dilemma} 1985, \textit{ARMED FORCES J. INT'L} 41 (Apr.).
\textsuperscript{52} Shultz, \textit{supra} note 17.
\textsuperscript{53} \textit{FIGHTING BACK, supra} note 51.
\textsuperscript{54} See \textit{INTERVIEW WITH SECRETARY SHULTZ, APRIL 16, 1986, 86 DEP'T ST. BULL.} 8, 9 (June 1986).
of evidence of an active campaign to support and encourage terrorist attacks against the United States and her allies. The states most active are Iran, Libya, Syria, North Korea, Cuba and Nicaragua. The Soviet Union and Eastern European nations stand in the background as trainers and promoters.

Having proven the value of terrorism as a tool in the 1979 American hostage crisis, the Iranians have since employed terrorists, either under direct Iranian control or responsive to Iran's direction, in numerous attacks against the United States, other Western states and moderate states in the Middle East. As stated by Central Intelligence Agency Director William Casey, "more blood has been shed by Iranian terrorists than any other," including fifty-seven incidents in 1983, and sixty-six in 1984. Its policy of terrorism was typified by Iran's announcement regarding the Shah and other enemies of the Iranian revolution:

Anyone who wants to assassinate these people in Iran or outside [could be] free anywhere to carry out the order of the court. They cannot be arrested by any foreign government as a terrorist because they will be carrying out the order of Iran's Islamic revolutionary court.

Most of the attacks, certainly the most deadly, sponsored by Iran have been carried out in Lebanon and Kuwait. Its most infamous surrogate is the so-called Islamic Jihad. Working with Syria, Iran has actively supported bombings, kidnappings, hijackings and assassinations; and it allows within its borders bases where terrorists can rest, train and re-equip to be maintained. In sum, "the pattern of Iranian-backed attacks against U.S. and other targets in the Middle East and elsewhere is clear and is part of an ongoing effort by the Khomeini regime to internationalize its revolution."

Libya—reminiscent of the pirate state it once was—is probably the most open and notorious advocate of terrorism. President Reagan quoted Qadafi as saying that Libya was "capable of exporting terrorism to the heart of America. We are also capable of physical liquidation and destruction and arson inside America." Also, a recent official publication of Libya's Revolutionary Committee, Al Zahf al Akhadar, stated:

Libya should support, train, and arm West German and Irish terrorists in retaliation against Western countries that harbor anti-Qadafi 'ter-

57 Jackson, supra note 28, at 36.
58 Some intelligence agencies consider Syria one of the most active supporters of Middle East terrorists. See Beecher Syria and Terror: How to Reply to 'Smoking Gun', Boston Globe, Oct. 29, 1986, at 26.
59 N. Livingstone and T. Arnold, supra note 47, at 17.
60 Reagan, supra note 21, at 7.
rorist.’ A few days later, [Qadhafi] spoke by satellite to a Black Muslim convention in Chicago and pledged that Libya was ready to give black separatists arms so that they could create their own ‘sovereign state in America.’ He also called on blacks in the U.S. military to desert and form the backbone of an army of liberation (footnotes omitted). 61

The evidence of other states actively engaged in the support of terrorist groups and acts is equally compelling. 62 Most important, however, are the activities of the Soviet Union. The Soviet Union has continued to be an active sponsor of terrorism by espousing so-called wars of national liberation. Both Marx and Lenin made clear statements regarding the question of the use and importance of terrorism to achieve political ends, 63 and later Soviet leaders have consistently supported terrorist violence. For example, Kruschev stated:

Liberation wars will continue to exist as long as imperialism exists. . . . Such wars are not only admissible, but inevitable. . . . We recognize such wars, and we will help the peoples striving for their independence. The Communists fully support such wars and march in the front rank with peoples waging liberation struggles. 64


64 Kruschev, quoted in Heinle, Dictionary of Military and Naval Quotations 159 (1966).
Premier Kosygin later made a similar statement:

The policy of peaceful coexistence . . . proceeds from the inadmissibility of the application of force in solving disputed questions among states. But this in no case means the rejection of the right of peoples, arms in hand, to oppose aggression or to strive for liberation from foreign oppression. The right is holy and inalienable and the Soviet Union will, without fail, assist [all] peoples. . . .

The Soviet Union's support for terrorism is well documented, and its involvement in sponsoring "liberation" wars constitutes a blatant violation of the fundamental norms of the United Nations Charter. The U.N. Declaration Concerning Friendly Relations and Co-Operation Among States, which is generally regarded as an authoritative interpretation of the U.N. Charter, provides in pertinent part:

Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

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65 Goren, infra note 68, at 96 and ch. 5 for various Soviet statements of active support for terrorist groups. See also WAR & PEACE, supra note 44, 22-23.

66 Here too the material is voluminous and compelling. See, e.g., Murphy & Brady, The Soviet Union and International Terrorism, 16 INT'L. LAW. 139 (Winter 1982); Moss, Terror: A Soviet Export, N.Y. Times Mag., Nov. 2, 1980, at 42; Sterling, infra note 67; Hearings Before the Subcommittee on Security and Terrorism of the Committee on the Judiciary, U.S. Senate, First Session on Terrorism: The Role of Moscow and its Subcontractors, June 26, 1981, Ser. No. 97-44 (1982); Almond, The Legal Regulation of International Terrorism, 3 CONFLICT 143, 146-48 (1983); Goren, supra note 63; Jacquot, Les Dossiers secrets du terrorisme (1985) (in examining the network of terrorism, the author found many terrorist organizations intertwined and concluded that the Soviet Union is the major supervisor of terrorism); Defector Describes Soviet Ties to Terrorists, Wash. Times, June 18, 1986, at 4; Gozier, Soviet Support for International Terrorism, INTERNATIONAL TERRORISM, supra note 28, at 64; R. Cline, Soviet Footprints in St. Peter's Square, 7 TERRORISM 53 (1984); Cline & Y. Alexander, Terrorism: The Soviet Connection (1984); Romerstein, Political Doctrine and Apparatus, in HYDRA OF CARNAGE, supra note 56, at 59; Patterns of Global Terrorism, supra note 11, at 4; PATTERNS OF INTERNATIONAL TERRORISM, supra note 11, at 14. As one Soviet writer explained it: "Each nation has the sacred right to wage liberation war . . . and there can be no co-existence as far as this question is concerned. As before, the Soviet Union is providing all-around support to the national liberation movements, thus demonstrating a profound sense of internationalism typical of the Soviet people." Quoted in Romerstein, id. at 67.

67 See N.Y. Times, Feb. 9, 1981, at 43, col. 4 referring to a diplomatic note the Soviet Union delivered to the U.S. defending its rights to assist national movements of independence.


69 Id. Professor Blum has also argued that fomenting acts of terrorism by one state against another is a violation of international law centering his argument around the 1951 Draft Code of Offenses Against the Peace and Security of Mankind (drawn up by the U.N. International Law
The Soviet Union is one of the few states which have expressly argued that prohibitions against—much less criminal sanctions for—terrorist acts should not apply to wars of national liberation.  

It is undeniable that the Soviet Union favors projection of terrorist violence across national borders—obviously an excellent tactic for promoting its own political objectives. But, despite the well documented evidence provided in Soviet doctrinal literature and political conduct, statements of defectors, captured subversives and a wealth of analytical literature provided by Western intelligence services, many observers have instead chosen to accept assurances of noncomplicity from the Soviet Union, and its client states and proxies. In view of the evidence, it is hard to comprehend the reluctance to condemn those countries responsible for terrorist acts, particularly since it is primarily their support that perpetuates international terrorism. Secretary Shultz stated this succinctly:

One does not have to believe that the Soviets are puppeteers and the terrorists marionettes; violent or fanatic individuals and groups are indigenous to every society. But in many countries, terrorism would long since have passed away had it not been for significant support from outside. . . . The international links among terrorist groups are now clearly understood; and the Soviet link, direct or indirect, is also clearly understood. The Soviets use terrorist groups for their own purposes, and their goal is always the same—to weaken liberal democracy and undermine world stability.

While the links between terrorist groups and their sponsors are self-evident, we rarely have direct causal connectivity or linkage between a recent terrorist outrage and the sponsoring state. This is partly due to a decade of dismantling our human intelligence collecting capabilities since the 1970s; but more importantly, it derives from the secretive nature of international terrorism and the use of surrogates who leave few clues.
This severely hampers efforts aimed at "proving" the guilt of the sponsor. The standard of proof or "how much information is enough" to affirm the complicity of a specific sponsoring state is unresolved; but, whatever the standard, it will be based more on political factors than legislation. In justifying a military response against a state sponsor as an effective deterrent, a functional standard of guilt must be established to provide a litmus test to determine whether the use of force is justified. The willingness of the United States, as demonstrated by the April 14, 1986, strike on Libya, to assert the right to act preemptively to defend its citizens and interests against terrorism, necessitates an examination of the legal justification for the use of force—one aspect of the legal framework that would support a "pro-active" policy against international terrorism.

III. The Framework for Using Force Against State Sponsored Terrorism: Self-Defense and Peacetime Reprisals

A. The Failure of Legal Controls to Curb International Terrorism

"Weak is the revolutionary who at a time of sharp struggle is stopped by law's sanctity. In a period of transition, laws have but a temporary significance. If a law hinders the revolution's pace, the law must abrogated or corrected."

—V. Lenin

It is beyond the scope of this article to discuss the myriad legislative efforts by states and the international community to stop international terrorism.

72 For a discussion of state responsibility see I. Brownlie, System of the Law of Nations, State Responsibility (1983); I. Oppenheim, International Law 337-38, 365 (H. Lauterpacht, 8th ed. 1955). Unfortunately, in the case of terrorism, a careful application of the principles of state responsibility will, in all likelihood mean that there will be few instances where it can be conclusively established that a state controls or has collaborated with terrorist groups. Not only is it difficult from an intelligence perspective to obtain the necessary evidence, the degree of proof is so great that, except in obvious cases, the use of military force would always be ruled out. Consequently, if a state desires to keep the use of force option open, a lesser standard, of necessity, must prevail. Also, it should be noted that the intelligence gathering problem is a real one, but beyond the scope of this article. See Roberts, Covert Responses: The Moral Dilemma, Fighting Back, supra note 11, at 133; Tovar, Active Responses, in Hydra of Carnage, supra note 56, at 231.

73 Since present U.S. policy does not allow a military response to terrorist attacks unless the group and its sponsor are known with almost absolute certainty, many state supporters of terrorism are instructing their surrogates not to issue proclamations taking responsibility for major attacks. See Wash. Times, Sept. 29, 1986, at 3.

