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## International Legal and Policy Implications of an American Counter-Terrorism Strategy

### Keywords

International Criminal Law, Terrorism, Air Law

# STUDENT COMMENT

## INTERNATIONAL LEGAL AND POLICY IMPLICATIONS OF AN AMERICAN COUNTER-TERRORIST STRATEGY

BY  
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### I. INTRODUCTION AND BACKGROUND

One of the major issues facing the international community today is how to deal with the rising threat of terrorism. The use of terrorism as a political weapon has expanded to virtually every geographic and political area of the world. The past year offers an example of the extent and frequency of the terrorist problem. In September 1984, the American embassy annex in East Beirut was virtually destroyed by a terrorist truck bomb.<sup>1</sup> In October 1984, an assassination attempt was made on Britain's Prime Minister Margaret Thatcher. Indeed, between September 1 and October 19, 1984, 41 acts of terrorism were perpetrated by no fewer than 14 terrorist groups against the people and property of 21 countries.<sup>2</sup>

This recent rise in the phenomenon of the use of terrorism as a political weapon can be attributed to two factors. First, new developments in technology, such as the increased sophistication of the mass media, now permit the terrorist's message to be disseminated throughout the world virtually minutes after a terrorist operation is undertaken. New developments in technology have provided the terrorist with powerful new weapons and more reliable means from which to escape. Thus, by using terrorist tactics, an individual or group can now obtain concessions from the nations of the world which in the past were more difficult to gain.<sup>3</sup>

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1. This was the third major attack on American interests in Lebanon in the past three years.

2. 84 DEP'T STATE BULL., No. 2093, Dec., 1984, at 86.

3. Sloan and Wise, *Countering Terrorism: The U.S. and Israeli Approach*, 9:3 MIDDLE E. REV. 55 (1977).

A second factor contributing to the growth in terrorism is that the cost in employing such tactics is rather minimal. Terrorist acts can be executed by a small number of persons. By aiming primarily at civilians, the potential list of unprotected targets is endless and such targets are readily available. Where the terrorist operation takes place in a country that is not concerned with the political goal to which the terrorist aspires, there tends to be a limited reaction from that country to the terrorist attack.<sup>4</sup> In short, because new developments in technology lend themselves favorably to terrorist methods, and because of the low cost involved in using such methods, terrorism has become a useful device for achieving even the most minor political benefits.

Recognizing that terrorism is an increasingly dangerous phenomenon, the United States government is actively searching for an adequate response to terrorism. To date, American policy has assumed a defensive posture, yet its underlying philosophy is based on unyielding firmness in dealing with terrorists. For instance, the United States believes that yielding to terrorist demands only increases and encourages subsequent acts of terrorism. The government will not pay ransom nor will it yield concessions to terrorists.<sup>5</sup>

Despite this policy, it has become increasingly apparent to American decision-makers that the present policy is inadequate. This growing realization has led to a search for more effective methods of dealing with the terrorist problem. Perhaps no clearer reflection of this new attitude can be found than in the recent speech given by United States Secretary of State George Shultz before the Park Avenue Synagogue in New York City on October 25, 1984. Because of the sharp new policy direction the Secretary proposed, that speech will be used in this article as a vehicle to explore the international legal implications of an active counter-terrorist policy. It is the contention of this writer that such a national approach to the problem of terrorism contains, at least in part, serious legal and policy problems. As such, modifications should be made to the approach proposed. The purpose of this article is to examine those international principles and policies concerning the use of unilateral economic and military measures as they are applied to the specific problems in American efforts to control international terrorism. The article addresses the extent to which the United States may, consistent with principles of international law, or should, consistent with the best interests of nations, engage in self-help<sup>6</sup> activities against states that support acts of international terrorism.

In order to address these questions, this article will first highlight the major aspects of the speech given by Secretary Shultz. The article will

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4. *Id.* at 56.

5. *Id.* at 57-58.

6. "Self-help" is used here to describe the situation where an injured state unilaterally takes measures to protect itself and its nationals.

then attempt to explain why Shultz and others feel a unilateral approach toward solving the terrorist problem should be taken. Then, the discussion will turn to a legal analysis of the approach proposed by the Shultz speech. The last part of the discussion will analyze the policy implications of adopting the proposed counter-terrorist strategy.

#### A. *The Shultz Speech on Terrorism*

Recognizing the inadequacy of existing U.S. policy in dealing with the problem of international terrorism, Secretary Shultz's speech of October 25, 1984 called for more active counter-measures in dealing with the terrorist problem, and asked for a broad national commitment to counter the threat of terrorism.<sup>7</sup> The "essence of our response," Shultz stated, "is simple to state: violence and aggression must be met with firm resistance."<sup>8</sup> The best deterrent to terrorism, he stated, is the "certainty that swift and sure measures will be taken against those who engage in it."<sup>9</sup>

In order to understand what Shultz meant by a "firm resistance" policy, a closer examination of the speech is necessary. The speech embraces a policy that contains several elements. (A) *Israel as an Example*. The speech urges that the methods used by the state of Israel in dealing with terrorism should be followed. Pointing out that "no nation has had more experience with terrorism than Israel,"<sup>10</sup> and that "Israel has won major battles in the war against terrorism,"<sup>11</sup> Shultz asserted that "nations of the world would do well to follow Israel's example [of how to deal with terrorism]."<sup>12</sup> (B) *Broader International Effort*. The speech calls for a broader international effort, and pledges that the United States "will work whenever possible in close cooperation with our friends in the democracies."<sup>13</sup> (C) *Economic Sanctions*. The speech calls for sanctions, implicitly economic in nature, to "isolate, weaken, or punish states that sponsor terrorism against [the United States]."<sup>14</sup> (D) *Armed Reprisal*. The speech calls for the use of Shultz urges that preemptive action be employed to "stop terrorists before they commit some hideous act."<sup>15</sup> His speech indicates that unpredictability and surprise are elements that a counter-terrorist policy should incorporate. The speech specifically calls for retaliation where there is "an attack on our people."<sup>16</sup> The speech advocates flexibility in response at the "times and places of our own choosing."<sup>17</sup> (E) *Non-Courtroom Evidence*. The speech asserts that there may

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7. Shultz, *Terrorism and the Modern World*, 84 DEP'T STATE BULL., *supra* note 2, at 15.

8. *Id.*

9. *Id.* at 16.

10. *Id.* at 15.

11. *Id.*

12. *Id.*

13. *Id.* at 17.

14. *Id.*

15. *Id.* at 16.

16. *Id.*

17. *Id.*

exist the need to respond militarily though U.S. officials may not have the "kind of evidence [of terrorist activity] that can stand up in an American court of law."<sup>18</sup>

### B. *The Desire for Unilateral Action Against Terrorism*

Secretary Shultz's call for a more active unilateral policy in dealing with the terrorist problem reflects a growing attitude among policy-makers that international agreements do not have the capability to effectively deal with these matters. Despite adoption of rules by the United Nations<sup>19</sup> and other bodies<sup>20</sup> which clearly outlaw international terrorism,

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18. *Id.* One final element in the proposed policy was an increased American intelligence capability. Because of the breadth of that subject, it will not be addressed in this article.

19. For instance, several conventions have been adopted regarding aviation hijacking. The 1963 Tokyo Convention requires parties to the convention to return any hijacked plane and passengers. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963 [1969] 3 U.S.T. 2941, T.I.A.S. No. 6768. The 1970 Hague Convention contains language that states parties must either extradite or prosecute hijackers. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970 [1971] 22 U.S.T. 1641, T.I.A.S. No. 7192. The 1971 Montreal Convention contains the same provisions with respect to individuals who engage in any kind of sabotage of aviation. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, T.I.A.S. No. 7570.

