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ARTICLES

SOVEREIGN DEBT RESOLUTION THROUGH THE INTERNATIONAL MONETARY FUND: AN ALTERNATIVE TO THE Allied Bank Decision .......................... Ettore A. Santucci

This article offers the mechanism necessary for a uniform response to defaults on international debts caused by nation states. The equivocal response by the Second Circuit, to the case brought by a conglomerate of banks, represented by Allied Bank, against the state-owned Banco Credito Agricola de Cartago, reveals the depth of the problem faced by creditors and debtors alike, when the outcome of the litigation is quite arbitrary. Mr. Santucci offers the International Monetary Fund (IMF) as the crucial actor in this situation, in order to bring about uniformity and certainty to international monetary markets through the centralization of decision-making. The IMF has a system of conditionality in place that bases access to additional funds upon the implementation of austerity measures. The proposed solution would extend this conditionality to Article VIII, Section 2 of the IMF Agreement, in order to control actions that cause defaults on debts. The country seeking restrictions would be given protection against foreign creditors, so long as exchange controls are "maintained and imposed consistently with the [Fund] Agreement." The privilege will be granted to those countries which formulate controls designed to encourage the normal flow of exchange funds as soon as possible. The present piecemeal reaction to defaults will not be adequate once the stakes get higher. The mechanism involving the IMF is the systemic and institutional change necessary to counter the escalating debt crisis.

REDEFINING TAXATION OF INTERNATIONAL ENTITIES: THE UNITARY CONTROVERSY (A CONSTITUTIONAL APPROACH) .................................. Mark B. Baker

Professor Baker addresses unitary taxation as it has been practiced by state taxing authorities in their efforts to tax the full income of corporations doing business both inside and outside their boundaries. The author notes that as states have shifted from taxation only of the income of the corporation's subsidiaries located in the state to taxation of the income of the foreign parent companies of domiciled subsidiaries, three constitutional issues have been raised. These issues arise from the fourteenth amendment due process clause, the interstata commerce clause and the foreign commerce clause. Professor Baker analyzes these issues, as they have been addressed by the United States Supreme Court, and suggests that the Court has shown an unwillingness to "limit the scope of the states' taxing power." The author points out that the Supreme Court's decision in Japan Line, where international commerce was involved, "mandated" two additional factors...
beyond the normal commerce clause factors: the enhanced risk of multiple taxation and the possibility that a state tax might impair federal uniformity. However, the Court's subsequent decision in *Container Corporation* has "left open the question of whether the worldwide unitary method may be applied to tax the worldwide income of a foreign corporation that has a U.S. domestic subsidiary." The author closes with the observation that the use of unitary method in the international arena may have serious ramifications and calls for a more "affirmative position" by the Executive branch in resolving the problems involved with the use of unitary taxation by the states.

**IN PERSONAM JURISDICTION IN FEDERAL COURTS OVER FOREIGN CORPORATIONS: THE NEED FOR A FEDERAL LONG-ARM STATUTE**

*This article examines the current status of federal long-arm jurisdiction, the practical problems associated with its use, and the constitutional limitations on federal in personam jurisdiction. Since current law creates a significant loophole through which alien corporations can avoid personal jurisdiction in any federal court, the conclusion reached by this author is that a generally applicable federal standard for long-arm jurisdiction presents the possibility of a more rational assertion of in personam jurisdiction by federal courts over distant parties — especially alien corporations. Such a standard should be authorized either by statute or as an amendment to Rule 4 of the Federal Rules of Civil Procedure.*

**CRITICAL ESSAYS**

**AN EXCHANGE ON U.S. FOREIGN POLICY IN CENTRAL AMERICA**

**Ignoring International Law: U.S. Policy on Insurgency and Intervention in Central America**

*The article considers U.S. actions towards Nicaragua as being totally void of justification in international law. Beres notes that the Reagan administration no longer feels the need to justify their position, and that the rationale has been reduced to pure *Realpolitik* considerations. There are proper grounds for intervention into a foreign state, such as for humanitarian concerns, but according to Beres, none are present in this case. The article goes beyond the single situation presented by Nicaragua. The whole process of foreign policy, based on *Realpolitik* considerations, breeds contradictions. For instance, the concept of independence, would be applied to groups fighting against a regime hostile to the U.S., but those fighting against an ally are not accorded the same honor, no matter how repressive the regime.*