74 Lenin quoted in Parry, supra note 12, at 156. Lenin is also quoted as saying: "The courts must not ban terror—to promise that would be deception or self-deception—but must formulate the motives underlying it, legalize it, as a principle, plainly, without any make-believe or embellishment." Id. at 168.
terrorism. Nevertheless, brief mention of those measures presently in effect, or which have been proposed, is necessary to put the discussion of the use of force by states against state sponsored terrorism in perspective. It should be noted that any of the legal, political or moral rationales for the use of force, discussed below, are premised on the exhaustion of all other political and legal remedies.

Since at least 1937, governments and international organizations have attempted to regulate, control and suppress terrorism. There have been numerous proposals for preventing and punishing terrorism; some have been accepted by states, others have not. There are a number of multilateral treaties to thwart aircraft hijacking and sabotage, attacks on diplomats and other internationally protected persons, use of the mails for delivering explosives or other dangerous substances, theft of nuclear materials, and prohibitions against hostage-taking. In addi-

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78 Two of the most comprehensive proposals that have languished since first advocated are the 1972 U.S. Draft Convention on Terrorism, U.N. Doc. A/c.6/L. 850 reprinted in 11 INT’L LEGAL MATERIALS 1382 (1972); and ABA STANDING COMMITTEE ON WORLD ORDER UNDER LAW, DIV. OF PUBLIC SERVICE, Model American Convention on the Prevention and Punishment of Serious Forms of Violence (July 1983).


tion, numerous bilateral agreements regarding aircraft hijacking and extradition have been signed in an attempt to stop hijacking and prevent terrorists from hiding in another state as fugitives from “political” prosecution.\(^{84}\) There have been concerted efforts to strengthen extradition laws to prevent terrorists from claiming their acts were “political” and thus bar extradition. The most recent example of these efforts is the recently ratified United Kingdom-United States treaty which severely restricts recourse to the political offense exception.\(^{85}\)

With each new outrage, states attempt to assure themselves and their citizens that they are achieving something by agreeing among themselves to undertake tougher measures against terrorist acts. These measures include the 1978 Declaration in Bonn,\(^{86}\) and the most recent statement by the seven leading industrial nations attending the Tokyo summit.\(^{87}\) These non-binding measures contain promises by each signatory to undertake measures to limit the size of missions and restrict travel of diplomats of states who are known or suspected of supporting terrorists; to invoke stricter visa and immigration controls; and, to refuse to export arms to states which support terrorism. In addition, bilateral accords also have been signed whereby the parties agree to share information and support various police operations against terrorists.\(^{88}\) Even the United Nations General Assembly and Security Council managed after the Vienna and Rome massacres to pass resolutions (non-binding) condemning all acts of hostage-taking and abduction.\(^{89}\) Finally, states


\(^{84}\) For various bilateral aviation agreements, see J. MURPHY & A. EVANS, supra note 75. An example of a successful bi-lateral accord is the Memorandum of Understanding on Hijacking of Aircraft and Vessels and Other Offenses, Feb. 15, 1973, United States-Cuba, 24 U.S.T. 737, T.I.A.S. No. 7579. There were no aerial hijackings between the two countries since the signing of the accord in February 1973 (it has since expired). See R. FRIEDLANDER, supra note 75, at 96 (1979).

\(^{85}\) The U.S. Senate consented to ratification on July 17, 1986. The British Parliament accepted with minor modifications and exchange of formal instruments of ratification is expected soon. This was confirmed in an Oct. 2, 1986 telephone conversation between the author and Ms. L. Allder, Dept. of State, Office of the Legal Advisor (Treaty Affairs). See Report of the Committee on International Terrorism, Proceedings and Committee Report of the American Branch of the International Law Association, at 126 (1985-86). U.S. Courts have also been willing to carve out a “wanton crimes exception” to the political crimes defense. See Abu Cain v. Wilks, 641 F.2d 504 (7th Cir. 1981); Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986). Specifically, the political crimes defense will be denied to persons who commit wanton and indiscriminate violence against armed persons not involved in armed hostilities.

\(^{86}\) See Busuttil, Bonn Declaration on International Terrorism: A Non-binding International Agreement on Aircraft Hijacking, 31 INT'L & COMP. L.Q. 474 (1982).

\(^{87}\) Terrorism Must Be Fought, Wash. Post, May 6, 1986, at A14.

\(^{88}\) See, e.g., Italy and U.S. Sign Accord to Fight Terrorism Together, Wash. Times, June 25, 1986, at 8B.

have undertaken to strengthen their domestic laws to provide for universal or long-arm jurisdiction over terrorist offenses to its nationals or in keeping with international conventions and to enhance the penalties for terrorist acts. 90

But despite these efforts and more current efforts under consideration to use law in the war on terrorism, there has been little success. As Judge Sofaer has stated: “The law has a poor record in dealing with international terrorism. The terrorist who is prosecuted is likely to be released far earlier than his sentence should require, often in exchange for hostages taken in a subsequent terrorist episode.”91 While more laws are needed, we cannot delude ourselves that closing “gaps” will overcome the problems that hinder law enforcement against terrorists. Recent events have demonstrated that “even when laws clearly govern particular conduct, they are often disregarded or otherwise fail to achieve their purpose.”92 If the primary function of law is to deal with problems in an orderly fashion, then the international legal system does not work to combat terrorism. As Judge Sofaer and others have correctly observed, it appears that international law is unable to deal with the nature of the problem. “Without the proper enforcement procedures, strongly worded statutes are not much help. The old common law adage that a law badly enforced is worse than no law at all still holds true.”93

The hollow formalism of the law arguably offers, if anything, even less help than no law at all. Ingenious schemes for new international tribunals and procedures have been proposed, 94 but they completely miss

90 For example, a bill presently before Congress, The Terrorist Prosecution Act of 1986, S. 1429, would establish U.S. criminal jurisdiction over certain violent offenses, including murder, manslaughter, assault, and kidnapping committed against U.S. nationals anywhere in the world in the course of a terrorist incident. See 44 CONG. Q. 477 (1986) (Senate passed the bill 92-0). Numerous other measures have been proposed by the administration and other members of Congress. See President Proposes Legislation to Counter Terrorism, 84 DEP’T BULL 65 (June 1984); S. 1373, 99th Cong., 1st Sess. (1985); S. 2335 (would exempt counter terrorism military action from the requirements of the War Powers Resolution), 44 CONG. Q. 1021-24 (1986). See also summary of various initiatives before Congress in 44 CONG. Q. 505, 849 (1986) and the Omnibus Diplomatic Security and Antiterrorism Act Conference Report, 132 CONG. REC. Vol. 112, at S11424-27 (Aug. 13, 1986).

91 Sofaer, supra note 15, at 901.

92 Id. at 902. See also Sofaer, letter in N.Y. Times, Jan. 28, 1986, at A24 regarding the interception of the Egypt airplane carrying Achille Lauro hijackers.

93 Friedlander, Coping with Terrorism: What is to be Done? TERRORISM: THEORY AND PRACTICE 238 (1979).

94 One solution, repeatedly stressed, is the desirability of an international criminal court and related organizations. See M. Bassiouuni, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980); Bridge, The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law, 13 INT’L & COMP. L.Q. 1255 (1964); Stone, AN INTERNATIONAL CRIMINAL COURT (1976); Sundberg, The Case for an International Criminal Court, 37 J. INT’L L. & COMM. 211 (1971); Pella, Towards an International Criminal Court, 44 AM.
the point. The manifest unwillingness of many governments to use existing legal remedies, e.g., Egypt's failure to prosecute the Achille Lauro hijackers) against terrorists demonstrates that the real problem is the lack of a will, not the lack of a way. While many governments are ready and willing to take firm action within existing laws, and to examine other stronger legal remedies, many are not. Until all states agree to live by their treaty commitments and to accept a world society in which terrorist acts are not accepted as a legitimate tool to further state ends, states must look to methods other than the use of international law to stop terrorism. One of those methods is the use of force as a self-help measure.

B. Legal Regulation of the Right to Self-Help: Aggression, Self-Defense and Peacetime Reprisals

"Between two groups that want to make inconsistent kinds of worlds, I see no remedy except force."

—Oliver Wendell Holmes

1. Aggression

The use of force against state sponsors of terrorism must be premised on acts of aggression by the state sponsor. Prior to 1974, there was little international agreement as to what constitutes unlawful aggression. However, in 1974, the United Nations General Assembly adopted, by consensus, a resolution on aggression which included the following definition:


95 The purpose of this article is to analyze the use of self-defense and peacetime reprisals as legitimate methods of self-help in combatting terrorism. However, it should be noted that there are other theories of self-help measures, most prominent of these being humanitarian intervention to protect a state's citizens and to ensure the preservation of fundamental human rights. E. Stowell, Intervention in International Law (1921); Intervention in World Politics (1984); Humanitarian Intervention and the United Nations (1973); F. Delima, Intervention in International Law (1971). See also discussion regarding "rectification" in Sheehan, Principles of Self-help, 2 Fletcher For., 135; A. Rubin, Terrorism and Social Control: An International Law Perspective, 6 Ohio N.U.L. Rev. 60, 67-68 (1979); Discussion, Control of Terrorism in International Life: Cooperation and Self-help, 71 Am. Soc'y Int'l L. Proc. 17, 31 (1977). Rectification is analogous to the general principle of the domestic law of restitution and quasi-contract. A state's right of rectification comes into play when it is injured as a result of a second state's failure to perform its acknowledged legal duty. For example, the failure of Egypt to prosecute the Achille Lauro hijackers, allowing them to fly to a safe haven, in contravention of its legal responsibilities under the Hostage Taking Convention (to which it is a party), would have given the injured state (the United States) a limited right to "rectify" the situation by directly performing the legal obligation neglected by the delinquent state; i.e. capture and prosecute the terrorists.

96 Letter from Oliver Wendell Holmes to Sir Frederick Pollack, quoted in Livingstone, Proactive Responses to Terrorism, Fighting Back, supra note 11, at 130.
The use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any manner inconsistent with the Charter of the United Nations, as set out in this definition.  