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

The General Assembly has also condemned hostage-taking. In 1979, it adopted, without objection, the International Convention Against the Taking of Hostages. International Convention Against the Taking of Hostages, G.A. Res. 34/146, 34 U.S. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979). The object of the convention is to ensure that those who take hostages will be subject to punishment if they are apprehended within any state's jurisdiction that is a party to the Convention. States that are parties to the Convention must cooperate in the prevention of acts of terrorism. The Convention rejects the concept that pursuit of equal rights and self-determination can justify terrorist acts. Parties must prosecute or extradite hostage-takers under the Convention, unless bound to do so under the 1949 Geneva Convention on the Law of Armed Conflict and the 1977 Additional Protocols.

20. The United States is a signatory to the regional agreement of the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, 27 U.S.T. 3949, T.I.A.S. No. 8413. Other signatories are: Costa Rico, the Dominican Republic, Mexico, Nicaragua, Uruguay, and Venezuela. Among the most significant obligations, members pledge in Article 8 to take all measures to prevent the preparation of terrorist acts in their territories, to exchange information on terrorism, to endeavor to have acts of terrorism outlawed in their own criminal laws, and to comply with extradition requests by signatories for terrorists.

The United States has also arrived at a common understanding with other industrialized nations regarding the terrorist problem. On June 9, 1984, during the London Economic Summit, the United States joined with Great Britain, Canada, France, West Germany, Italy, and Japan in making a Declaration on International Terrorism. Among the most significant items agreed upon, they pledged: closer cooperation among their security forces in combating terrorism, a review of their own domestic laws so as to better counter terrorism, review

the frequency of terrorist acts continues to increase unabated. Moreover, the United Nations Security Council's record of dealing with specific incidents of terrorism could be characterized as an abysmal failure. Agreement amongst member states are rare regarding the degree to which they feel that international terrorism poses a threat. Worse still, there is little evidence that parties to anti-terrorist conventions are engaging in cooperative efforts on any systematic basis.

### 1. *Economic Factors*

Economic factors explain, in part, why international bodies have been unable to come to terms with the terrorist problem. Potential disruption of trade weakens the willingness of nations to condemn acts of terrorism. For instance, there is strong evidence of Libyan involvement in supporting assassinations and other terrorist activity. Yet, the United Nations has not adequately addressed that problem because Libya is an important trading partner to Western Europe. The potential cost to Western European countries of condemning Libyan acts—denial of large amounts of trade—is greater than the Europeans are willing to pay.

### 2. *Political Factors*

Political factors also explain why international bodies have been unable to come to terms with the terrorist problem. In the United Nations, the United States has clashed with certain Communist countries who have been disturbed over American initiatives against terrorism. These countries feel that a U.S. plan of action, if adopted by the United Nations, would hamper so called "Wars of National Liberation."<sup>21</sup> For instance, other Communist nations might feel that any condemnation of Bulgaria or other Eastern Bloc countries for engaging in terrorism would be an indictment of Communism as a system, therefore, they should not support any such condemnation efforts.

### 3. *Legal Factors*

Legal factors also explain why international bodies have been unable to come to terms with the terrorist problem. The prevalent view of the restrictive nature of the United Nations Charter<sup>22</sup> restrains nations that would otherwise respond to aggressive acts. The United Nations Security Council considers a nation's use of force without taking into account any justification based upon broader political or security contexts.<sup>23</sup> This view clearly limits the occasions on which the use of force is deemed permissible. The approach rejects, *ab initio*, any argument based upon the

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of weapons sales policies, and consultation with each other regarding known terrorists. 84 DEP'T STATE BULL., No. 2089, Aug., 1984, at 4-5.

21. Sloan and Wise, *supra* note 3, at 57.

22. See *infra* notes 64, 92, 93, and accompanying text.

23. See *infra* note 83 and accompanying text.

broader context of an "accumulation" of terrorist attacks.<sup>24</sup> Further, the Security Council has adopted a restrictive view of what kind of action is deemed proportional to a prior illegal act. In determining if a response is proportional, only events immediately preceding a response are examined.<sup>25</sup>

#### 4. *United Nations Record*

Aside from the economic, political, and legal factors, the United Nation's dismal record in reacting to specific terrorist acts has made policy-makers more determined than ever to solve the terrorist problem outside the United Nations framework, and more willing to employ forceful, unilateral acts. Indecisive United Nations responses, such as those following the hijacking to Entebbe<sup>26</sup> and the militant takeover of the American embassy in Tehran,<sup>27</sup> are cited as reasons for the growing frustration. Moreover, United Nations inaction despite Israeli requests for Security Council condemnation of terrorist Fedayeen activity also has left American policy-makers skeptical of international multilateral efforts to address the terrorism issue.<sup>28</sup>

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24. *Id.*

25. Levenfeld, *Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Retaliation Under Modern International Law*, 21 COLUM. J. TRANSNAT'L L. 1, 19 (1982).

26. On June 27, 1976, four Arab terrorists hijacked an Air Force jet just after take-off from Athens. The plane was carrying 250 passengers, including 96 Israeli citizens. The hijackers had the pilot fly the airplane to Entebbe, Uganda. There, the passengers were held hostage in the airport terminal. Non-Israelis were released. After much evidence showed that the President of Uganda was supporting the hijack operation, and after hopes to solve the matter appeared futile, Israeli commandos flew to the airport and rescued the hostages.

After the raid, the Organization of African Unity (OAU) submitted a complaint to the Security Council. The OAU complaint condemned the Israeli rescue attempt to save hostages as an "act of aggression."

Despite strong evidence that the Ugandan government assisted in the hostage-taking operation, Uganda escaped formal action from the Security Council. The Security Council would not support a United States/United Kingdom resolution which did not condemn Uganda, but only the hijacking itself.

See J. MURPHY, *THE UNITED NATIONS AND THE CONTROL OF VIOLENCE, A LEGAL AND POLITICAL ANALYSIS* 186-87, 190 (1982).

27. In January, 1979, the Shah of Iran was deposed and left Iran, replaced by the Ayatollah Khomeini. The United States permitted the Shah entry into the United States for medical treatment. In protest of his entry, Iranian militants, with the tacit approval of the Iranian government, seized the American embassy in Iran, taking 66 Americans hostage, and demanding that the United States return the Shah and his wealth to Iran. The United States brought the case to the Security Council and before the International Court of Justice. However, Iran did not comply with the Security Council's resolution calling for the release of the hostages nor did it recognize the jurisdiction of the court. After American diplomatic efforts failed to obtain the release of the hostages, the United States launched a military rescue, which aborted due to helicopter equipment failure.

Though, concededly, United Nations reaction to the incident created an atmosphere which enabled the adoption of the International Convention Against Hostage-Taking, in the final analysis, the United Nations proved largely irrelevant to the resolution of the crisis. *Id.* at 191-93.

28. See generally Y. TEKOAH, *IN THE FACE OF THE NATIONS: ISRAEL'S STRUGGLE FOR*



Thus, it is not surprising that American policy-makers have grown increasingly disillusioned over the capacity of international bodies to deal with terrorism. To protect American interests against the threat of terrorism, American leadership now ponders new options of self-help in order to counter terrorist activity. The fact that international terrorism is not often susceptible to peaceful controls is not a new realization; but this realization, coupled with a greater willingness to use unilateral action, including military action, adds a special exigency to the international horizon.<sup>29</sup>

## II. INTERNATIONAL LEGAL ANALYSIS OF PROPOSED POLICY

### A. *State Responsibility for Terrorist Acts*

To determine the legality of any American action against a state that supports terrorism, the first question that must be asked is whether that state is internationally liable for the terrorist activity. If the terrorist act did not originate directly from the government, but instead originated from independent acts, the question arises whether responsibility for the terrorist act can be imputed to the government. This issue is central to an analysis of the international legal implications of the Shultz speech since that speech urges military and economic sanctions against nations which engage in, or at least acquiesce to, terrorism.