**Confusing Victims and Victimizer: Nicaragua and the Reinterpretation of International Law**

*Initially, the article considers the present state of international law. Friedlander concludes that this body of law has been nothing more than an attempt to thwart the Darwinian progression of global power. The*
only reliable source of compliance is nothing more than the concept of good faith obligations to carry out the terms of agreements. By depicting the United Nations within a North-South dichotomy, the power to formulate rules rests with the non-Western majority without a corresponding power in reality. The rules formed within the past few decades are not entirely clear in application. This claim applies to the concept of humanitarian intervention with equal force. With the void in enforcement capabilities, the United States must fend for itself in regard to the division of global power. The Reagan administration has decided not to rely upon recent formulations of international law that inherently possess a non-Western bias. Since no one else will help to prevent Soviet intervention in this hemisphere, the U.S. must take the initiative and act on its own.

THE NUCLEAR COLLISION COURSE: CAN INTERNATIONAL LAW BE OF HELP? ..........................
John H.E. Fried 

It is the thesis of this article that international law prohibits nuclear war. The thesis is based on the premise that, since no specific norms concerning nuclear warfare exist, the rules generally applicable to all weapons must apply. The author enumerates many of the rules that currently govern warfare, and concludes that the use of nuclear weapons must inevitably and intolerably break those rules. In addition, the author analyzes the U.S. Administration's Strategic Defense Initiative and considers its impact on the arm's race. The author concludes with a recommendation that the U.S. reciprocate the Soviet Union's no first-use pledge.

STUDENT COMMENT

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SOVEREIGN DEBT RESOLUTION THROUGH THE INTERNATIONAL MONETARY FUND: AN ALTERNATIVE TO THE ALLIED BANK DECISION

ETTORE A. SANTUCCI*

INTRODUCTION

On April 23, 1984, the United States Court of Appeals for the Second Circuit rendered its first decision in the case of Allied Bank International v. Banco Credito Agricola de Cartago (Allied Bank I).1 In Allied Bank I, the court held that exchange restrictions imposed by Costa Rica, which prevented certain Costa Rican banks from making payments to foreign creditors in United States dollars when due, would be given effect in United States courts on grounds of comity, because they were consistent with the policy and law of the United States.2 Accordingly, the court affirmed the lower court's dismissal of an action for breach of payment brought by a syndicate of foreign creditor banks against the Costa Rican debtors.3 On July 3, 1984, the Second Circuit granted the plaintiff's peti-

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1. 733 F.2d 23 (2d Cir. 1984). Although the decision was subsequently withdrawn by the court, see infra note 4 and accompanying text, it will be necessary to cite to the opinion repeatedly in the course of this article, as several important aspects of the case were discussed by the Second Circuit in its first decision (Allied Bank I), but not in its second decision (Allied Bank II, see infra note 5 and accompanying text).

2. 733 F.2d at 24.

3. Id. at 27. The banking industry reacted in shock to this holding. The New York Clearing House Association (the Clearing House), an association of twelve leading commercial banks in New York City, which had already filed an amicus curiae brief on the initial hearing on appeal, filed a brief as amicus curiae in support of plaintiff's petition for rehearing. The United States government who had not participated in any prior proceedings in the case, also filed a brief as amicus curiae in support of the petition.
tion for rehearing. On March 18, 1985, the Second Circuit reversed and vacated its Allied Bank I decision. Therefore, the lower court's dismissal of the action was reversed and remanded to the district court for entry of summary judgment for the only plaintiff creditor bank left on appeal. In Allied Bank II, the court held that in Allied Bank I it had mistakenly found the Costa Rican restrictions consistent with United States policy and therefore, such restrictions were not entitled to recognition on grounds of comity. The court also held that the act of state doctrine did not prevent the United States courts from rendering a judgment in the case, because the situs of the debt was in the United States and not in Costa Rica.