Article 2 of the Resolution sets forth the principles of priority and aggressive intent, stating that the first use of armed force by a state in contravention of the United Nations Charter will constitute a \textit{prima facie} act of aggression. Article 3 lists several specific acts which constitute aggression, including acts which are associated with attacks initiated by state sponsored terrorists. For example, acts of aggression include:

\begin{enumerate}
\item the action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state;
\item the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state or such gravity as to amount to the acts listed above [blockade, bombardment, invasion], or its substantial involvement therein.
\end{enumerate}

In addition, Article 4 provides that the acts enumerated in Article 3 are not exhaustive; and the Security Council is free to determine that other acts constitute aggression under the Charter. Article 5 further provides that no consideration, be it political, economic, military or otherwise, is to serve as a justification for aggression. A war of aggression, according to Article 5, is a crime against international peace, with aggression giving rise to international responsibility. While obviously this definition of aggression falls far short of legal perfection, the formulation of tests and criteria directs one's attention to the aggressive nature of conduct by a particular state. No enumeration of aggressive acts could be exhaustive; therefore focus was placed instead on the initiation of hostilities and aggressive intent. Thus, one useful test of aggression consists of the

\begin{itemize}
\item The difficulty of obtaining Security Council condemnation of aggression as well as collective, effective action against aggression was aptly demonstrated in the Falklands/Malvinas War. See Aarend, \textit{The Falklands War and the Failure of the International Legal Order in the Falklands War} 52 (1985).
\item Art. 7, for example, implies that liberation movements have the right to receive outside assistance in their struggle. Cf. Stone, \textit{Hopes and Loopholes in the 1974 Definition of Aggression}, 71 Am. J. Int'l L. 224 (1976).
\item M. Bassiouni, \textit{supra} note 94, at art. 2.
\end{itemize}
existance of repeated refusals to seek a settlement by peaceful means.

One problem with the aforementioned definition is its requirement that "armed bands" or terrorists to carry out their acts of aggression before a state can legitimately respond in self-defense. Consequently, the preparatory stages of dispatching attackers do not by themselves amount to an act of aggression. Thus, no act of aggression has occurred until there has been an actual attack against another state attributable to terrorists operating from the territory of the supporting state. Limiting aggression to an actual attack ignores the quality and nature of weapons available to terrorists today, especially those sponsored by a state. Use of terrorist groups or other armed bands to coerce another state into various courses of action was recognized early on as "indirect aggression," a difficult aspect of aggression to address. The use and characteristics of this form of aggression were succinctly noted in 1961 by Professors McDougal and Feliciano:

A chief characteristic of 'indirect aggression' appears to be the vicarious commission of hostile acts by the aggressor states through the medium of third party groups located within the target state and composed either of foreigners or national[s] of the target ostensibly acting on their own initiative. The hostile acts may include the giving of aid and support and, frequently, strategic and tactical direction to rebellious internal groups.

The assistance given to internal groups may frequently assume more covert and subtle forms, including the training, exportation and financing of leaders and specialists in subversion, sabotage, infiltration, fomentation of civil violence, and coups d'état. 'Indirect aggression,' disguised as a purely domestic change, presents peculiar difficulties for external decision-makers (footnotes ommitted).

It is unreasonable to expect a state to await an attack on its forces or citizens before taking action against those planning the attack. While "preparatory or threatening" acts by individuals cannot be used as a pretext for the use of retaliatory force against a state not clearly tied to the terrorist group; nevertheless, as a practical matter, a state cannot, nor should it, be required to wait an actual terrorist attack if it holds convincing evidence of an imminent attack. Whether preparing for an attack or actually carrying out acts of terrorism is involved, support of these activities fits squarely into the U.N. definition of aggression. Allowing terrorists to operate in one's territory, or training, equipping, and transporting terrorists to another state to commit terroristic acts should fit squarely within the spirit, if not the letter, of the U.N. Resolution on Aggression. If a state uses terrorist surrogates, it is using armed force

against another state; and that is aggression. Consequently, Judge Sofaer could reasonably conclude, that "[b]y providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principle of international law, just as if he [Libyan leader Qadhafi] had used its own forces."\textsuperscript{104} The existence of an act of aggression which would justify a response leads next to a review of the international law under which force may be used as a response.

2. U.S. Policy on Using Force

"Diplomatic methods are fine, but we will never give up the gun till[sic] we've achieved our goal."

—PLO Terrorist\textsuperscript{105}

The bombing of the U.S. Marine headquarters in Beirut on October 23, 1983, was dramatic and horrific and clearly demonstrated how effectively governments could use terrorism to achieve their goals. The attack provoked an intense debate in the United States about its role in the Lebanon peacekeeping process. Additionally, it demonstrated how vulnerable U.S. forces are to this form of attack. The Long Commission concluded with regard to the importance of terrorism as a strategic weapon of violence that "terrorist warfare can have significant impact and demonstrates that the United States and specifically the Department of Defense is inadequately prepared to deal with this threat. Much needs to be done, on an urgent basis, to prepare U.S. military forces to defend against and counter terrorist warfare."\textsuperscript{106}

One response was a determination that the United States needed "an active defense,"\textsuperscript{107} whereby the United States "must be prepared to retaliate—selectively."\textsuperscript{108} The use of military force as a form of deterrence and a recommended U.S. policy against terrorists, notwithstanding with U.S. strike on Libya, remains a contentious domestic issue.\textsuperscript{109} Secretary of Defense Weinberger in a November 28, 1984, speech outlined six tests that the United States would apply when deciding whether to send military forces into combat (against terrorists) abroad:

\textsuperscript{104} Sofaer, supra note 15, at 921.
\textsuperscript{106} Long Commission Report, supra note 4, at 3.
\textsuperscript{107} Shultz urges 'Active' Drive on Terrorism, Wash. Post, June 25, 1984. See also The Scherr Lecture, supra note 17.
\textsuperscript{109} The 1984-85 debate between Secretary Shultz, who advocated the use of force, and Secretary of Defense Weinberger, who warned of the need for extreme prudence in utilizing armed force, was well publicized. See U.S. NEWS AND WORLD RPT., Dec. 24, 1984, at 20-21.
1. The act must be vital to U.S. interests.
2. We must be prepared to fight "wholeheartedly with the clear intention of winning."
3. The military and political objectives must be clearly defined; and we must have the means to achieve them.
4. There must be "reasonable assurance" of support by Congress and the public.
5. Forces will be committed only as a "last resort."
6. Finally, we must be ready to continually re-evaluate and "adjust if necessary" the need to continue a military operation.\(^\text{110}\)

However, the Secretary later noted that the most appropriate way to deal with terrorism "is to do things that discourage, deter, prevent it, [and] diminish it in the future" which could include the use of force.\(^\text{111}\)

Despite Weinberger's caution, the U.S. commitment to use force was made clear by disclosure of a still classified presidential directive on terrorism, National Security Decision Directive (NSDD) 138, signed by President Reagan on April 3, 1984. NSDD 138 "represents a quantum leap in countering terrorism, from the reactive mode to recognition that pro-active steps are needed."\(^\text{112}\) Former Assistant to the President for National Security Affairs Robert McFarlane suggested that the policy included the following key elements:

1. The practice of terrorism under all circumstances is a threat to the national security of the United States;
2. The practice of international terrorism must be resisted by all legal means;
3. State-sponsored terrorism consists of acts hostile to the United States and to global security and must be resisted by all legal means;
4. The United States has a responsibility to take protective measures whenever there is evidence that terrorism is about to be committed; and
5. The threat of terrorism constitutes a form of aggression and justifies acts of self-defense.\(^\text{113}\)

Since the use of force to combat terrorism now appears to be accepted U.S. policy,\(^\text{114}\) the regulation of that force must be considered in light of both the more traditionally accepted views on the use of force to respond to aggression, and the developing perspectives on how military force can be used within a legal regime that accepts its use only as a last resort.

\(^\text{113}\) Address of Robert McFarlane, *supra* note 23.
3. The Customary Law of Self-Defense and the UN Charter

"When you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him."

—Franklin D. Roosevelt

In the field of international law, one of the most significant twentieth century developments has been the legal regulation of the formerly unregulated privilege of states to use force. The League of Nations Covenant placed primary emphasis on restricting the right of member states to resort to war, either in breach of certain obligations connected with accepting the arbitration or judicial settlement of certain disputes, or the recommendations thereon of the League of Nations Council. In the Briand-Kellogg Pact of 1928, state parties generally agreed to renounce recourse to "war" to solve international disagreements, and as an instrument of national policy. Disputes or conflicts between the parties were to be settled by "peaceful means." But despite attempts to renounce war, states have never rejected the right of a state to use force in self-defense.

As previously noted, there is widespread agreement that the United States must develop military responses to terrorism. Force directed against states sponsoring terrorism may be justified as self-defense. Traditional international law recognizes the right of a state to use force in self-defense when responding to the threat or use of force. The purpose of self-defense is to protect the "essential" rights of territorial integrity and political independence necessary to the existence of a state, while at the same time encouraging the peaceful settlement of disputes. Customary or traditional law on self-defense prescribes the use of peaceful procedures, if they are available, as the first requirement of self-defense. Once peaceful means are exhausted, use of force in self-defense must be justified on the basis of actual necessity, as opposed to pretense or sham; and the responding force must be proportional to the initial use of force. These prerequisites were stated in the now classic formulation of the right of self-defense offered by Secretary of State Daniel Webster to Great Britain's Lord Ashburton in the Caroline affair.
In Secretary Webster’s view, self-defense was justified only when the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”\(^{121}\) The *Caroline* incident stands for the proposition that a state has a right of self-defense against hostile activities originating from a second state, including the right to invade the territory of the state harboring the hostile forces. The territorial integrity of the second state must temporarily give way to the threatened state’s right to self-defense.\(^{122}\) Self-defense is justified as a preventive, not a retaliatory action.\(^{123}\)

Later writings of scholars and the practice of states established, based on the *Caroline* case, four prerequisites for the use of force in self-defense:

1. An infringement or threatened infringement of the territorial integrity or political independence of the defending state;
2. The failure or inability of the other state to prevent the infringement;
3. The absence of alternative means to secure protection; and
4. The strict limitation of the defending state’s use of force to prevent danger.\(^{124}\)

Consequently, the customary right of a state to use force in self-defense justifies actions against terrorists located in another state that is either unwilling or unable to stop the terrorist activities.\(^ {125}\) State practice and

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\(^{121}\) See [id. at 410-14](#).

\(^{122}\) Id. See also Letter from Secretary Webster to Mr. Fox (Apr. 24, 1841) reprinted in *29 Brit. and Foreign St. Papers* 1129, 1138 (1840-41); Jennings, *The Caroline and McLeod Cases*, 22 *Am. J. Int’l L.* 82 (1938).

\(^{123}\) One expert reads *The Caroline* as supporting “the right of self-defense of a state against hostile actions proceeding from another’s jurisdiction . . . [and] [t]he failure of a government to prevent harmful acts of private persons against foreign states can legally be met by the exercise of the rise of self-defense on the part of the menaced community, and this right extends to the invasion of the territory in which the hostile act originated.” *M. Garcia-Mora, International Responsibility for Hostile Acts of Private Persons Against Foreign States* 32 (1962). Thus, if a state harboring terrorists is unwilling or unable to suppress them, its “right of territorial integrity must yield to the right of self-defense of the states against whom the bands are directing their activities. Implicit in this assertion is the recognition that the right of territorial integrity is by no means absolute but must give way to the apparently stronger right of self-defense of the threatened community.” *Id.* at 116.