Under principles of international law, a state bears responsibility where it permits its territory to be used for terrorist activity; arguably it is also responsible where such acts are allowed to exist without state knowledge. Under the principle of external responsibility, one state's violation of another state's external political or territorial sovereignty is a delinquency which imposes liability on the offending state.<sup>30</sup> All states have an internationally imposed obligation to refrain from the threat or use of force (excluding self-defense) against the territorial sovereignty of another state. This international prohibition also extends to private individuals acting either independently or on behalf of a state in which they are located. Two theories exist which impute responsibility to a state for a violation of an internationally imposed duty: direct liability, and vicarious liability.

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PEACE (1976).

However, it may be argued that in view of Israeli occupation of Arab lands, the Council has chosen to characterize Fedayeen violence as permissible guerilla activity, not terrorist activity, and therefore has refused to condemn the violence.

29. Pedersen, *Controlling International Terrorism: An Analysis of Unilateral Force and Proposals For Multilateral Cooperation*, 8 TOLEDO L. REV. 209, 210 (1976).

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

### 1. *Direct Liability*

The notion of direct responsibility holds a nation liable for acts of organs of its government.<sup>31</sup> Because (at least publicly) no nations of the world openly subscribe to the use of "terrorism" as a legitimate tool *per se*, this concept is not very helpful in determining state responsibility for terrorist acts.

### 2. *Vicarious Liability*

Under the principle of vicarious liability, a state would be held liable where it knowingly allows private persons to operate terrorist operations within its borders. Arguably, a state would also be internationally liable even where it has no such knowledge. This theory focuses on those private acts which may be imputed to the state. The vicarious liability of the state flows from the recognized duty of a state to exercise reasonable care to prevent illegal acts which may originate in its territory. Where such acts occur, the state has a responsibility to either punish wrongdoers or to compel them to make retribution.<sup>32</sup>

If a state is found delinquent by not controlling private individuals in its territory, vicarious liability may be imputed to the state-based one of three theories: fault liability, acts on behalf of a state, or absolute liability.

#### a. *Fault Doctrine*

Under the fault doctrine, a state will incur responsibility for hostile acts committed from its territory, unless the state was unaware of such conduct, or knew but was unable to prevent the hostile activity.<sup>33</sup> This doctrine has enjoyed enormous support as a legal principle over the years. This view is implicit in the *Corfu Channel* case. There, the court concluded that a state's mere control over its territory does not necessarily establish state responsibility.<sup>34</sup> The court underscored the principle that a state is liable if it knowingly permits its territory "to be used for acts

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31. Part I of Draft Articles on State Responsibility [hereinafter cited as Draft Articles], [1980] 2 Y.B. INT'L L. COMM'N art. 5, at 31, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2). Under this theory, officials of a government who, while acting in their official capacity, engage in acts of terrorism, act on behalf of the state, therefore, their state is internationally liable.

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

This principle is stated in The Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations. [Hereinafter cited as Declaration of Principles of International Law]. That pronouncement forbids a state's acquiescence of activity within its territory that aims at fomenting civil war on committing terrorist acts in another state. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

33. W. LEVI, *CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION* 242-43 (1979).

34. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4.

contrary to the rights of other States.”<sup>35</sup> Application of this principle to the control of terrorism indicates that although a state is aware of the presence of terrorist groups in its territory, it will nonetheless escape vicarious responsibility if it has no power to prevent hostile acts by that group or state.

b. *Acts on Behalf of the State*

Under a second theory, a state will incur responsibility for the offending conduct of persons that act on behalf of the state.<sup>36</sup> Rather than focusing upon the stated or formal relationship between such persons to determine whether the state somehow consented, even tacitly, to the offending behavior. The implication of adopting such an approach is that if a state accepts the benefits derived from actions of persons it knows have perpetrated an act of terrorism, even after the fact, it may ratify the act and be held liable.

c. *Absolute Liability Doctrine*

A broader doctrine which holds the state strictly accountable for acts within its borders is the doctrine of absolute vicarious liability. According to this doctrine, a state's mere toleration of the use of its territory as either a point of departure for incursion into the territory of another state or as a base of operation is a violation for which a state will be held absolutely liable.<sup>37</sup> Thus, where private individuals violate international law, liability will attach to the state from whose territory the individuals perpetrated the act, regardless of the state's actual complicity or failure to prevent those same acts.<sup>38</sup> Due to the harshness that this principle works on a nonaccomplice “innocent” state, this principle has not received widespread acceptance.

3. *Application of Principles*

The principles of direct liability and vicarious liability, as applied to American measures against terrorism, may be summarized in the following manner. Consistent with customary international law, the use of any measure is valid only if directed against an entity responsible for the breach of international law. If the offending conduct is directly attributable to the government because the country's officials in their official capacity support terrorism, such as where high government officials actually engage in a terrorist act, then the government is legally responsible and may be the object of appropriate economic and military response. With-

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35. *Id.*

36. Draft Articles, *supra* note 31, art. 8.

37. See Declaration of Principles of International Law, *supra* note 32.

38. W. Levi, *supra* note 33, at 235. Due to this principle, it is in a state's best interest to monitor its territory for terrorist activity, and, if such activity is found, to take measures to prevent further activity.

out further inquiry, the government is deemed liable.<sup>39</sup> The difficult question arises when persons engaging in terrorism act independently from the state in which they operate. In order to take economic or military action against that state, there must initially exist a nexus between the government and the group engaging in the terrorist action.<sup>40</sup> The threshold nexus is established where nationals commit a breach of international law, such as conducting terrorist operations, and the government has failed to act to prevent the delinquency.

A prerequisite to the use of economic or military force against a state for alleged support of terrorist operations is that that state must be shown to have a level of active complicity with the terrorist activity that would deem the connection "substantial." Where evidence exists indicating such complicity, a state contemplating action against the terrorist-associated state may infer that the associated state is violating international law and so take direct action against that state.<sup>41</sup> Given this standard, were Secretary Shultz's policy adopted which accepts, in some situations, the use of military force even where evidence of terrorist activity may not "stand up in an American court of law,"<sup>42</sup> such a policy would inevitably run into legal difficulties by failing to first establish a requisite "substantial" connection. It appears evident that a policy that would stand up in an American court of law is precisely what is necessary to establish a "substantial" connection.

#### B. *Legal Limits of State Self-Help Measures Involving Economic Sanctions*

Assuming a nation is liable for a given terrorist operation within its territory,<sup>43</sup> the next issue is whether economic actions are legally permitted against such subversive centers.

A certain degree of coercion is inevitable in a state's day-to-day interaction with other states.<sup>44</sup> Recognizing this fact, international rules permit economic reprisals against states found to be violating international law.<sup>45</sup> Hence, economic sanctions would be legally permissible

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39. Salpeter, *Armed Reprisals During Intermediacy—A New Framework for Analysis in International Law*, 17 VILL. L. REV. 270, 303 (1971).

40. *Id.*

41. *Id.* at 304.

42. See *supra* text accompanying note 18.

43. Some commentators refer to such nations as "subversive centers." Hereinafter, this writer shall use "subversive center" to label those nations deemed so internationally liable.

44. Dempsey, *Economic Aggression and Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto*, 9 CASE W. RES. J. INT'L L. 253, 269 (1977).

45. See Bowett, *International Law and Economic Coercion*, 16 VA. J. INT'L L. 245, 252 (1976).

The most significant multilateral convention on international trade and economics is the 1947 General Agreement on Tariffs and Trade (GATT), 4 U.S.T. 6391, T.I.A.S. No. 1700, 55 U.N.T.S. 187. GATT attempts to insure access to international markets and to

against states found to be liable for terrorist activity. However, before such economic reprisals are permissible as a form of self-help, several conditions must exist: first, there must exist a prior international delinquency; second, other means of redress must have been either exhausted or unavailable; and third, economic measures taken must be limited to the necessities of the case and proportionate to the wrong done.<sup>46</sup>

### C. *Legal Limits of State Self-Help Measures Involving Military Action*

Since the United States has enunciated that it is willing to consider measures of unilateral military action against terrorism (as indicated in the Shultz speech), another issue which must be addressed is the extent to which the United States may, if at all, resort on its own to the use of armed force against states which support terrorism.