The Allied Bank litigation sent shock waves through the money centers of the globe and the capitals of overburdened debtor countries. This paper is not, however, a case comment on Allied Bank. The purpose of this paper is to suggest ways to prevent litigation in situations analogous to the one involved in Allied Bank. This kind of litigation, regardless of the outcome and the reasoning offered to justify it, has a devastating impact on the precarious equilibrium laboriously achieved day after day in the international debt arena. It is too dangerous and disruptive for all parties involved—winners and losers alike—to surrender their fate to the hands of tribunals, who are forced to decide complex issues in a piecemeal, case-by-case fashion. Therefore, a systemic and institutional alternative to litigation must be developed to avoid such consequences.

This thesis is true regardless of the ultimate outcome in Allied Bank, because the case lacks any credible effort to analyze the systemic and institutional concern raised by the situation at issue. The Allied Bank II court confined itself to a recitation of the language used by the United States government, as amicus curiae, to support a vaguely defined and superficially analyzed "debt resolution procedure that operates through the auspices of the IMF." The court, however, refused to discuss and construe the actual provisions of the International Monetary Fund Articles of Agreement (the Bretton Woods Agreement). In fact, any reference to the Agreement, or the "charter" of the international monetary order, was omitted from the Allied Bank decisions. Therefore, in a way Allied

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4. The Second Circuit granted a rehearing before the same panel that had heard the case in the first instance. Both the Clearing House and the United States government filed amicus curiae briefs in support of plaintiff on rehearings. For a discussion of some of the arguments raised by amici on rehearing, see infra notes 135-145 and accompanying text.

5. Allied Bank International v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985). This second decision of the Second Circuit will hereinafter be referred to as Allied Bank II.

6. Id. at 519-20.

7. Id. at 523.

8. Id. at 519. See infra notes 39-42, 135-138 and accompanying text.

9. The IMF Agreement was only mentioned briefly in the Brief for Defendants-Appellees on Rehearing at 40-41, Allied Bank International v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985) [hereinafter cited as Defendant's Brief], where defendants sug-
Bank epitomizes the inability, or the unwillingness, of the judicial process to accommodate any systemic and institutional consideration for the purposes of resolving the international debt crisis.

Institutional and systemic considerations are, however, the most important issues for the future and will be the exclusive focus of this essay. Looking ahead to possible future instances where debtor countries resort to exchange controls to handle their external debt crisis, a number of lessons must be drawn from Allied Bank. This paper submits that the Bretton Woods Agreement contains the means and authority for the Fund to play a central role in a situation similar to the one at issue in Allied Bank and to offer a viable alternative to future litigation.

I. THE ALLIED BANK LITIGATION

Allied Bank International (Allied) brought an action in the United States District Court for the Southern District of New York, on behalf of thirty-nine United States and foreign creditor banks, against three Costa Rican banks, which are owned by the Republic of Costa Rica. The action was brought for breach of payment of certain notes issued by the Costa Rican banks in 1976. Payments on the notes were to be made in New York with United States dollars. The loan agreements provided for concurrent jurisdiction in the New York and Costa Rican courts. The dollars were to be supplied by the Costa Rican Central Bank. The loan agreements also provided that a failure to make a payment due solely to the omission or refusal of the Central Bank to provide the necessary U.S. dollars would not constitute an event of default for a ten day grace pe-

10. Allied Bank II, 757 F.2d at 518.
11. Id. at 519.
12. Id.
13. Id.
period. After such period, however, the creditors could demand full payment of the promissory notes.