\(^{124}\) See J. Brierly, *The Law of Nations* 426 (6th ed. 1963) (Citing the Corfu Channel case for the proposition that retaliation is illegal but use of force to prevent “expected unlawful” acts was legitimate).


\(^{126}\) Mere toleration of a terrorist group would not be enough to conclude that there was a
international publicists before World War II agreed that self-defense against hostile armed bands was legitimate. However, actions in self-defense had to be limited to attacks on those armed groups in host states that were physically unable to control the groups. For example, in 1818 the United States invoked the doctrine of self-defense to justify the use of American troops to suppress hostile Indian bands in Spanish western Florida. The Secretary of State instructed the U.S. Minister to Spain to stress that U.S. forces crossed the border "not in a spirit of hostility to Spain, but as a necessary measure of self-defense." The territory would be restored to Spanish control whenever Spain indicated that it was "able and willing to fulfill [its duty] of restraining by force the Florida Indians from hostilities against [American] citizens. The American position in confronting latter day terrorists emanating from adjacent territory rested on "the immutable principles of self-defense—upon the principles which justify decisive measures of precaution to prevent irrepairable[sic] evil to our own or its neighboring people." Under this legal regime, a state unable to prevent its territory from being used as a launching pad for attacks against another state was not entitled to full respect for its territorial integrity. It had to submit to defensive measures if it could not police its own territory. As Professor Hyde explained:

The reasonableness of the claim of a state that respect be paid to its supremacy within its domain, as well as to its political independence, depends upon its success in satisfying the full measure of its obligation growing out of activities within its territory which are productive of a direct effect upon foreign states and their nationals.

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substantial level of state complicity. "However, as government complicity with terrorists increases from toleration to incitement, fomentation and support, the government actions begins to resemble and 'armed attack,' possibly legitimizing defensive responses." Note, Controlling International Terrorism: An Analysis of Unilateral Force and Proposals for Multinational Cooperation, 8 U. Tol. L. Rev. 209 (1976).
126 M. Garcia-Mora, supra note 122, at 114-15.
127 Bowett, supra note 124, at 56.
128 2 J. Moore, supra note 120, at 405-06.
129 Instructions from the Secretary of State to the Minister for Mexico (Dec. 10, 1836), reprinted in id., at 420.
130 I. Hyde, International Law 110-14 (1922). U.S. intrusions across the border into Mexico to hunt down and destroy armed bands in 1912 was also justified under a right of self-defense "superior in the particular circumstances to the right of territorial inviolability." Report of Secretary of War Commission to Investigate Claims of Americans for Damages Suffered Within American Territory From Insurrection in Mexico, reprinted in II 2 G. Hackworth, Digest of International Law 289 (1941). In this situation, the U.S. went to great lengths to stress that under "no circumstances will [U.S. troops] be suffered to trench in any degree upon the sovereignty of Mexico or develop into intervention of any kind into the internal affairs of our sister republic." Letter from the American Secretary of State to a representative of the Mexican Government of March 13, 1916, reprinted in id., at 292. See also Letter from Secretary of State to the Mexican Ambassador (Aug. 26, 1919), reprinted in id., at 300. More recently, other countries have also claimed a similar right of self-defense. See Prime Minister Begin's statement to the Israeli Knesset (May 7, 1979),
In sum, customary law accepted and permitted reasonable and necessary acts of self-defense premised on a compelling threat and an overwhelming necessity to act. However, the question remains whether the exercise of self-defense prior to an actual attack is inconsistent with present law. This law is reflected in the UN Charter which has severely restricted a state's recourse to the use of force to resolve international disputes.

The aim of the United Nations is "to ensure, by acceptance of principles, and the institution of methods, that armed force shall not be used save in the common interest." Furthermore, Article 2(4) requires that all members "refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." The use of force under the Charter is enunciated in Article 51 which preserves "the inherent right of individual or collective self-defense if an armed attack occurs against a member. . . ."

Legal scholarship is far from reaching agreement on the limitation Articles 2(4) and 51 place on the use of force in self-defense. There are essentially two schools of thought as to their interpretation. The "restrictive" view asserts that resort to force by a UN member is unlawful, regardless of any wrongs or dangers that provoked it, unless it is (1) for self-defense against an armed attack, or (2) collective action pursuant to competent decisions of the UN organs. Thus, if neither of these forms of


132 United Nations Charter, preamble, para. 1, 3 Bevans 697; reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW 1 (Brownlie ed. 1967).

133 "The broad effect of Article 2(4) is . . . that it entirely prohibits the use of threat of armed force against another state except in self-defense or in execution of collective measures authorized by the council or assembly." BRIERLY, supra note 123, at 415. See Wright, The Legality of Intervention Under the United Nations Charter, 51 Am. Soc'y Int'l L. Proc. 88 (1957). Professor Brierly observed that "the truth is, that the Charter, while it mentions 'justice' in its preamble and in Article 2(3), does not occupy itself very much with insuring that 'justice' as distinct from 'peace' shall prevail among members of the United Nations." J. BRIERLY, supra note 123, at 414.

134 Article 51 states:

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 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 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.
relief are available, the member state would have to submit indefinitely, without redress, to the continuance of these wrongs.\textsuperscript{135} This view has been bolstered by UN practice which has consistently refused to recognize a right of preventive or anticipatory self-defense "for fear that it may be too fraught with danger for the basic policy of peace and stability."\textsuperscript{136}

The "restrictive" view is best summarized by Professor Henkin who underscored the necessity for a strict interpretation of Article 51:

But anyone reading the article, as a lawyer or as a layman, would read the article as permitting an exception only if armed attack occurs.

\ldots

The reasons why these provisions, as interpreted, were made the heart of the Charter are not a mystery. The nations coming out of a second World War concluded that, despite inadequacies in international law and order, force was no longer tolerable; injustice would have to be dealt with, changes would have to be achieved, by other means. An exception to the ban on force, to permit self-help in the case of armed attack, was inevitable and just. \ldots But the exception was deliberately made clear and narrow. Armed attack is an objective fact, comparatively easy to prove, difficult to fabricate.\ldots Exceptions beyond that, however, would tend to destroy the rule. Even an extension to "anticipatory self-defense" would open the floodgates to fabrication \ldots to paranoia \ldots to confusion of aggressor and victim in every situation of tension in a conflict-ridden world.\textsuperscript{137}

Nevertheless, however reasonable the restrictive interpretation of self-defense may have seemed when Article 51 was adopted, in a world, where the norm was indirect attacks by the use of terrorist surrogates, today such an interpretation is unrealistic and dangerous. It must be rejected for several reasons.

First, the "restrictive view" ignores the special problems inherent in counter-insurgency self-defense. States confronted with attacks consisting of terrorist bombings, hijackings and other criminal acts have limited

\textsuperscript{135} J. Stone, \textit{Aggression and World Order} 94-95 (1958). It should be noted that, arguing on the basis of the travaux preparatoire, Professor Stone rejects the restrictive interpretation of Article 51. \textit{Id.} at 98.

\textsuperscript{136} R. Higgins, \textit{The Development of International Law Through the Political Organs of the United Nations} 203 (1963).

options. The choice is either directly destroying terrorist training camps and bases or inflicting injury upon the host government to induce it to suppress or curtail terrorist activities. In either instance, the target state will appear to be making a disproportionate response because the scale is large, the operation overt, and the action undertaken by the regular government military forces government in the territory of a foreign state.\textsuperscript{138}

Secondly, it is illogical to limit the right of self-defense to armed attacks. Fundamental threats to the existence of a state may be undertaken without resort to armed attacks; and conversely, the necessity of defending a nation may arise without being attacked. Professor Bowett criticized the restrictive interpretation as follows: "The substantive rights to which self-defense pertains and for which it serves as a means of self-protection are: a) The Right of Territorial Integrity, b) The Right of Political Independence, c) The Right of Protection Over Nationals, [and] d) Certain Economic Rights."\textsuperscript{139} For example, a condition requiring self-defense can arise due to non-military coercion such as the imposition of economic embargoes or boycotts. Consequently, Professor McDougall argues:

To say... that Article 51 limits the appropriate precipitating event for lawful self-defense to an 'armed attack' is in effect to suppose that in no possible context can applications of non-military types of coercion... take on efficacy, intensity, and proportions comparable to those of an 'armed attack' and thus present an analogous condition of necessity.\textsuperscript{140}

A fortiori, when the coercion consists of military measures just short of an armed attack, a state should be entitled to protect itself.

Most importantly, the adoption of the restricted interpretation gives rise to the anomalous situation of UN members being left remiss in the face of "all kinds of illegality, injustice and inhumanity as long as these do not take the specific form of an 'armed attack' under Article 51."\textsuperscript{141} This occurs because the fundamental predicate for the restricted right of self-defense—a reasonably operative Security Council—has never come to pass. 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 the peace. But, history has shown that the Security Council is incapable of assuming this role. As one scholar observed:

The reduction of self-defense to an interim right was made on the assumption that the international quasi-order, which was to be estab-


\textsuperscript{139} D. Bowett, supra note 124, at 270.

\textsuperscript{140} M. McDougal & Feliciano, supra note 103, at 240-41.