Simply because a state supports terrorist activity is not reason enough to allow other states to employ armed force in response to that international offense. Other values, such as the maintenance of overall world order, must be considered. Thus, the kind of armed force employed against the state, the manner and timing in which it is employed, and the aim at which the policy is directed, all have a bearing on the ultimate legality of the measure.

In determining the legality of a nation's use of force, it is paramount that a sound analysis recognize the signing of the United Nations Charter as a legal event of profound importance. Since World War II, the vast majority of nations have become United Nations members. Hence, any voluntary agreement by those nations may significantly alter customary international law concerning the agreed subject. Under customary international principles, much flexibility is given to a state which attempts to repel violence.<sup>47</sup> Generally, those principles view a state's use of force as permissible in two cases: first, when acting in self-defense;<sup>48</sup> and second, to retaliate for past wrongs perpetrated. Therefore, it is important to determine whether the United Nations Charter has in any way limited, ex-

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prevent discriminatory tariffs. A member is generally prohibited from imposing export restrictions. However, each contracting party may "take any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency international relation."

46. Dempsey, *supra* note 44, at 298-99.

47. Those circumstances which allowed a state to use force were construed so broadly that up until the early part of the Twentieth Century, a state could wage war for virtually any reason without violating international law. In 1928, the use of past precedent concerning the use of force was cast into a state of ambiguity when the Kellogg-Briand Pact renounced war as an instrument of national policy. Nonetheless, since 1928, customary international principles governing the use of force have been repeatedly invoked by states in order to justify their actions.

48. Here, "self-defense" is used in the broad sense to include the use of armed force to ensure the protection of a nation's nationals abroad, and where conditions justifying humanitarian intervention are met.

panded, or rejected the doctrines of self-defense or retaliation.<sup>49</sup>

1. *Doctrine of Self-Defense*

a. *Customary International Law and Self-Defense*

Since customary international law permits the use of force in self-defense, it follows that customary principles would permit the use of force to counter-terrorist activity if such measures could be characterized as necessitated by "self-defense." Whether such force can be characterized as "self-defense" becomes a definitional issue.

(i) *Anticipatory Self-Defense*

International law's customary definition of "self-defense" includes not only those actions in response to actual attack, but also preemptory response in anticipation of impending attack.<sup>50</sup> Under customary principles, a state need not wait for any armed attack to occur, whether conventional or unconventional.<sup>51</sup> Use of force in the name of self-defense is permitted where a state reasonably apprehends that it will be the object of an attack by another entity.<sup>52</sup> By examining the practice of states, publicists have been able to identify four preconditions to the permissible use of force in self-defense. First, there must be an impending threat;<sup>53</sup> second, there must exist compelling necessity to act in response to coercion;<sup>54</sup> third, all practical peaceful procedures have been exhausted; and fourth, force must be proportionate to the threat and cannot exceed measures strictly necessary for self-defense.<sup>55</sup>

This traditional formulation of the principle of self-defense, incorporating anticipatory self-defense, is found in the oft-quoted words of

49. Reference to the word "retaliation" in this article is intended to be synonymous with "armed reprisal."

50. See *infra* text accompanying note 58.

From its customary origins, the right of anticipatory self-defense was viewed as an integral part of the right of self-defense. Plato justified the forceful preemption of an imminent threat in the name of self-preservation. *THE LAWS OF PLATO* 5 (A. Taylor trans. 1934). Cicero, Gentili, and Grotius recognized the right to act against a potential assailant when faced with immediate and certain danger. See Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U.L. REV., 187, 189-90 (1984). So deeply rooted was this concept, that assurance of its continued vitality as a principle was made a condition precedent to the signing of the Kellogg-Briand Pact. Dempsey, *supra* note 44, at 310.

51. Gross, *supra* note 32, at 479.

52. *Id.* at 483.

53. See *infra* text accompanying note 58.

54. This element distinguishes the doctrine of self-defense from the doctrine of armed reprisal. While the latter concept is retributive and past-oriented, the former is forward-looking and addresses an immediate threat of injury.

55. This element distinguishes the doctrine of self-defense from the doctrine of self-preservation. Whereas the concept of self-defense justifies only enough action to remove the pressure of a present threat, the now rejected doctrine of self-preservation would permit action beyond removal of imminent threat to include more speculative threats.

American Secretary of State Daniel Webster in the *Caroline* case of 1842.<sup>56</sup> *Caroline* is generally recognized by commentators as authoritative precedent that self-defense, including the concept anticipatory self-defense, is legal doctrine.<sup>57</sup> In *Caroline*, Secretary Webster formulated specific standards for the use of self-defense. In correspondence with Lord Ashburton, Webster wrote that in order for an act to qualify as an exercise of valid self-defense, a state must show that necessity of self-defense is "instant, overwhelming, and leaving no choice of means and no moment for deliberation."<sup>58</sup> Further, he stated that a state "must establish that it did nothing unreasonable or excessive, and that admonition or remonstrance to the aggressor was impracticable."<sup>59</sup>

Thus, according to customary international law, preemptive action urged by Secretary Shultz against terrorist activity is legally permissible if such preemptive action meets the traditional standard of anticipatory self-defense.

b. *United Nations and Self-Defense*

The next issue which must be addressed is whether adoption of the United Nations Charter has changed the customary international law of self-defense. Despite the clear customary right that would exist for a state to engage in anticipatory acts when reacting to terrorist activities, the international community today remains substantially divided over whether the United Nations Charter has outlawed anticipatory measures. Under the Charter, recourse to use of force by self-help is permitted where the use of force could be justified as a measure of self-defense under Article 51 of the Charter. Article 51 states that the self-defense may be exercised "until the Security Council has taken measures necessary to maintain international peace and security."<sup>60</sup>

As a modern principle of international law, the right of self-defense has never been seriously disputed. However, heated debate remains, largely over definitional problems of interpreting the United Nations Charter. In particular, debate exists over whether a particular act should be characterized as "in self-defense" or "aggressive,"<sup>61</sup> what kind of at-

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56. 61 Parliamentary Papers (1843), reprinted in Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L. L. 82 (1938). That case involved the burning in American territory of an American steamer named "Caroline" by Canadian troops. During that time, Americans were giving military supplies to Canadian rebels in Canada. The American government was either unwilling or unable to prevent the flow of these supplies. When it appeared to the Canadians that assistance would continue and that the *Caroline* posed a threat to Canadian authority, the steamer was burned.

57. *Id.* at 82.

58. *Id.* at 89.

59. *Id.*

60. U.N. CHARTER art. 51.

61. Debate exists over whether to characterize an act as anticipatory self-defense, and hence lawful, or as aggressive, and hence unlawful. Regarding the concept of aggression, Article 2(3) paragraph 4 of the U.N. Charter declares that: "[m]embers shall refrain in their

tack constitutes sufficient provocation to invoke a self-defense response,<sup>62</sup> and whether the United Nations Article 51 is a principle of limitation or illustration.<sup>63</sup>

The view that the Charter only allows for a restrictive right of self-defense has substantial scholarly support and has apparently been adopted by the Security Council. Under this "narrow" view of interpreting the term "self-defense," the legitimate unilateral use of force has been severely limited by the United Nations Charter.<sup>64</sup> Those scholars argue that the United Nations Charter prohibits all forms of self-defense with the exception of Article 51 self-defense. The effect of following this view is that even a clear breach of international law, such as where a state openly participates in terrorist activity, does not give rise, by itself, to a unilateral right of armed response by a state against the terrorism-supporting state.