Payments were regularly made until August 1981, when the government of Costa Rica, in response to a severe economic crisis, unilaterally halted the release of any currency for the payment of debts. In November 1981, the government of Costa Rica in effect utilized controls over foreign exchange to establish a temporary suspension of payments on external debts, unless the prior approval of the Central Bank was obtained. The Central Bank did not authorize payments of principal and interest on the promissory notes at issue. The Costa Rican government's decree, deferring payments on the foreign debt, stated that "presently the government of Costa Rica is renegotiating its external debt and for this purpose there should be harmony of decisions and centralization in the decision-making process." All the foreign creditor banks brought an action in the New York District Court for breach of payment on the notes.

While this action was pending, the banks began negotiations for the rescheduling of the debt. In July 1983, the U.S. District Court for the Southern District of New York dismissed the action on the ground that the act of state doctrine applied to the acts of the Costa Rican government. In September 1983, an agreement rescheduling the Costa Rican debt was signed by all the creditor banks except one, Fidelity Union Trust company of New Jersey (Fidelity). On appeal from the District Court's dismissal, Allied represented the lone bank which continued to refuse to accept the rescheduling.

Costa Rica's deferment of payments on foreign debts also caused it to default on its intergovernmental obligations. Such default triggered section 620(a) of the Foreign Assistance Act, which prohibits governmental aid to any country in default on loan payments to the United States, un-

15. Id.
16. Id.
17. Id.
18. Id. at 25.
19. Id. at 24-25. Throughout the litigation defendants argued that this reason for the deferment indicated that Costa Rica never intended to repudiate its external debt. Defendants saw this good faith defense as the central aspect of the case and argued that "nothing in the [Allied Bank] decision, or the arguments of the Costa Rican banks, may be read to permit a foreign country unilaterally to abrogate its debts to U.S. citizens." Defendants' Brief on Rehearing at 2. The defendants thus tried to limit the holding to the specified facts of the case and reprimanded the plaintiff and amici for their "desire to foreclose an undesired result in a different case in another court at a future time." Id.
20. Allied Bank I, 733 F.2d at 25.
21. Id.
23. Allied Bank I, 733 F.2d at 25.
24. Id.
25. Id.
less the President advises Congress that "assistance to such country is in the national interest." But President Reagan and the House of Representatives expressed full support for Costa Rica. In January 1983, the United States joined several other nations in the signing of the Paris Club Agreed Minute which rescheduled the intergovernmental debt of Costa Rica.

The court in Allied Bank I held that the actions of the Costa Rican government causing default on the notes were "consistent with the policy and law of the United States" and that comity required that such actions be given effect in the United States courts. The court did not rule on the act of state defense relied upon by the District Court below. The Court of Appeals also stated that the result it reached was not dependent on the choice of the controlling law as determined by the situs of the debt.

In its finding that the Costa Rican decree was consistent with the policy and the law of the United States, the court in Allied Bank I relied in part on the support for Costa Rica manifested by both the legislative and the executive branches of the United States government. More importantly, however, the court drew an analogy between Costa Rica's prohibition of payment of its external debt and the reorganization of a business pursuant to Chapter 11 of the U.S. Bankruptcy Code. The court reasoned that Costa Rica's actions were not a repudiation of the debt, but rather a mere "deferral of payments while it attempted in good faith to renegotiate its obligations." Giving effect in the United States courts to the Costa Rican exchange restrictions, the court concluded, would achieve the same result as an automatic stay of all collection actions against a business filing an application for reorganization under Chapter 11.

The same court, however, changed its conclusions and held in Allied Bank II that, in light of the U.S. government's "elucidation of its position," the court was no longer convinced that the Costa Rican decree was consistent with the policy of the United States. The Allied Bank II court made no mention of its prior analogy of a debtor country rescheduling its debt and a domestic debtor filing for reorganization under Chapter 11.