\textsuperscript{141} J. Stone, supra note 135, at 99.
lished by the United Nations, would normally work. The Security Council was to exercise the utmost freedom in determining what amounted to a threat to peace, breach of peace or act of aggression, including armed attack. If, therefore, the Security Council fails to fulfill its appointed function, this task falls back on the individual members of the United Nations.\textsuperscript{142}

Recent events, such as the Falklands/Malvinas conflict, the Iran-Iraq War, the Soviet invasion of Afghanistan, and Vietnamese aggression against Cambodia, have shown that prohibition of resort to force, in the absence of an effectively functioning Security Council, is ludicrous and chimerical. The Security Council has proven itself ineffective due to political bias and paralysis in the face of superpower confrontation. What is left is the incongruity of subjecting a state to coercion while denying it a fair hearing (or any hearing at all) at the Security Council. A state faced with coercion short of an armed attack would most certainly, under the restrictive view, be left without any effective right to protect its own citizens.\textsuperscript{143} This view must be rejected as unresponsive to the realities of a world lacking an impartial, smoothly functioning Security Council where states engage with impunity in terrorist acts against each other. As Sir Humphrey Waldock cogently stated: "[A] legal system which merely prohibits the use of force and does not make adequate provision for the peaceful settlement of disputes invites failure."\textsuperscript{144}

A more compelling and rational interpretation of the Charter’s proscription on the use of force argues that it leaves intact the right of self-defense as it existed in prior customary international law. For example, several scholars have argued that Article 51 does not restrict the right of self-defense “to cases falling precisely within the words in Article 51 ‘if an armed attack occurs;’” rather the import of Article 51 seems to be that the “inherent” or customary international law right of self-defense remains unimpaired.\textsuperscript{145} Similarly, while authorities disagree on what sort of “armed attack” is sufficient to trigger a self-defense response;\textsuperscript{146}

\begin{itemize}
  \item \textsuperscript{142} Schwarzenberger, \textit{The Fundamental Principles of International Law}, 87 \textit{Acad. De Droit Int’l Recueil Des Cours} 195, 338 (1955).
  \item \textsuperscript{143} It appears that the International Court of Justice retains the restrictive interpretation of armed attack: "The Court does not believe that the concept ‘armed attack’ includes assistance to rebels in the form of provisions of weapons or logistical or other support.” ICJ Judgment: Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), reprinted in 80 \textit{Am. J. Int’l L.} 785, 795 (1986).
  \item \textsuperscript{144} Waldock, supra note 124, at 456.
  \item \textsuperscript{146} On the other hand, one author argued that if “armed attack” means illegal armed attack it means any illegal armed attack, even a small border incident. \textit{...} Kunz, \textit{Individual and Collective
ultimately, the existence of an “armed attack” by armed bands of terrorists depends on difficult questions of fact as to what is necessary for the protection of certain essential state interests. Since the Charter does not define the term “armed attack,” it is submitted that UN members may, in exercising their rights of individual or collective defense, legitimately interpret armed attack as not only an action in which a state uses its armed forces, but also employs terrorist groups. Resolution of these questions rests with the target state since that state’s territorial integrity, independence or citizens are at risk.\textsuperscript{147}

Under customary international law, convincing evidence of preparation for an armed attack triggers the right of self-defense recognized by the UN Charter. Sir Waldock argues:

> Article 51, however, speaks only of an inherent right of self-defense, *if an armed attack occurs*. . . . [This does not] cut down the customary right and make it applicable only to the case of resistance to an armed attack by another state. . . . [Nor does it] restrict forcible self-defense to cases where the attack provoking it has actually been launched.

. . . .

Where there is convincing evidence not merely of threats and potential danger but of an armed attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier.\textsuperscript{148}

With respect to attacks on terrorist camps, bases and their means of support, the use of force in self-defense is arguably not against the territorial integrity or political independence of another state, nor inconsistent with the spirit or letter of the UN Charter.\textsuperscript{149} This interpretation of Article 2(4) is consistent with the decision in the 1949 Corfu Channel

\textsuperscript{147} Professor McDougal views the issue as follows: “In broadest formulation, [the] right of self-defense, as established by traditional practice, authorizes a state which, being a target of activities by another state, reasonably decides . . . that such activities imminently require it to employ the military instrument to protect its territorial integrity and political independence . . . .” McDougal, supra note 145, at 597-98. The British sinking of French naval vessels in Oran, French North Africa during World War II, the United State quarantine in connection with the Cuban missile crisis of 1962, and the attack on Libya in 1986 by the United States were all justified as acts of self-defense to defend the security of the target state from an imminent threat. See I. Oppenheim, supra note 72, at 303 (British acts against the French); Mallison, supra note 145, at 423 (Cuban missile crisis); \textit{U.S. Exercises Right of Self-Defense Against Libyan Terrorism, 86 DEP'T ST. BULL. 1 (June 1986) (U.S. Attack on Libya).}

\textsuperscript{148} Waldock, supra note 124, at 496-98.

\textsuperscript{149} Article 2(4), it may be recalled, requires all members to refrain in their international relations from the threat or use of force “against the territorial integrity or political independence” of any other state, or “in any other manner inconsistent with the purposes of the United Nations, U.N. CHARTER art, 2, para. 4.
The International Court of Justice permitted the use of force in the face of a strong probability of armed attack. It also found use of defensive force intended to assert rights illegally denied consistent with Article 2(4).

The customary formulation of the right of self-defense allowed resort to force only if the necessity was "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Some international scholars view the limitation of self-defense to cases requiring instant and immediate response as a central element of legitimate self-defense. One writer stresses that the need for self-defense must be instant and therefore does not cover "(a) either preventive measures against remote future contingencies of (b) retaliatory measures against past offenses which are unlikely to be repeated in the immediate future."  

This interpretation is overly restrictive and fails to accept the realities of modern international relations. As Professor McDougal has explained:

Even the highly restrictive language of Secretary of State Webster in the Caroline case, specifying a 'necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation,' did not require "actual armed attack," and the understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists. The requirement of proportionality, in further expression of the policy of minimizing coercion, stipulates that the responding use of the military instrument by the target state be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense under the established conditions of necessity.

It has indeed been accepted principle that a target state may make a first, provisional decision that the conditions of necessity are such as to require it immediately to employ the military instrument for preservation of its territorial integrity and political independence. Given the continuing ineffectiveness of the general community organization to act quickly and certainly for the protection of states, no other principle

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151 "A threat and, indeed, use of force—the demonstration of naval force in Albania's territorial waters [the subject of the Corfu Channel case]—is not contrary to Article 2(4) when it is affirmation of rights which have been illegally and forcibly denied. . . . It is enough if there is a strong probability of armed attack—an imminent threat of armed attack." Waldock, supra note 124, at 500.
could be either acceptable to states or conducive to minimum order.\textsuperscript{152}

Under the \textit{Caroline} interpretation, absent an immediate or instant need to act, a state has no right of self-defense until an "armed attack" actually occurs. Creeping violations of territorial rights must be suffered unless the Security Council acts effectively—an unlikely proposition. To avoid the resultant incongruities, the concept of necessity must be separated into two components: 1) necessity calling for instant and immediate response, and 2) necessity in the absence of any other alternative. The second component of necessity assumes importance today because neither a residual legal right to declare aggressive war nor an paralyzed Security Council exists. If an appeal to the proper authorities would be pointless, a form of necessity arises whereby the threatened state could justifiably enter the offending state and eliminate the threat to its sovereignty. Evaluation of a claim of necessity always will require careful analysis of various factors besides the element of immediacy.\textsuperscript{153}

The requirement of necessity, therefore, really constitutes an abbreviation for the threat of armed attack and the lack of an opportunity to seek a peaceful settlement. The standard considers prior violation of international law implicit in the preparation to launch an armed attack by a state or its surrogates, as well as a de facto refusal or inability of the offending state to employ alternatives to conflict resolution other than force.

Responses in self-defense must not only be necessary, but also proportionate to the complained of transgression. The proportionality concept,\textsuperscript{154} became widely accepted in the twentieth century and provides one basis of the modern view of self-defense articulated in the UN Charter.\textsuperscript{155} Defensive action which greatly exceeds provocation, as measured by relative casualties or scale of weaponry, will be condemned as illegitimately disproportionate. Governments, by and large, observe the proportionality requirement when faced with isolated attacks.\textsuperscript{156}

Proportionality is closely linked to necessity as a requirement of self-defense. Acts of self-defense must not exceed, in manner or aim, the necessity provoking them. "Proportionality in coercion constitutes a requirement that responding coercion be limited in intensity and magni-

\textsuperscript{152} M. McDougal \& F. Feliciano, \textit{supra} note 103, at 230.

\textsuperscript{153} Id. at 242.

\textsuperscript{154} Secretary Webster in the \textit{Caroline} case also maintained that "the act justified by the necessity of self-defense must be limited by that of necessity and kept clearly within it." IV J. Moore, \textit{supra} note 120, at 412. \textit{See also J. Brierly, \textit{supra} note 123, at 405-07; M. McDougal \& Feliciano, supra note 131, at 217-18.}

\textsuperscript{155} I. Brownlie, \textit{supra} note 130, at 261-65.

\textsuperscript{156} For example, as one scholar theorized, the use of nuclear weapons would be a disproportionate and thus illegitimate response to a conventional attack in most cases. Singh, \textit{The Right of Self-Defense in Relation to the Use of Nuclear Weapons}, 5 \textit{Indian Y.B. of Int'l Aff.} 3, 32-4 (1956).
tude to what is reasonably necessary promptly to secure the permissible objectives of self-defense.”

While this general formula leaves room for different application in particular cases, uncertainty in some situations does not impair the essential validity of the principle or its practical application in many conflicts.

Self-defense is an inherent international legal right of all nations recognized by the UN Charter. The right of self-defense may arise in order to counter the use of force, an immediate threat of the use of force, or to respond to a continuing threat. Although a threat of force is generally thought of in terms of actions by a state’s conventional forces, state-sponsored terrorist activity also constitutes a hostile act enabling the right of self-defense to be exercised to protect a state’s essential interests—constructed as its citizens, forces, property or national policy objectives. Although not a limitation on the right of self-defense, international law generally restricts acts of self-defense to measures necessary, relevant, and proportionate to the threat.

4. Peacetime Reprisals

Reprisals are methods adopted by states to secure redress from another state by taking retaliatory measures. Under customary international law, reprisals consisted of injurious and otherwise internationally illegal acts of one state against another permitted on an exceptional basis, namely to compel the latter to consent to a satisfactory settlement of a dispute created by its initial international delinquency. Reprisals predate the present state system since they originated in the medieval practice of private reprisals. The sovereign authorized these acts of retaliation upon the issuance of “letters of marque and reprisal” to redress wrongs committed by the citizens of one state against those of another. The private reprisal aimed primarily to compensate victims of

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157 I. OPPENHEIM, supra note 72, at 136. See the discussion of the Nautiloa case infra.
160 It is beyond the scope of this article to discuss at length the historical development of reprisals particularly since it is more than adequately treated in Taubbee and Anderson, Reprisal Redux, 16 CASE W. RES. J. INT’L L. 309 (1984); VERZIJL, 8 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 37 (1976). The word “retaliation” is often used synonymously with “reprisal,” although certain distinctions were drawn relative to the purposes of each. See, e.g., Clark, English Practice with Regard to Reprisals by Private Persons, 27 AM. J. INT’L L. 694, 695-96 (1933).
161 See W. BISHOP, supra note 158, at 848 (quoting Vattel who wrote that “whoever ill-treats a citizen indirectly injures the state, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish
injustice. Private reprisals were abolished, initially on an individual country basis, then by all the states that signed the Treaty of Paris in 1856.\textsuperscript{162} Since 1856, reprisals by private individuals have been regarded as illegal, with only states entitled to recourse to this form of self-help.