(i) *Criticism of the Narrow View of Self-Defense*

Those scholars who argue that the United Nations Charter prohibits all forms of self-defense other than Article 51 self-defense would be entirely justified in their interpretation if the United Nations security organs had either established the collective machinery to oppose aggression, or could and would respond quickly on an *ad hoc* basis.<sup>65</sup> However, for the most part, this machinery does not exist. War between nations did

international relations from the threat or use of force against the international integrity or political independence of any state, or on any manner inconsistent with the purposes of the United Nations." "Aggression" is defined in Article 2(4) as the "use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state. . . ."

62. Article 51 states that self-defense may be lawfully exercised against an "armed attack." Debate exists today over the definition of what constitutes an "armed attack." One view is that even a small isolated incident is sufficient to justify a self-defense response. A second view looks to the totality of acts to determine whether a systematic campaign exists, hence constituting "armed attack." A third view requires a government-initiated invasion by a large organized force in order to constitute an armed attack. A fourth view requires at least some type of negligence by a state by not restraining the aggressive acts of armed bands. Pedersen, *supra* note 29, at 215-16.

63. This final area of dispute is perhaps more of a problem of construction than definition. One view asserts that Article 51 restricts self-defense only to the occasion when "armed attack" occurs. A second view is that Article 51 specifically guarantees a right of self-defense where there is an "attack", but does not enunciate other lawful situations where self-defense action may be taken.

64. Scholars supporting this view argue that the United Nations Charter expressly limits the use of force to situations of self-defense, or implementation of a decision by a competent international organization; a state may not be justified in using force in any other situation. They further argue that given the language of Article 2(4), the international legal order has expressed its desire to limit self-defense actions to very narrow circumstances. They argue that Article 51 explicitly condones only one type of legitimate self-defense: the repulsion of actual armed attack. The combined effect of Articles 2(4) and 51, they argue, is to restrict the right of self-defense to the precise wording of Article 51, making that Article the exclusive source of authority of legitimate recourse to war. Pedersen, *supra* note 29, at 213.

65. Dempsey, *supra* note 44, at 309.



not end with the signing of the United Nations Charter.<sup>66</sup> Furthermore, Article 51 envisions self-defense as an interim right, to be exercised only when the Security Council assumes responsibility for resolving the dispute and restoring peace. Experience has shown that the Security Council is incapable of maintaining peace and security because of political bias wrought by paralysis in the face of Superpower disputes.<sup>67</sup> Lastly, this "narrow" interpretation ignores the special problems inherent in combating terrorist actions. For example, states confronting terrorist bombings often have limited options due to the covert and often fleeting nature of terrorist activity. In short, the fundamental flaw of the "narrow" view of self-defense is that by being so restrictive, it allows for and contributes to situations where justice cannot prevail.<sup>68</sup>

(ii) *Case for a Broad View of Self-Defense*

Under a "broad" interpretation of the United Nations Charter, the use of anticipatory types of counter-measures against terrorist activity would be permitted. Under this view, the state is left to take such measures as it feels are necessary to ensure its defense.<sup>69</sup> Consequently, the endangered state is not obligated to first seek peaceful resolution if it reasonably believes that self-defense action is a pressing necessity.<sup>70</sup> The rationale for this view was perhaps best stated by Sir Humphrey Waldock when he said ". . . it would be a travesty of the purposes of the Charter to compel a defending state to allow an assailant to deliver the first and perhaps fatal blow . . . [T]o read Article 51 otherwise is to protect the aggressor's right to the first strike."<sup>71</sup>

A "broad" view of self-defense leaves intact the right of self-defense as it existed before the United Nations Charter. Legal justification for leaving customary international law intact is that the phrase in Article 51 states: "[n]othing in the Charter shall impair the inherent right of self-defense."<sup>72</sup> The United Nations Charter neither expressly prohibits nor allows anticipatory self-defense; therefore, all relevant rules of treaty construction must be considered in its interpretation. Further, it is axiomatic that treaties only limit the rights of nations to the extent that those nations have explicitly agreed to be so limited. Since the United Nations Charter does not create new rights, a state's right to engage in those acts which ensures its own survival is preserved under the United Nations Charter.

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66. *Id.*

67. Levenfeld, *supra* note 25, at 20.

68. *Id.*

69. Gross, *supra* note 32, at 485.

70. *Id.*

71. Quoted in Mallison and Mallison, *The Israeli Aerial Attack of June 7, 1981 Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?*, 15 VAND. J. TRANSNAT'L L. 417, 440 (1982).

72. *Id.* at 420.

The "legislative history" of the United Nations Charter appears to be consistent with this "broad" view. The *travaux preparatoires*, to which one may turn in the case of documentary ambiguity, suggest only that Article 51 should safeguard the existing right of self-defense and not restrict it.<sup>73</sup> While the Spanish and English translations of Article 51 use the phrase "armed attack," three other official languages, including the French version, use a broader term, "*aggression armee*."<sup>74</sup> The French version is generally considered to be the most accurate version of the Article's negotiating history,<sup>75</sup> and, therefore, Article 51 should be read as authorizing the use of force in response to any armed aggression, including the threat of the use of force under Article 2(4). Moreover, in the process of formulating the prohibition of unilateral coercion contained in Article 2(4), drafters indicated that the traditional permissibility of self-defense was not intended to be abridged or attenuated; to the contrary, it was to be preserved and maintained.<sup>76</sup>

This interpretation of Article 2(4) is further strengthened by several post-United Nations Charter events. In the 1949 *Corfu Channel* case, decided by the International Court of Justice, the Court permitted the use of force in the face of a strong probability of armed attack.<sup>77</sup> It found that a defensive use of force intended to affirm rights illegally denied is not consistent with 2(4).<sup>78</sup> Aside from this case, there are other examples in which the use of preemptive methods were accepted by the international community as legitimate situations requiring self-defense. They include the 1962 American naval "quarantine" of Cuba to prevent supplies from arriving in Cuba that would aid in the arming of Soviet nuclear missiles on Cuban soil,<sup>79</sup> and the 1967 Israeli airstrike against Egypt when Israeli intelligence evidence gave clear indication that an Egyptian attack was impending.<sup>80</sup>

### c. *Degree of Response Permitted: Proportionality*

Assuming that the customary right of anticipatory self-defense is preserved under the United Nations Charter, the next issue which must be addressed is what degree of response is permissible under the standards required by the self-defense doctrine? Although no precise formulation exists for determining the permissible amount of violence in response to an illegal act, it is well settled that the doctrine of self-defense does permit a use of force necessary to remove any danger which initially war-

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73. Gross, *supra* note 32, at 480.

74. Mallison and Mallison, *supra* note 71, at 420-21.

75. *Id.*

76. Dempsey, *supra* note 44, at 310.

77. *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4.

78. *Id.*

79. Mallison, *Limited Naval Blockade or Quarantine Interdiction: National or Collective Defense Claims Valid Under International Law*, 38 GEO. WASH. L. REV. 335 (1962).

80. N. SAFRON, *FROM WAR TO WAR: THE ARAB ISRAELI CONFRONTATION, 1948-1967*, at 268 (1969).

rants the self-defensive action.<sup>81</sup> Despite this standard, disagreement exists over whether measurement of the danger is limited to immediately preceding illegal acts, or can include an "aggregation" of past illegal acts or an "accumulation of events" to reflect long-term threats. Otherwise stated, disagreement exists over whether the legality of a response is to be determined by reference to the prior illegal act which brought it about, or whether the legality of the response is to be determined by reference to the whole context of the relationship between involved parties.<sup>82</sup> Notwithstanding the wide differences of opinion on this issue, the Security Council's position on this matter is clear. The Security Council has formally condemned as an illegal reprisal any attempt to justify totality of violence based upon an "accumulation of events."<sup>83</sup> Therefore, regardless of the outcome of the ongoing debate over permissible levels of violence undertaken in self-defense, it may be concluded that any American military response which employs a level of violence which even appears to be greater than is necessary to counter any immediate terrorist threat is bound to be met with stiff criticism from the world community.