27. 22 U.S.C. section 2370 (g)(1982).
28. Allied Bank I, 733 F.2d at 25.
29. Id.
30. Id. at 24.
31. Id.
32. Id.
33. Id. at 26.
34. Id.
35. Id.
36. Id.
37. Allied Bank II, 757 F.2d at 520. The court concluded that the Costa Rican government's unilateral attempt to repudiate private commercial obligations was inconsistent with the orderly resolution of international debt problems and with the interests of the United States as a major source of private international credit. Id. at 522.
The court changed its opinion on the Allied Bank situation because it was fully persuaded by the U.S. Justice Department’s claimed support for “the debt resolution procedure that operates through the auspices of the IMF,” since “guided by the IMF, this long established approach encourages the cooperative adjustment of international debt problems.”

The Allied Bank II court reasoned that such a procedure required that the underlying obligations to pay remained valid and enforceable. Therefore, the court concluded, Costa Rica’s attempted unilateral restructuring of private obligations threatened the system of international cooperation and negotiation supported by the United States, and thus was inconsistent with United States policy. The court did not question the United States government’s explanation of its apparently inconsistent position, which on the one hand opposed Costa Rica’s conduct insofar as private international debts were concerned, while at the same time, officially supported that same conduct insofar as intergovernmental obligations are concerned.

According to the Allied Bank II court, Costa Rica’s exchange restrictions could not be respected in the United States courts on grounds of comity. Consequently, the court had to rule on the act of state defense raised by the defendant debtors below. The court noted that if, as the court below had held, the act of state doctrine was applicable, judicial examination of the Costa Rican decree would be precluded. The court, however, concluded that the act of state doctrine was inapplicable to the facts of Allied Bank.

The Allied Bank II court reasoned that the act of state doctrine did not bar inquiry by the courts into the validity of extraterritorial takings. According to the court, the act of state defense would have been available if the situs of the property, the debt, was in Costa Rica at the time of the

38. The court simply said, rather cryptically, that “the appellees’ ability to pay United States dollars relates only to the potential enforceability of the judgment; it does not determine whether judgment should enter.” Id. at 522.

39. Id. at 519.

40. Id.

41. Id.

42. Id. The court explained that its holding in Allied Bank I was premised on the United States’ willingness to restructure Costa Rica’s intergovernmental loans and to continue providing aid to Costa Rica. Id. at 520.

43. Id. at 520.

44. Id. The court explained that the act of state doctrine operates to confer presumptive validity to certain acts of foreign sovereigns by rendering nonjusticiable claims that challenge such acts. Id. Quoting from the U.S. Supreme Court’s opinion in Underhill v. Hernandez, 168 U.S. 250, 252 (1897), the court said that “every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit judgment on the acts of the government of another done within its own territory.” Id.

45. Id. at 520. Quoting from Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964), the court stated that the act of state doctrine protects only the validity of a taking of property by a foreign government within its own territory. Allied Bank II, 757 F.2d at 520.
purported taking. 46 However under ordinary situs analysis, the court found that the loan agreement's nexus with New York, 47 as well as the United States' "interest in maintaining New York's status as one of the foremost commercial centers in the world," 48 made New York the situs of the debt. 49 Accordingly, the court concluded the Costa Rican decree was an extraterritorial taking of property and as such, was unprotected by the act of state doctrine. 50

II. APPLICABILITY OF ARTICLE VIII, SECTION 2(B) TO THE ALLIED BANK DISPUTE

The application of the Bretton Woods Agreement to the dispute was never before the Allied Bank court. It is, however, appropriate to address this issue because both Costa Rica and the United States are members of the IMF. The situation at issue in Allied Bank is at least arguably covered by Article VIII, section 2(b) of the Fund Agreement 51, which provides, in part, that "exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with [the Fund] Agreement shall be unenforceable in the territories of any member." In its interpretation of this provision, 52 the Fund stated that the purpose of Article VIII, section 2(b) is to withdraw from private parties, who violate the legitimate exchange regulations of a member, "the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts." 53 In the same decision, the Fund made it clear that "by accepting the Fund Agreement members have undertaken to make the principle mentioned above effectively part of their national law." 54