The concept of interstate or public reprisals originated in the late eighteenth century and was often cited, until World War II, as justification for the use of force during peacetime.\textsuperscript{163} A state undertook these reprisals "to secure redress for a legal wrong inflicted by another state," by "inflicting a not disproportionate injury . . . designed to compel consent to a just and satisfactory settlement."\textsuperscript{164} Thus, reprisals sought more than simply to secure compensation for a wronged citizen. They became "a sanction, a weapon to enforce a change in the opponent's policy."\textsuperscript{165}

The doctrine of reprisals during peacetime was grossly misused and frequently characterized as "a weapon in the hands of the Great Powers."\textsuperscript{166} Despite this misuse, reprisals were far from useless. If one respects the rules governing the use of reprisals, then reprisals serve as a reasonable weapon in the modern international legal order's arsenal to combat terrorism.

Modern formulations of reprisals usually find their genesis in the Naulilaa Incident Arbitration decision.\textsuperscript{167} The arbitral tribunal specified the following basic prerequisites for legal reprisals:

The first prerequisite, sine qua non, for the right to exercise reprisals is an occasion furnished by a previous act contrary to international law . . .
Reprisals are only lawful when preceded by an unsatisfied demand. The use of force is only justified by its character of necessity.

Even if one admitted that international law does not require that the reprisal be approximately measured by the offense, one should certainly consider as excessive, and thus illegal, reprisals out of all proportion with the act which motivated them.168

These elements have been utilized by various scholars to form the basis for the modern definition of reprisals. For example, Professor Bowett lists the three preconditions of reprisal as:

(1) The target state must be guilty of a prior international delinquency against the claimant state.
(2) An attempt by the claimant state to obtain redress or protection by other means must be known to have been made, and failed, or to be inappropriate or impossible in the circumstances.
(3) The claimant's use of force must be limited to the necessities of the case and proportionate to the wrong done by the target state.169

Reference to the element of intent can distinguish reprisals from self-defense. Self-defense is future oriented since its goal is state security against threats to its territory or sovereignty. Reprisals, on the other hand, are oriented to the past; they seek to punish previous illegal acts and prevent their recurrence.170 However, the distinction between self-defense and reprisals is far harder to make in practice than to define. As Professor Bowett has declared: Not only is the motive or purpose of a state notoriously difficult to elucidate but, even more important, the dividing line between protection and retribution becomes more and more obscure as one moves away from the particular incident and examines the whole context in which the two or more acts of violence have occurred. Indeed, within the whole context of a continuing state of antagonism between state, with recurring acts of violence, an act of reprisal may be regarded as being at the same time both a form of punishment and the best form of protection for the future, since it may act as a deterrent against future acts of violence by the other party.171

Reprisals take many forms172 but generally fall in two categories: positive reprisals which entail overt acts that would otherwise be illegal, and negative reprisals consisting of refusing to perform ordinarily obliga-

168 Id. at 1026.
170 Id. See also Schwartztenberger, supra note 142, at 313; Waldock, supra note 124, at 464.
171 See Bowett, supra note 169.
172 Typical types of reprisals are embargo, military occupation, naval bombardment, boycott, pacific blockade, and intervention. In using reprisals to combat state sponsored terrorism the focus here will be primarily on armed reprisals although, as in the case of Libya, other reprisals, such as economic sanctions, may be appropriate.
tory acts.\textsuperscript{173} Retaliatory acts are designed: (1) to enforce obedience to international law by discouraging further illegal conduct; (2) to compel a change in policy by the delinquent state; and (3) to force a settlement of a dispute with the delinquent state whose actions breached international law.\textsuperscript{174} Once an internationally recognized obligation has been breached, a particular state must be identified as responsible.\textsuperscript{175} This is especially important in consideration of reprisals against states alleged to have sponsored terrorist acts.

The use of armed reprisals requires prior identification of a responsible state or entity followed by attempts to achieve peaceful redress of the dispute.\textsuperscript{176} However, no attempt to obtain peaceful redress is required if it appears "inappropriate or impossible in the circumstances."\textsuperscript{177} For example, given the futility of Israel's past resorts to the Security Council and the possible adverse effect on Israeli citizens and property of an unsuccessful attempt to secure condemnation of PLO attacks, Israel would be entitled to act in reprisal, without attempting peaceful redress so long as the a response is in proportion to the initial attack.

As with self-defense, must a reprisal satisfy the requirement of proportionality to be legitimate? Indeed, as Professor Bowett has noted, "reasonable" reprisals roughly equivalent to the previous illegal injury, are less likely to be condemned by the Security Council.\textsuperscript{178} A proportional response depends on circumstances and, in general, requires:

- armed force in reprisal will not be used to regain redress for trivial rights;
- the use of force must be executed as humanely as possible
- the retaliating state must avoid any use of force that would cause or escalate into a war; and
- the force employed must be confined to obtaining redress only.

Rough equivalence in the number of deaths and extent of property damage remains the \textit{sine qua non} of proportionality.\textsuperscript{179} However, the status of certain persons excludes them from this calculation, e.g., murdering PLO children in retaliation for the murder of Israeli children. The pro-

\textsuperscript{173} I. OPPENHEIM, \textit{supra} note 72, at 140.
\textsuperscript{174} G. HACKWORTH, \textit{supra} note 130, at 152.
\textsuperscript{175} I. OPPENHEIM, \textit{supra} note 72.
\textsuperscript{176} Traditionally, a demand for redress involves three elements: (1) the offending state informed of the wrong; (2) the lapse of a reasonable amount of time for the offending state to respond; and (3) refusal of the offending state to make amend. I. OPPENHEIM, \textit{supra} note 72, at 142-43.
\textsuperscript{177} See Bowett, \textit{supra} note 169.
\textsuperscript{178} Professor Bowett describes the Israeli situation and their use of reprisals in some detail in his article, \textit{supra} note 169. See also Falk, \textit{supra} note 138; Levenfeld, \textit{Israeli Counter-Fedayeen Tactic in Lebanon: Self-Defense and Reprisals Under Modern International Law}, 21 COLUM. J. TRANS-NAT'L L. 1 (1982).
\textsuperscript{179} Bowett, \textit{supra} note 169, at 7, 11 (Condemnations of Israel have followed when the Council has stressed the disproportionate nature of the reprisal).
hibition of reprisals against certain objects and facilities by the laws of war also must be observed. Additionally, proportionality must be calculated on the basis of prior events. Therefore, an accumulation of small events, such as minor terrorist attacks, can justify a single, larger retaliatory response in certain instances. Requiring a state to respond to each nuisance attack with a roughly equal nuisance serves no purpose. Past attacks should justify a large retaliation only if they are part of a continuous, overall plan of attack that relies on numerous small raids. Any other approach may unduly risk escalation.

Some scholars have argued that proportionality can also be determined by reference to future action. In their view, the use of force would be calculated to prevent an enemy from engaging in the threatened attack against the defending state. Obviously, basing proportionality on a necessarily speculative assessment of the enemy's future conduct runs the risk of becoming too permissive, unlike anticipatory self-defense where an armed attack is imminent thus justifying a response to the threat. If an unfounded expectation of a massive enemy attack or series of attacks can justify a massive anticipatory thrust to deter the imagined onslaught, then the rule of law would be irrelevant. Furthermore, proportionality would have no meaning since preventive application of force such as a reprisal action provides no ready reference point for the calculation of a proportional response. Making justifications for reprisal on the basis of a future wrong is difficult since the wrong supposedly justifying the retaliatory response has yet to occur.

5. Peacetime Reprisals Under the UN Charter

Articles 2 and 51, previously discussed in the context of self-defense, comprise a minimum order structured to ensure freedom from aggression and the right of self-defense as a deterrent. Consequently, many authorities have concluded that reprisals and retaliation are illegal under the UN Charter. This conclusion derives from the Article 2(4) prohibition of the use of force, the Article 2(3) injunction to settle disputes peacefully, and the limitation on force used by states in self-defense

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180 Most writers concede, albeit reluctantly, that since proportionality cannot be accomplished with anything near mathematical certainty, any response not obviously disproportionate to its provocation satisfies the requirement. F. Kalshoven, supra note 161, at 344-42.

181 See, e.g. 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, and the four 1949 Geneva Conventions (all ratified by the United States) reprinted in Documents on the Laws of War (A. Roberts, and R. Guelff eds. 1982).

182 M. McDougal & F. Feliciano, supra note 103, at 682, argue that "the kind and amount of permissible reprisal violence is that which is reasonably designed so as to affect the enemy's expectations about the costs and gains of reiteration or continuation of his unlawful act as to induce the termination of and future abstention from such act."
stated in Articles 51 and 53.\textsuperscript{183} Professor Brownlie thus concluded “the provisions of the Charter relating to the peaceful settlement of disputes and nonresort to the use of force are universally regarded as prohibiting reprisals which involve the use of force.”\textsuperscript{184}

The Security Council has also condemned “reprisals as incompatible with the purpose and principles of the United Nations.”\textsuperscript{185} The Council’s rationale was that UN members have contracted not to use force to resolve international controversies.\textsuperscript{186} Since reprisals were not considered as the use of force in self-defense, they were considered illegal.

Despite Security Council condemnation, actual practice has shown that an inconsistency exists between the statements and actions of both the Security Council and the General Assembly regarding reprisals. The Council has generally not condemned a reprisals considered “reasonable.” By condemning only unreasonable or disproportionate reprisals, the Council has affirmed the right of states to resort to reasonable reprisals. As Professor Bowett has observed: “There is clearly some evidence that certain reprisals will, even if not accepted as justified, at least avoid condemnation.”\textsuperscript{187} Israeli counterterrorist measures, the subject of most of the condemnations by the Security Council as illegal reprisals.\textsuperscript{188} They have been justified by the Israelis largely as reprisals or retaliation, and less frequently as self-defense.\textsuperscript{189}

The legality of reprisals has been addressed in the context of the Middle East by Professors Falk and Blum in the aftermath of the December 1968 Israeli reprisal against the Beirut airport.\textsuperscript{190} Professor Falk argues that the Beirut reprisal constituted a violation of international law because it involved the use of force without any recourse to diplomatic

\textsuperscript{183} Id. at 121-24.

\textsuperscript{184} The United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States, supra note 8, also declares that: “States have a duty to refrain from acts of reprisal involving the use of force.”


\textsuperscript{186} Falk, supra note 138, at 429 and n. 37. Statement made in censure of U.K. for carrying out reprisals against the Yemen town of Harib in retaliation for Yemeni support of the war in Aden.

\textsuperscript{187} M. McDougal & F. Feliciano, Legal Regulation of the Right to International Coercion, 68 YALE L.J. 1057, 1063-64 (1956).

\textsuperscript{188} See Bowett, supra note 169, at 18-21.

\textsuperscript{189} Id.