## 2. *Doctrine of Armed Reprisal*

So consistent has been the Security Council's rejection of the "accumulation of events" theory,<sup>84</sup> that recent practice suggests Israel, the United States, and the United Kingdom are placing less reliance on the theory, and are now exploring other legal doctrines to provide legal justification for policies aimed against continued low-level international violence. Quite striking is the development that Israel has relied less and less on a self-defense argument and has taken counter-terrorist action which it openly justifies on the theory of reprisal.<sup>85</sup> Following Israel's lead in this area, United States policy-makers, as evidenced by the Shultz speech, are now contemplating employing an armed retaliatory strategy against terrorism.

Under existing international law, any American policy that would respond to terrorism by using armed reprisal<sup>86</sup> would be illegal since a reprisal is not a means of sovereign self-protection; reprisals merely intend

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81. Gross, *supra* note 32, at 487.

82. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 4 (1972).

83. *Id.* at 6-7.

84. *Id.* at 10.

85. *Id.*

86. Generally, "armed reprisals" are acts of retaliation for violations of law which cause injury to the a state exercising the reprisal.

By use of the word "armed reprisal" in this article, this writer refers to that which much of the literature refers to as "peacetime armed reprisal", not "wartime armed reprisal." Because the primary purpose of this article is to examine acts of terrorism within the context of states that are not at war with one another, wartime armed reprisal will not be discussed.

to inflict injury for past harm done.<sup>87</sup> However, new evidence suggests increased approval by the international community of selective types of reprisals.

a. *Customary International Law*

Customary international law permitted armed reprisal as a matter of self-help within the limits set forth by the *Naulilaa* case.<sup>88</sup> The *Naulilaa* court framed the essential requirements for legitimate armed reprisal. These requirements are essentially the same requirements as those required to justify self-defense. First, in order for the injured state to make a legitimate reprisal, there must have been a prior illegal act.<sup>89</sup> Second, the injured state must also have attempted to obtain redress from the offending state for the alleged violation.<sup>90</sup> Lastly, implementation of the reprisals must not be patently offensive, that is, disproportionate to the wrong done.

b. *Reprisals and the United Nations*

In addressing whether forceful reprisals are legally recognized today, we must again address the issue: to what extent has the United Nations Charter changed, if at all, the customary international law on this subject?

Given the prevalent view of interpreting the United Nations Charter, any armed reprisal by a modern state in response to terrorist activity would be deemed a forbidden act.<sup>91</sup> This view places great reliance on Article 2 of the Charter which states in pertinent part:

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

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

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political inde-

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87. Other purposes of reprisals are: first, to enforce obedience to international law by discouraging other illegal conduct; second, to compel a change in policy of a delinquent state; third, to force a settlement to a dispute which resulted from a breach of international law by a delinquent state; and fourth, to compel the delinquent state to make reparation for the harm done. Salpeter, *supra* note 39, at 277-78.

88. 2 R. INT'L ARB. AWARDS 1012. In that case, three German soldiers were killed by Portugese soldiers at a Portugese post. The attack was largely the result of misunderstandings between the same German and Portugese soldiers. In response, German forces attacked Portugese outposts in Angola, a Portugese colony.

89. A prior illegal act may exist where there has been a violation of a decision by an international tribunal with proper jurisdiction, a violation of an international convention recognized by opposing states, a violation of a bilateral treaty, or a violation of a customary rule of international law.

90. Examples of attempted redress would include good faith arbitration or negotiation.

91. See OPPENHEIM, *supra* note 30, at 156.

pendence of any State, or in any other manner inconsistent with the Purposes of the United Nations.<sup>92</sup>

The above view was reaffirmed in the U.N. Declaration on Principles of International Law Concerning Friendly Relations in Cooperation Among States, adopted by General Assembly Resolution 2625 (XXV) October 24, 1970. The Declaration maintains that “[s]tates have a duty to refrain from acts of reprisal involving the use of force.”<sup>93</sup> In view of the strong language in these documents, and because the aim of reprisals has traditionally been solely to punish, there is widespread support for the proposition that the United Nations Charter has outlawed armed reprisal. As such, any American military action undertaken against a terrorist subversive center merely to punish the state for supporting terrorist activity would constitute illegal armed reprisal.

(i) *Case for a Broad View of Armed Reprisal and Reinterpretation of the United Nations Charter*

Despite a well settled *de jure* rejection of the use of armed reprisal as a legitimate act of state, the use of reprisals as a legitimate state tool is gaining renewed international support.<sup>94</sup> Under an increasingly popular revisionary interpretation of the United Nations Charter, armed reprisals taken by nations in response to certain acts of violence appear to have the approval of the international community, at least in the *de facto* form.<sup>95</sup> It may be argued that conduct of the United Nations Security Council in its refusal to condemn what under customary international law would be “reasonable” reprisals, constitutes a recognition, at least in *de facto* form, of the continued vitality of the concept reprisal.<sup>96</sup> This Security Council practice, however, must be viewed with caution since the Security Council’s stated position is condemnation of armed reprisal.<sup>97</sup> Nonetheless, the emergent position, given the Security Council’s failure to condemn “reasonable” reprisals, is that such reprisals hold at least a tacit form of legitimacy. One writer has said that among the factors which may affect the Security Council’s acquiescence to a “reasonable” reprisal is the timing of the reprisal in relation to efforts of peaceful settlement, and how far the state taking the reprisal has, by its own conduct, provoked the act against which it subsequently takes reprisal action.<sup>98</sup> Recognition of this pattern of behavior and the clear rejection by the Security Council of the “accumulation of events” doctrine accounts for the increased readiness of nations to justify military action in terms of retaliation rather than in terms of self-defense. It appears that those reprisals undertaken to “pre-

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92. U.N. CHARTER art. 2, para. 3, 4.

93. M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 161-74 (1971).

94. See Bowett, *supra* note 82, at 26-27.

95. *Id.* at 10-11.

96. Levenfeld, *supra* note 25, at 35.

97. Bowett, *supra* note 82, at 21.

98. *Id.* at 15-16.

vent" acts of warfare will likely avoid condemnation.

Within the context of customary international law, several reasons exist why "reasonable" reprisals should be legally permitted. First, the United Nations Charter does not rule out armed reprisal as a measure of self-help. The Charter makes no mention of the words "armed reprisal" or "retaliation." Second, later authoritative interpretation does not rule out armed reprisal as a measure of self-help. The *Corfu Channel* case indicates that a residual right of reprisal remains in modern international law since that case apparently ratified a resort to forceful self-help by allowing a battleship to traverse legally disputed waters.<sup>99</sup> Third, while the United Nations Charter is essential to the understanding of the right to implement forceful actions, the Charter should not function as a straight-jacket to analysis.<sup>100</sup> Interpreting the United Nations Charter as outlawing all forms of reprisals ignores the realities of a vast array of conduct short of war. For instance, a state facing incessant threat of terrorist attack has no alternative but to use force to protect its territorial integrity and nationals. Despite this reality of the world condition, it is preferable to maintain legal standards to govern the use of armed coercion short of war, rather than to condemn the use of all kinds of force.<sup>101</sup> Fourth, forbidding all types of reprisal creates a split between the norm of international law and the actual practice of states. In the long-run, by creating this divergence, civilized society runs the risk that the substance of international law will become little more than aspirational slogans. In the short-run, subscribing to a view of international law which does not conform to the reality of the practice of states places international law in the position of acquiring its own "credibility gap."<sup>102</sup>

### III. POLICY ANALYSIS

Since terrorism can strike in countless forms, any successful policy addressing the problem must include a coherent, comprehensive plan, encompassing a wide range of responses so as to ensure effective, appropriate levels of response. Therefore, a successful policy must include an assessment of the degree to which a state is involved in a terrorist act, and suggest useful diplomatic, legal, ideological, economic, and military responses to acts of terrorism. Furthermore, that policy should make full use of existing international processes, and urge reform in those international processes and laws where appropriate.