The United States has accepted the Fund Agreement, and therefore,

46. Id.
47. Id. The court noted that: the debtors conceded jurisdiction in New York; payments were to be made in New York; Allied, the syndicate agent, is located in New York; and some of the negotiations between the parties took place in the United States. Id.
48. Id. The court noted that the viability of New York as an international clearing center for United States dollars and the source of billions of dollars of international loans each year depends on creditors' confidence in the judicial enforceability of contracts subject to the jurisdiction of the United States courts. Id. at 521-22.
49. Id. at 522.
50. The court offered a secondary reason for its conclusion, namely that the purported taking had not "come to complete fruition within the dominion of the foreign government" since Costa Rica could not wholly extinguish the debtor banks' obligations to pay United States dollars to Allied in New York. Id. at 521.
51. See infra text accompanying notes 60-69.
52. Pursuant to Article XXIX(a) (formerly Article XVIII) of the Fund Agreement, the Executive Board of the Fund has the authority to settle with finality any question of interpretation of the Articles that arises between a member and the IMF or between members.
53. IMF Decision No. 446-4, Selected Decisions of the International Monetary Fund and Selected Documents 233 (1983) [hereinafter cited as Selected Decisions].
54. Id. at 233-34.
has given Article VIII the force of law in the United States.\textsuperscript{55} If it can be demonstrated that Article VIII, section 2(b) does indeed apply to loan agreements of the kind at issue in \textit{Allied Bank}, the courts of the United States have a duty to apply the positive law of the IMF Agreement in the same manner as a treaty.

Assuming that Article VIII, section 2(b) applies to such loan agreements,\textsuperscript{48} the crucial inquiry in \textit{Allied Bank} should have been whether the Costa Rican exchange restrictions were maintained or imposed consistent with the law and policy of the United States. The Second Circuit should have denied recognition to the Costa Rican decree, unless sufficient evidence had been introduced to satisfy the court that the promissory notes at issue were unenforceable since the requirements for claiming the Article VIII, section 2(b) defense were satisfied. If the Second Circuit had given or denied effect to the Costa Rican decree based solely on the unilateral interest of the United States, it would have violated the spirit and the letter of the Fund Agreement, which is an integral part of the law of the United States.

A future role of the Fund in similar circumstances surpasses the effect that an application of Article VIII, section 2(b) would have had in \textit{Allied Bank}. Even if the Second Circuit had considered Article VIII, section 2(b) as the governing rule of the case, the outcome would have simply been determined by considering which party had the burden of proving that the requirements of such provision were satisfied and whether sufficient evidence could have been offered to meet the burden. In such circumstances, the Fund's role would have been a reactive one, albeit a crucial one in the litigation. Pursuant to the Fund's undertaking "to lend its assistance in connection with any problem which may arise in relation to the...interpretation of...Article VIII, section 2(b),"\textsuperscript{57} the Fund would have had jurisdiction to make a conclusive determination that the exchange control regulations were, or were not, maintained or imposed consistently with the Articles.\textsuperscript{58}

A more crucial lesson to be learned from \textit{Allied Bank}, however, is that Article VIII, section 2(b) may present the Fund with the opportunity to play an active role in future situations where a debtor country facing a liquidity crisis chooses to impose restrictive exchange controls, which make it impossible for domestic borrowers to honor their obligations to foreign lenders when due. The Fund's active role should ideally prevent litigation, rather than determine its outcome. The remainder of this paper will explore exactly what such role should be and how it can be reconciled with the Bretton Woods Agreement, from which the Fund derives its authority.