\textsuperscript{190} H. ALON, COUNTERING PALESTINIAN TERRORISM IN ISRAEL 16-19 (1980) (Describes Israeli retaliatory raids as “reprisals.”); M. DAYAN, MOSHE DAYAN: STORY OF MY LIFE 172-173, 190-191 (1976). Nevertheless, self-defense remains the central theme of all Israeli military actions because of their (and Arab) perceptions of themselves being in a constant state of war.
solutions. Also, the Israelis failed to establish a direct link between the Lebanese Government and the Palestinian terrorists. 191 However, Falk did not adopt the strict stance espoused by the United Nations and claim that all reprisals were forbidden. He established twelve preconditions which would have to be met before any reprisal could be legally undertaken. These preconditions can be summarized as follows:

- a diligent effort be made to achieve a conciliatory result over a reasonable period of time, including recourse to international organizations;
- the use of force is proportional to the provocation;
- the retaliatory action be taken only against military and paramilitary targets; and,
- the government undertaking the reprisal provide an immediate explanation of its conduct before relevant international organizations. 192

These stringent requirements make most Israeli reprisals illegal.

Professor Blum responded that Israeli attacks on Arab states supporting terrorism were legal due to the existing state of war between Israel and its Arab neighbors. 193 Since the Arab states were, in effect, waging war against Israel by backing terrorist organizations as surrogates, Israel could retaliate against those states under the legal right of self-defense. Despite Israeli characterization of this act as a reprisal, Professor Blum preferred to consider their actions under the more palatable label of self-defense.

Notwithstanding Security Council and General Assembly declarations and scholarly argument to the contrary, Security Council practice has sanctioned the use of reprisals when they appeared “reasonable.” As Professor Bowett suggests, while reprisals remain de jure illegal, they have gained de facto acceptance. 194 Thus reprisals should not be condemned on their illegality alone, but rather, on the basis of “reasonableness” determined primarily on a case-by-case basis which takes into account the proportionality of the reprisal more than any other factor. 195 By condemning only unreasonable or disproportionate reprisals, the Security Council has affirmed the right of states to resort to reasonable reprisals as a legitimate self-help measure.

Article 2(4) provides further support for the legitimacy of reason-

191 As the result of an Arab terrorist attack on an EL Al aircraft a raid on the Beirut airport was conducted by Israeli commandos. Several planes were destroyed and the Israeli chief of staff, General Yetzhak Bar Lev., was reported to have stated the purpose as being “to make clear to the other side that the price they must pay for terrorist activities can be very high.” N.Y. Times, Jan. 5, 1969, § 4, at 1.
192 Falk, supra note 138, at 440-42.
193 Id. See Bowett’s critique, supra note 169, at 27-28.
194 Blum, supra note 69, at 254-55.
195 Bowett, supra note 169, at 11.
able reprisals since it leaves open the possibility that a reprisal is a use of force not "inconsistent with the purposes of the United Nations." In the Corfu Channel case, the International Court of Justice condoned a resort to forcible self-help (the passage of British warships through a disputed channel), thus hinting that some residual right to reprisal remains in the modern international legal order dominated by the U.N. Charter.\(^{196}\)

Finally, prohibition of all reprisals may run the risk of leaving much state conduct unregulated. As Professor Burke explained:

[T]he current state of [international] affairs is characterized by a collective security system that is not effective or likely to be so, by a preference for peaceful change which unfortunately is not translated into techniques by which such change may be achieved, and by a set of economic and social conditions that lead to constant change and friction inflicting more or less serious deprivations, though less than the use of force, upon state interests. As a result of these factors, . . . a state may suffer considerable injury that the existing system remains completely unable to remedy through collective procedures. If the individual state is also forbidden to resort to minor coercion in self-help, the accumulation of irritations and pressures may create conditions favorable to the employment of very intense forms of coercion.\(^{197}\)

It is preferable to maintain legal standards that govern resort to coercion short of war, rather than abandon any regulation of such force by a blanket condemnation. States will ignore the latter practice. Instead of determining that reprisals are invariably illegal under the UN Charter, it is far better to retain the "criteria of reasonableness in a situation that threatens at many points to deteriorate into intense and limitless forms of violent conduct."\(^{198}\) The case for the legality of reprisals is well stated by Professor Burke:

Instances of permissible use of minor coercion recognized in international law before the U.N. Charter continue to be lawful, and, in particular, . . . Article 2(3) and 2(4) do not extend to complete prohibition of all forms of coercion other than that employed in individual or collective self-defense. The state is entitled . . . to rely upon prescriptions of customary international law such as permissible reprisals. . . . This argument may be supplemented by the allegation that the exercise of forcible measures of self-help is fully within the community's expectations about the sanctions permissible under international law and that the United Nations Charter may be interpreted appropriately to reflect

\(^{196}\) Id. at 10-12.

\(^{197}\) Waldock, supra note 124, at 501, argues that the court "apparently allowed a demonstration of force not merely for insuring safe exercises of the right of passage but to test the attitude of the wrong-doer and to coerce it into future good behavior. This seems to go close to allowing forcible self-help without reference to the United Nations."

these expectations.\textsuperscript{199}

In sum, the doctrine of peacetime reprisals establishes a desirable tool for maintaining a semblance of legal regulation over the use of force short of war. Recognition of proportional reprisals and responses in self-defense as legitimate tools of self-help will clarify the meaning of both and eliminate the necessity of trying to fit every use of armed force within the context of self-defense. This had diluted the meaning of self-defense to the point it signified little more than a propaganda code word to justify every use of force, legitimate or otherwise. The better approach is to judge the use of force on the basis of measurable criteria (the wrong committed, identifiable transgressor, exhaustion of peaceable remedies, necessity and proportionality), rather than argue incessantly about the legality of reprisals or the limits of the use of force in self-defense.


The United States has generally followed the statements of the UN and "taken the categorical position that reprisals involving the use of force are illegal under international law..."\textsuperscript{200} In 1973, the Department of State rejected a proposal by Professor Rostow that the United States condone reprisals as measure of self-help when a state cannot or will not fulfill its international legal obligations.\textsuperscript{201} However, the U.S. practice has shifted somewhat from a blanket condemnation of reprisals to an insistence that the terrorist acts which provoked a state into reprisals be condemned at the same time.\textsuperscript{202} While the United States recognizes the principles of anticipatory self-defense and the difficulty sometimes encountered in distinguishing between the exercise of self-defense and an act of proportionate reprisal, it insists on maintaining the distinction without attempting to clarify the difference between the two. As the State Department noted, U.S. Government officials, including the President, have often labeled actions as reprisals, retaliation or retribution, only later to justify them on the basis of self-defense.\textsuperscript{203}

On April 5, 1986, a terrorist bomb exploded in a West Berlin nightclub frequented by American service personnel. Two Americans and a Turkish women were killed, and 239 others were wounded. In response, U.S. air strikes were carried out on a military airport near Tripoli, a barracks used as a command and control center, a training area allegedly

\textsuperscript{199} Falk, \textit{supra} note 138, at 431, n. 39.
\textsuperscript{200} Burke, \textit{supra} note 198.
\textsuperscript{201} Statement of Ms. J.W. Willis, Deputy Assistant Legal Advisor for European Affairs, Dept. of State, 1979 \textit{D}IGEST OF U.S. PRACTICE IN \textit{I}NT'L L. 1749, 1752 (1983). \textit{S}ee also M. WHITEMAN, \textit{supra} note 185.
\textsuperscript{202} \textit{Id.} at 1750.
\textsuperscript{203} \textit{Id.} at 1752.
used by terrorists, other barracks and command posts, and Benina Air Base from which defensive, suppressive activities and air defense could be mounted against U.S. forces. The U.S. justified the attack as follows:

These strikes were conducted in the exercise of our right of self-defense under Article 51 of the United Nations Charter. This necessary and appropriate action was a preemptive strike, directed against the Libyan terrorist infrastructure and designed to deter acts of terrorism by Libya, such as the Libyan-ordered bombing of a discotheque in West Berlin on April 5.204

Secretary Shultz described the U.S. attack as "an act of self-defense . . . proportionate to the sustained, clear, continuing, and widespread use of terror against Americans and others by Qadhafi's Libya."205 Later, in response to a question, Shultz stated the primary objective was "to defend ourselves both in the immediate sense and prospectively."206

The U.S. response to Libyan terrorism met all the criteria of a reasonable reprisal. All attempts by the United States at pacific redress—quiet diplomacy, public condemnation, economic sanctions, and demonstration of military force—had failed. The United States approached Arab states requesting them to convince Qadhafi that he should stop supporting terrorism. The United States terminated diplomatic relations with Libya and unilaterally imposed economic sanctions, despite failing to convince its allies to join in multilateral sanctions. Next, the United States demonstrated its ability to use force by posturing off the coast of Libya. But nothing worked. Libya clearly had been guilty of numerous acts of terrorism and compelling evidence demonstrated its direct complicity in the Berlin bombing. In view of the failure of these other alternatives, the air strikes were considered necessary and proportionate, given their concentration on purely military targets which ostensibly could be used in direct support of terrorist acts.207 Beyond its retributive aspects, the attack was likely to further the constructive goal of deterring terrorism.208

However, U.S. government officials characterized the attack as purely one of self-defense based on assertions that Libya was engaged in

204 Id. at 1751. See also President Reagan's statement, supra note 21.
206 Joint News Conference by Secretary Shultz and Secretary Weinberger, April 14, 1986 Id. at 3.
207 Id. at 4. See also the White House statement of April 14, 1986 (It's our hope that action will preempt and discourage Libyan attacks against innocent civilians in the future.) and President Reagan's address to the Nation, April 14, 1986 (We believe that this preemptive action against terrorist installations will not only diminish Colonel Qadhafi's capacity to export terror, it will provide him with incentives and reasons to alter his criminal behavior.) Id. at 1-2.
208 One of the targets was supposedly Qadhafi's personal guards. It was never explained what role, if any, they had in terrorist acts. Most likely they were targeted more for demonstration purposes.
"sustained, clear, continuing and widespread use of terror against Ameri-
can[s] and others . . ."\textsuperscript{209} The United States also cited previous attacks
and the statements of Qadhafi that he wanted to have America "fight on
a hundred fronts in support of the attack."\textsuperscript{210} As Professor Bowett
noted, the dividing line between protection (self-defense) and retribution
(reprisal) is elusive.

Indeed, with the whole context of a continuing state of antagonism
between states, with recurring acts of violence, an act of reprisal may
be regarded as being at the same time both a form of punishment and
the best form of protection for the future, since it may act as a deter-
rent against future acts of violence by the other party.\textsuperscript{211}

If the United States accepted proportionate reprisals as an acceptable,
legitimate form of self-help, it would be unnecessary to stretch the mean-
ing of self-defense, especially by alluding to some future, ill-defined, po-
tential acts of terrorism which may prove exceedingly difficult to link to
state support.