#### A. *Policy on Substantial Complicity*

As stated previously, sanctions may be made against a state which has, to a substantial degree, participated in a breach of international

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99. *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4.

100. Salpeter, *supra* note 39, at 288.

101. Levenfeld, *supra* note 25, at 35.

102. *Id.*

law.<sup>103</sup> In determining an appropriate policy toward a state deemed liable for terrorist activity, other important values must be weighed besides the importance of countering a terrorist threat. The international commitment to uphold the principle of territorial integrity and the risk that violence might escalate into wider conflict must be balanced against holding a state accountable for terrorist activity.<sup>104</sup> Balancing these concerns, the United States should not regard a state's toleration nor negligent oversight of terrorist activity, as "substantial complicity."<sup>105</sup> However, with the same concerns in mind, a state's activity should be deemed "substantial complicity" and appropriate sanctions should be levied against it where it clearly incites, foments, or supports terrorist activity.<sup>106</sup>

Where a nation fails to control terrorist activity because of the inability of its government to function,<sup>107</sup> the greatest amount of care must be exercised by American leadership to ascertain the precise situation before weighing the above mentioned concerns. No coercive measures should be taken by the United States against targets within a state where terrorists operate when it appears that the state's government is making an attempt to control terrorist activity, and (assuming American nationals are the terrorist victims) either: (1) those prospects of control are not significantly less than could be accomplished by the United States, or (2) vital national security interests of the United States are not at stake. In such cases, the aims of avoiding the escalation of violence and of observing a state's political independence would outweigh the importance of holding such a state accountable for any terrorist act. However, the United States should take action against targets within a state where terrorists operate when it appears that a government's inability to function has created a political vacuum, enabling a terrorist group to operate, and (still assuming American nationals are the terrorists-victims) either (1) prospects of control by the government of the state out of which the terrorists operate are significantly less than could be accomplished by the United States, or (2) vital national security interests of the United States are at stake. In such situations, the importance of controlling terrorism would outweigh the aims of avoiding the escalation of violence and of observing a state's political independence.

### B. *Diplomacy, Ideology, and International Claims*

In keeping with the general proposition that the United States should use only the amount of coercive pressure that is necessary to achieve policy objectives, policy-makers should consider diplomatic, ideological, and legal options to resolve a crisis precipitated by state sup-

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103. Salpeter, *supra* notes 40, 41, and accompanying text.

104. Pedersen, *supra* note 29, at 220.

105. *Id.*

106. *Id.*

107. This was the case of the government of Lebanon in 1982 before the Israeli armed invasion into that country in that same year.

ported terrorism. The United States should always make vigorous diplomatic protest against states that support terrorism, even if U.S. nationals are not victims.<sup>108</sup> The United States has an interest in inducing other states to refrain from engaging in international terrorism, therefore it should always express privately, through diplomatic channels, its concern to a state that encourages international terrorism. Ideological public pressure should be brought against the political leadership of a state that supports terrorist activity. This pressure must be made in such a way that the same leadership would find it in its best interest not to engage in such activity in the future. Public pressure and dissemination of information regarding terrorism acts perpetrated by an elected government should be directed to that government's nationals, the same perpetrated by a nonelected government should be directed to the offending state's ideological allies, with the aim to ideologically isolate the terrorist-supporting state from the world community. The United States should consider making international claims against states that support terrorism. The work of Richard B. Lillich has concluded that the law of state responsibility would support, at least in situations where evidence would indicate "fault" on the part of the respondent state, claims against states for failure to prevent injuries caused by terrorism, or for a state's failure to apprehend, punish, or extradite terrorists.<sup>109</sup> Lillich's study notes that the most significant problem in asserting such a claim would be the great unlikelihood that respondent state would acknowledge international responsibility for its actions.<sup>110</sup> Nevertheless, the act of formally asserting an international claim would raise the consciousness of the international community by focusing on the illegal acts of the respondent state.<sup>111</sup>

### C. *Policy on Economic Sanctions*

As discussed previously, international law permits unilateral economic sanctions by nations which deem the sanctioning appropriate and in accordance with its vital interests. Thus, the issue of whether to impose unilateral economic sanctions on subversive centers becomes an issue of policy rather than law.<sup>112</sup>

For two reasons, the general use of unilateral economic action against

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108. J. MURPHY & A. EVANS, *LEGAL ASPECTS OF INTERNATIONAL TERRORISM* 569 (1978).

109. Lillich and Paxman, *State Responsibility for Inquiries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217 (1977).

110. *Id.* at 312.

111. *Id.*

112. It should be noted that U.S. municipal law allows for sanctioning by the United States against states which support terrorism. The Anti-Hijacking Act of 1974 authorizes the President to suspend air traffic with any nation which aids terrorist groups or a nation that continues air service to a nation encouraging hijacking. 49 U.S.C. para. 1514 (Supp. 1976). The International Security Assistance and Arms Control Act stops military and economic assistance to any nation giving sanctuary to international terrorists, unless the President determines that National Security justifies the continuance of such assistance. 22 U.S.C. para. 2371 (Supp. 1976).



subversive centers should be discouraged. First, diplomatic problems may be created with United States allies who have strong historical, economic, or security relationships with a sanctioned state. Second, an economically sanctioned country could probably find alternative sources of trade outside the United States.<sup>113</sup> Thus, for economic sanctions to be successful in altering policies of nations supporting subversive centers, such sanctions must be multilateral.

Unfortunately, multilateral economic sanctions as presently used are not influential in shaping the policy of a state that has violated international law. The primary reason multilateral economic sanctions are not influential is because of ineffective use by the Security Council.<sup>114</sup> Several recent sanctioning experiences show that a nation can ignore Security Council sanctions without it experiencing an adverse impact on its policies. When the United States sought United Nations imposition of economic sanctions on Iran for actively supporting Iran militants who took hostage American embassy officials in that country,<sup>115</sup> Iran was able to formally ignore the United Nations call without impunity. Available data leads to the conclusion that economic sanctions instituted by the United Nations against Rhodesia were not the impetus behind the creation of a new state of Zimbabwe.<sup>116</sup> Security Council sanctioning and weak enforcement by member states has in practice rendered the use of United Nations economic sanctions useless.<sup>117</sup> In the Rhodesian sanctioning effort, United Nations sanctions came too later, and were applied too gradually in order to operate as a tool to force Rhodesia to comply with international law. The Security Council did eventually initiate a full compliment of mandatory economic sanctions against Rhodesia, but this came over six years after the United Nations first took cognizance of the situation.<sup>118</sup>

Taking into account the interdependent and competitive environment in which international economic sanctions must operate, any reform to improve the effectiveness of these sanctions must come from a more sophisticated use of multilateral sanctions. Once an international delin-

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113. Here, a lesson should be taken from the American response to the Soviet invasion of Afghanistan in 1979. In response to that invasion, the United States suspended exports of agricultural goods and items of high technology to the Soviet Union. At least with respect to agricultural goods, the Soviets were able to find alternative sources. Since the American farmers' enormous grain market with the Soviets was eliminated, those farmers alone were made to bear the brunt of American economic sanctioning.

114. United Nations Article 41 provides the Security Council with the authority to use economic sanctions; the Security Council may decide what measures are to be employed to give effect to its decisions, and it may call upon United Nations members to apply such measures. The Security Council's Article 41 decisions are binding on members, but are not self-executing. Actual legal obligations that arise depend upon each member state's own legislation. Polakas, *Economic Sanctions: An Effective Alternative to Military Coercion?*, 6 BROOKLYN J. INT'L L. 289, 305 (1980).