\textsuperscript{55} 22 \textit{U.S.C.} section 286 (1982).
\textsuperscript{56} See \textit{infra} notes 60-64 and accompanying text.
\textsuperscript{57} IMF \textit{Decision No. 446-4, Selected Decisions}, \textit{supra} note 53, at 234.
\textsuperscript{58} Id.
III. Article VIII, Section 2 Conditionality

The question whether international loan agreements\(^\text{59}\) are included in the definition of "exchange contracts" for purposes of Article VIII, section 2(b) has not yet been resolved. In the last four decades two different definitions of exchange contracts have been proposed: a narrow one, restricted to contracts for the exchange of currency of one country for that of another or at the most, to contracts which are "monetary transactions in disguise,"\(^\text{60}\) and a broad one, encompassing all contracts that in any way affect a country's exchange resources.\(^\text{61}\) The narrow definition, contrary to the broad one, excludes a promise between residents of different countries to lend or deposit an amount in foreign currency against a promise by the debtor to pay interest on and to repay or return such

\(^{59}\) Such loans normally involve the extension of credit in a particular currency in exchange for a promissory note obligating the debtor to pay interest and, in accordance with a maturity schedule, to repay the principal of the loan in the same currency. See generally, R. W. Edwards, Jr., International Monetary Collaboration 129-32 (publication forthcoming).


\(^{61}\) This definition has received the vigorous support of Sir Joseph Gold, Gold, Exchange Contracts, supra note 60, at 787-89; of Dr. Mann, Mann, Legal Aspects of Money, supra note 60, at 387-88; of Elias Krispis, Krispis, Money in Private International Law, 120 Recueil des Cours 191, 286-90 (1967); of John Williams, Williams, Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement, 15 Va. J. Int'l L. 319, 332-44 (1975); and of Prof. Francois Gianviti, Gianviti, Le Controle des Changes Etrangers Devant le Juge National, 69 R.C.D.I.P. 667, 674 (1980). The broad view of exchange contracts has been adopted by courts in a number of countries, including Germany and France. For a detailed discussion of such cases see Mann, Legal Aspects of Money, supra note 60, at 386-87. See generally J. Gold, The Fund Agreement in the Courts (1962) [hereinafter cited as Gold, FAIC] and J. Gold, The Fund Agreement in the Courts: Volume II (1982) [hereinafter cited as Gold, FAIC II]. See also Gold, The Fund Agreement in the Courts, in IMF Staff Papers 199 (1983). A review of scholarly comments and court decisions in all IMF members led Dr. Mann to conclude that the majority of learned writers would seem to support the broad view. Mann, Legal Aspects of Money, supra note 60, at 389. Sir Joseph Gold also stated that most of the cases cited by the Terruzzi court in support of the narrow view were lower court decisions, contrary to the decisions supporting the broad view rendered by the highest German and French courts. Gold, Exchange Contracts, supra note 60, at 798. Considering the relative reputation and status of the courts that have confronted the issue, Sir Joseph Gold concluded that "the tilt would be towards the broad interpretation." id.
principal amount, either in the same currency or in the debtor’s own currency.63

In a recent article, Sir Joseph Gold convincingly criticized the narrow view of exchange contracts.63 He also delivered a very compelling argument in favor of the broad view, stating that “good sense, the purposes of the Articles, and the history of Article VIII, section 2(b)” support such a view.64 If Gold’s analysis is sound, the definition of exchange contracts in Article VIII, section 2(b) includes loan agreements between borrowers in the country imposing exchange control regulations and foreign lenders, regardless of the currency in which payments of interest and principal are to be made and regardless of whether the borrower already has the foreign currency needed to make such payments or has to contract to purchase it.

Assuming that Article VIII, section 2(b) is applicable to international loan agreements, the concept of Fund conditionality should be extended to the availability of a Bretton Woods defense. This proposal is premised

62. Sir Joseph Gold noted some apparently odd consequences that this conclusion would have in the international lending situation and relied on such oddities to criticize the narrow view of exchange contracts. Gold, Exchange Contracts, supra note 60, at 786, 791. In particular, Gold noted that while such definition would exclude loans to be repaid in the same currency, it would not exclude the same loans if they had to be repaid in a different currency. Id. at 786. He concluded that the drafters of Article VIII, section 2(b) could not possibly have intended to make such a distinction. Id. Sir Joseph Gold also noted that, even if a particular loan agreement were covered by the narrow definition of exchange contracts, the operation of Article VIII, section 2(b) would be frustrated if the debtor already had the foreign currency necessary to pay interest or principal to foreign creditors and thus did not have to contract to purchase the foreign exchange. Id. at 791. Gold concluded that “no economic justification exists for distinguishing between a payor who already has the necessary exchange to make prohibited payments and a payor who must buy it.” Id.