Clearly, reprisals have utility in combating terrorism. If employed
with restraint and only when other alternatives or justifications for the
use of force do not exist, reprisals can constitute an effective response to
the intimidation and violence of state-sponsored terrorism. Sponsoring
states and their surrogates would be forced to factor this response into
the cost-benefit analysis of conducting or supporting further terrorist
acts. Given present state practice regarding reprisals (where expediency
appears to prevail over the letter of the law and utility of proportionate
reprisals as a last resort), the United States should abandon its present
policy. In a stronger policy, the United States should undertake to clar-
ify what responses are acts in self-defense, measures in reprisal or both.

IV. CONCLUSION: THE WILL TO CHALLENGE HOSTES HUMANI
GENERIS

"[A] civilization that can thus succumb . . . must have become so de-
generate that neither its appointed priests and teachers, nor anybody
else, has the capacity, or will take the trouble, to stand up for it. If this
is so, the sooner such a civilization receives notice to quit, the better."

\textsuperscript{209} Until the September bombings in Paris, there were not middle eastern instigated terrorist
attacks in Europe and few attacks from local terrorist groups. However, it is arguable whether it
was the U.S. attack on Libya or tightened security measures, increased surveillance of Libyan diplo-
mats and better intelligence sharing that contributed to the relatively few attacks Western Europe
experienced.

\textsuperscript{210} Statement of President's Press Secretary, Larry Speakes, N.Y. Times, April 15, 1986, at
A11. \textit{See also, Statement of Ambassador Walters before the Security Council on April 15, 1986, 86
Dep't St. Bull.} 19 (June 1986).

\textsuperscript{211} \textit{Id.}
"Were a civilized nation engaged with barbarians, who observed no rules of war, the former must also suspend the observance of them..."

—Hume\textsuperscript{213}

The challenge of terrorism is fundamentally a challenge of will. If a test of strength between those who initiate and support terrorist violence and those who oppose it is to occur, then that challenge can only be met by the exercise of power. That power derives from a legal-political structure designed for regulation, not reformation.

At present, little chance exists of terrorism being controlled on a universal basis as long as states and international organizations are prepared to apply a double standard of legality. They currently confer legality and respectability upon acts of violence that are committed by those with whom they sympathize, especially when their position can be explained using the language of the new international order that places "self-determination" and "independence" above any other principle or obligation. In a recent poll of Palestinian Arabs in the West Bank and other areas of the Middle East, 87.6% of those surveyed felt the 1978 hijacking of an Israeli bus in which 34 people were killed was justified; 81.2% responded the same for the 1983 bombing of the U.S. Marines in Beirut; 60.5% favored placing a bomb in an Israeli El Al airliner; and 36.9% supported the Rome and Vienna airport massacres in December, 1985.\textsuperscript{214} The poll revealed that almost 60% agreed that "armed struggle" was the most effective tactic for solving the Palestinian issue; and Palestinians generally "favor violence and terror and will brook no accommodation with Israel or its very existence. Equally importantly, the poll shows that terror is not likely to end; it might actually increase."\textsuperscript{215}

Since a violent, anti-democratic, anti-western and anti-semitic society such as that of Palestinian Arabs of the West Bank serves as a birthplace for terrorists and terrorism in general, it is readily apparent that the national will be enlightened about the threat and engaged in the fight. It will be long, hard, complex and bitter. The fight will be one of confusion and accusation. We will continue to witness an assault on global order by radical or totalitarian regimes which provide covert support to terrorists. That support can always be denied in the absence of any "proof" of direct links to terrorists. In addition to the ability to assert a plausible denial, supporters of terrorism attempt to turn the tables by incessant

\textsuperscript{212} Bowett, \textit{supra} note 169, at 3.
condemnations of states that have used force in response to terrorists and states supporting terrorism that have not been effective in covering their tracks. This phenomenon is summarized by Professor Moore:

A constant and recurring confusion in dealing with terrorism is the failure to condemn terrorism as a policy of aggressive violence in violation of the United Nations Charter and instead to condemn the defensive response of the democracies to terrorist attack as though the defensive response were itself the aggressive attack. In part, this results from terrorist warfare as covert war in which the attack is denied using all of the means available to modern intelligence and political disinformation networks. By so doing the attacking nations seek to conceal the attack as part of the general background noise of ongoing international terrorism and guerrilla warfare. The full weight of the international immune system against aggressive attack is then applied to the relatively open defensive response against the secret attack. This syndrome of "the invisible attack" and "the anemic defense right" threatens to destroy the international immune system against aggressive attack, and by destroying the distinction between attack and defense, to destroy the most important principle in 2000 years of human thought about war prevention.216

Although more laws are needed to close loopholes, law itself will never be sufficient to stop terrorism. The absence of compulsory adjudication on a general basis may be cited in support of this assertion. But, even if compulsory judicial settlement were legally required for the illegal acts of a state or international brigands, a recalcitrant offender hiding in a state supportive of its acts could avoid effective compliance. Under Article 39 of the UN Charter,217 the Security Council may seek to compel compliance by requiring the state sponsoring terrorism to pay reparations for the wrong committed. However, prevailing political differences and the requirement of unanimous approval by the permanent members of the Council render such enforcement measures ineffective.

Consequently, a state defending itself against terrorism must look to other means, including the selective use of force. Use of force can never, nor should it, be used in isolation. It must supplement diplomatic and other action. Restraint must be used but should not prevent use of force when a state deems it justified (necessary) and feasible. If a state is grievously injured by continuing terrorist attacks, and the organized international community is incapable of affording timely redress, then the injured state must stand ready to take necessary and proportionate measures to protect itself and its "essential" interests without condemnation

216 Id.
from the world community. As long as those measures are necessary and proportionate, the response is "legal," irrespective of its characterization as either an act of self-defense or reprisal.

U.S. policy should be modified to embrace the entire spectrum of legal, diplomatic, economic, political and military measures to counter terrorist attacks. The elements of such a policy should weave a seamless web of deterrence (the defensive prevention of attack), pre-emption (anticipatory self-defense) and retaliation/reprisals (punishment and active discouragement of future terrorist attacks). By failing to include reprisals as a credible option, U.S. policy permits the terrorists and their state supporters to occupy a superior strategic and tactical position. The destruction of the Marine barracks in Beirut illustrates this point. The terrorist knew that there would be little or no price for their actions because of a lack of national will and the existence of substantial political and legal barriers\(^{218}\) make it extremely unlikely that the United States will use force.

The discussion of actions in self-defense and reprisals has highlighted distinctions and similarities. Self-defense serves primarily to protect the security of the state and its essential interests (such as territorial integrity and political independence) by direct means. Reprisals, on the other hand, have a punitive purpose, i.e., through indirect means to deter repetition of the illegal conduct. However, it is frequently difficult to discern in actual practice the purposes for which a nation might take an action. In this regard, it is useful to distinguish the two principles by examining the fundamental difference in the nature of the threat in each instance. The legitimate exercise of the right of self-defense always involves a situation, where an imminent and serious threat to the vital interest of the defending state generates a necessity to act to protect those interests. In this respect, the critical criteria for evaluation are the severity, immediacy and continuing nature of the threat. On the other hand, reprisals contemplate responsive actions in retribution for prior, completed illegal acts by the offending state. In these instances, the element of immediacy or continuance of the threat is not present. However, this distinction, commonly drawn between the rights of self-defense and reprisals, remains, at best, a very tenuous one. In reality, whether considered in terms of the interests on behalf of which or the acts in response to which force may be employed, little appreciable difference appears between forcible reprisals and self-defense. While a difference exists in the conditions held to govern the exercise of reprisals and self-defense, this

\(^{218}\) Article 39 provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security. U.N. Charter art. 39.
difference appears quite modest when applied to provocative and unlawful behavior in the context of an antagonistic relationship between states.

Characterization of a military response to terrorist attacks as a reprisal, whether accurate or not, should not be sufficient to declare it a violation of international legal order. Military force should be used only if the stakes justify it; if other means are not available; and then, only in a manner appropriate to achieve the desired end—stopping state support of terrorism. Punitive military response to terrorism should be employed in the "pro-active" campaign against terrorism in a manner consistent with established principles of international law. As Secretary of State Shultz remarked:

It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerrillas. International law requires no such result. A nation attacked by terrorists is permitted to use force to prevent or preempt future attacks, to seize terrorists, or to rescue its citizens when no other means is [sic] available. The law requires that such actions be necessary and proportionate.

The UN Charter is not a suicide pact. The law is a weapon on our side, and it is up to us to use it to its maximum extent.\(^{219}\)

Policy makers realize that the choices which confront them in the war on terrorism will not always be clear and readily discernible. What is legal may not always be moral and vice versa. Furthermore, that which is considered both moral and legal may not be politically feasible. Policy formulation requires evaluation of all three factors. However, in using armed force, whether characterized as self-defense or reprisal, there should be no response without a foundation of strong moral justifications. Clearly, the populace of a democracy will not view immoral activities which are on a par with those of terrorists as legitimate. For example, killing women and children will not be accepted as a legitimate response to a similar terrorist act. Claiming a defense justifiable for protection of democratic values while employing tactics similar to those practiced by terrorists undermines public confidence. Therefore, a military response must be based on necessity and restrained in its use. If perceived as a method of last resort, popular support will remain after all the shouting subsides.

If a state is expected to act flexibly, effectively and decisively against

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terrorism acceptable mechanisms must be available to counter terrorist activities. If anything is clear about fighting state supported terrorism, it is the need for an active strategy whereby governments are better organized to respond; and nations are intellectually and psychologically prepared to meet the challenge. Arguing that military action to retaliate or preempt terrorism is contrary to international law, or that the use of force against terrorism lowers us to the barbaric level of the terrorists, serves only to confuse and decrease the potential for a national and international consensus. Self-help measures are not illegal if exercised with restraint in response to illegal acts of terrorists. "[T]hose who allege that the Western democracies run the risk of becoming like the terrorists they oppose by adopting proactive options to suppress and defeat them are engaging in a cruel form of deception and falsehood, which only encourages and emboldens terrorists who want the United States to be paralyzed with indecision and moral vacillation. It is a sad commentary on the times that it is necessary to reassert our obvious superiority, by any conceivable yardstick, to the terrorists and their sponsors whose only politics are those of fear and murder and whose law flows out of the barrel of a gun."220

Without a right to effective self-help, the value of justice, even when distinctly threatened, is subjected to the value of peace, even if minimally threatened. In an imperfect world order, failure to recognize the legitimacy of self-help measures in the face of the terrorist threat will detract from, rather than secure, international peace and a just international legal order.221

221 Livingstone, Proactive Responses to Terrorism, in FIGHTING BACK, supra note 11, at 109.