115. See *supra* note 27.

116. Polakas, *supra* note 114, at 316.

117. *Id.*

118. *Id.* at 312.

quency is found, a decision as to whether to impose Article 1 sanctions should be made forthwith. In making that decision, net costs to the international community, and costs to individual states, should be weighed against net benefits derived by the international community as a whole. If a decision is made to employ Article 1 sanctions, those sanctions must be imposed quickly and decisively. Since economic sanctioning pressure is slow to affect a targeted territory, such pressure should not be hampered further by slow implementation. The target's trading partners must be monitored in order to ensure compliance with multilaterally imposed sanctions. Where violations of such sanctions are found, they must be met with a firm response. In every case where implementation of multilateral economic sanctions is considered, the cost of enforcement must be added to the costs incurred due to the loss of the market.<sup>119</sup>

#### D. *Policy on Military Measures*

Because diplomatic, ideological, legal, and economic measures may fail to bring sufficient coercive pressure against a state that supports terrorism, the United States must explore the use of military measures in applying pressure against such states. The Shultz speech urges the adoption of a more active strategy to counter terrorism fashioned after the policy adopted by the Israeli government.<sup>120</sup> From the context of the speech, it may be inferred that Shultz supports an American policy similar to Israeli military policy against terrorism. While both the United States and Israel have policies that do not yield to terrorist demands, a fundamental difference has existed between their respective policies. While the U.S. policy to date has been largely a defensive response to terrorist activity, Israeli policy assumes an offensive stance. U.S. policy has been to punish specifically those individuals who actually carry out an overt terrorist attack. The U.S. response is not brought to bear until specific acts of terrorism are under way. As opposed to this American pattern of behavior, Israeli policy concentrates on the source; thus terrorist leadership and supporters are not immune from counter-strikes.<sup>121</sup>

Arguably, legal precedent exists for the notion that the doctrine of armed reprisal is available to all nations.<sup>122</sup> Sound policy reasons may even exist for some nations to make use of armed reprisal. It is arguable that an Israeli policy of armed reprisal has deterred many terrorist acts that would have otherwise have occurred. Even were such an assertion is shown to be true, American policy-makers should not conclude on that basis alone that it is in the United States's best interest to adopt such a policy. The United States, in its own national interest, should not use force against subversive centers where reprisal is the only basis for its action. The United States is a superpower, and with that status is carried

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119. *Id.* at 317-18.

120. See Shultz, *supra* notes 10-12.

121. Sloan and Wise, *supra* note 3.

122. See the *Nautilaa Case*, *supra* note 88 and accompanying text.

a great deal of influence. Because of that status, any armed reprisal by the United States against subversive centers would be more apt to result in response by the Warsaw Pact<sup>123</sup> than were a reprisal undertaken by a nonsuperpower nation, such as Israel. Given this status, an American policy of armed reprisal against subversive centers may do more to endanger the maintenance of international peace and security than the initial terrorist activity.<sup>124</sup> The values that would lead to a sounder policy of American nonreprisal against terrorist centers are the same ones that led President John Kennedy to a successful, peaceful resolution of the Cuban missile crisis. One incident resulting in death is not sufficient reason to catapult a nation of superpower status into war.<sup>125</sup>

Given the great confusion that exists over whether the concept of self-defense includes the customary form of anticipatory self-defense,<sup>126</sup> the United States should urge the clear recognition of the anticipatory doctrine, since to take the contrary position would protect an aggressor's first strike.<sup>127</sup> In an era of sophisticated terrorist methods<sup>128</sup> and long range nuclear ballistic missiles, it is unrealistic for an endangered state in all circumstances to wait until devastation before a response is taken. Further, it is notoriously difficult to maintain an adequate defense system which relies upon meeting attacks incident by incident, as in the case of continued harassment by terrorists. Since legal precedent does exist to support the doctrine of anticipatory self-defense,<sup>129</sup> the United States should leave open the option of engaging in preemptive action where essential to national security. However, the United States should take preemptive action against a terrorist-supporting state only where conditions are such that a state is deemed from legal<sup>130</sup> and policy<sup>131</sup> viewpoints to have participated to a substantial degree<sup>132</sup> in a terrorist act, conditions meet the requirements for customary anticipatory self-defense<sup>133</sup> and conditions are such that the prospective benefits of engaging in the self-defensive action outweigh the prospective costs wrought by escalation in

123. The Warsaw Pact has sometimes been described as the Eastern Block's counterpart to the North Atlantic Treaty Organization (NATO). It is the military alliance among Soviet Satellite countries and the Soviet Union.

124. J. MURPHY & A. EVANS, *supra* note 108, at 556.

125. During the height of the Cuban Missile Crisis, one United States Air Force officer, Major Rudolf Anderson, was killed by a surface-to-air missile while flying a reconnaissance mission over Cuba. R. KENNEDY, *THIRTEEN DAYS, A MEMOIR OF THE CUBAN MISSILE CRISIS* 97-98 (1968).

126. See notes 60-80 and accompanying text.

127. See Mallison and Mallison, *supra* note 71 and accompanying text.

128. See Sloan and Wise, *supra* notes 3 and 4.

129. See notes 51-59, 77-80, and accompanying text.

130. See note 41 and accompanying text.

131. See notes 105-107 and accompanying text.

132. Where legal and policy aspects of "substantial complicity" are met, not only is a terrorist-supporting nation deemed accountable under international law, but it is in American best interest that enforcement measures be levied against such a nation.

133. See notes 53, 54, 55, and accompanying text.

violence.

The United States should urge the adoption of more flexible standards in measuring the amount of force permissible under the doctrine of self-defense. Presently, the Security Council measures the legality of such force by strict reference to a prior illegal act.<sup>134</sup> The artificiality of such a measurement does not permit a clear reflection of the traditionally hostile parties. Indeed, it favors the party which engages in a "continuous war" consisting of "isolated" terrorist acts. Such a measurement of response places at a decisive disadvantage any party which first chooses to use violence. The responding party is left only to treat the symptoms of the illegality and not to cure the illness. The better view, allowing for a measurement of threat based upon an "accumulation of events,"<sup>135</sup> would be a highly probative approach in ascertaining the reasonableness by which a responding state perceived that a danger was imminent. In the meantime, given the stated position of the Security Council, any decision to utilize an American counter-strike would be wise to limit the level of counter-terrorist violence to an amount corresponding to the immediately prior terrorist act.

#### IV. CONCLUSION

In view of the mounting number of terrorist acts perpetrated against American citizenry, it is altogether natural that American policy-makers should feel perplexed by their inability to control international terrorism. Nonetheless, in their desire to counter the threat of terrorism, policy-makers must be cautious not to translate their frustrations into policies which though in the short-term might remove an immediate terrorist threat, violate cherished international principles of law, or are in the long-term counter-productive to either better national security or a more peaceful world order. Since the Shultz strategy of more active counter-terrorist actions potentially suffers in part from these deficiencies, that proposed policy must be reconsidered. In the short-term, it aims to remove a terrorist threat by asserting a more active use of economic and military measures, but in the long-term it may prove counter-productive by holding nations accountable for terrorist acts without regard to any high level of complicity. By not giving full consideration to the uniquely powerful position of the United States in the world community, and by advocating an active use of military measures that have as their traditional purpose the intent to punish, rather than to deter, the United States stands to lose more than it could ever gain. A sounder approach to the terrorist problem would recognize the international legal constraints to unilateral national action and see the advantages of self-restraint, but where necessary, bring the appropriate level of coercion to bear on those which support terrorist activity.

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134. See note 83 and accompanying text.

135. See notes 82, 83, and accompanying text.