63. Gold, Exchange Contracts, supra note 60, at 787, 793-94, 799-800, 801-02. The author criticized the logic underlying Professor Nussbaum’s proposal for a narrow view of exchange contracts, which was adopted by the Terruzzi court. Id. at 787. Gold also criticized the Terruzzi court’s interpretation of the text of Article VIII, section 2(b) and of the expression “exchange contracts” in relation to Article VIII, section 2(a) and Article VI, section 3. Id. at 793-94, 799-800. Finally, Gold criticized the policy considerations offered by the Terruzzi court to support its narrow view of exchange contracts. Id. at 801-02.

64. Sir Joseph Gold stated that the narrow view of exchange contracts would “reduce Article VIII, section 2(b) to triviality . . . not only because the category of exchange contracts defined in this way would be so small a proportion of total contracts under which international payments and transfers or capital transfers are made, but also because cases within the limited category would be unlikely to come into the courts.” Id. at 789. Gold also offered an interpretation of the text of Article VIII, section 2(b) whereby the alleged redundancies in the expressions “exchange contracts” and “involve the currency of any member,” as well as in the expressions “exchange contracts” and “exchange control regulations” would be eliminated. Id. at 793-94. Such supposed redundancies had become an argument in favor of the narrow view adopted by the Terruzzi court, following a comment made by Dr. Mann, MAN, LEGAL ASPECTS OF MONEY, supra note 60, at 385. See Terruzzi, [1976] 1 Q.B. 709, 712. Finally, Gold demonstrated that a correct understanding of the interests and purposes of the IMF supports a broad definition of exchange contracts especially after the second amendment of the Articles. Gold, Exchange Contracts, supra note 64, at 788, 802-05, 808-10.
on the unenforceability of exchange contracts contrary to a member’s exchange control regulations, via the “imposed or maintained consistently with [the Fund] Agreement” clause of Article VIII, section 2(b). While conditionality has so far been restricted to the receipt by a member of money from the Fund, there is no reason in law or policy why it should be so limited. This article will suggest that conditionality can reasonably be viewed as a general concept, inherent to the Fund’s authority to approve, or disapprove, certain actions by members based on various provisions of the Articles. Therefore, the Fund can invoke conditionality whenever a member seeks to enjoy a privilege consistent with the IMF Agreement.

The unenforceability of exchange contracts which violate the legitimate exchange controls of a member is such a privilege. The Article VIII, section 2(b) privilege can be subjected to Fund conditionality through the authority given to the Fund by various provisions of the Articles. The recognition of exchange control regulations outside the country imposing them is a privilege available to Fund members because of their membership in the IMF. The traditional view of courts in most countries has been that exchange controls, like tax and penal laws, are enforceable only in the territory of the sovereign that issued them. It is a widely accepted principle of international private law that the enforcement of foreign exchange controls outside the country imposing them would be against the public policy of the forum where such enforcement is sought. The view taken by the Second Circuit in Allied Bank II is consistent with this ma-

65. Article VIII, section 2(b) is normally claimed as a defense by a private, and occasionally by a public party to a contract in an action for breach brought by another party before the courts or administrative tribunals of an IMF member country. If the Article VIII, section 2(b) defense is available to the party claiming it, the action for breach of contract must be dismissed, because the underlying contract is “unenforceable in the territories of any member.” Whether the defense is in fact available in a given action depends on whether the three requirements of Article VIII, section 2(b) are satisfied. These requirements are: (1) the contract must be an “exchange contract which involves the currency of (a) member;” (2) it must be “contra the exchange control regulations of that member;” and, (3) such exchange control regulations must be “maintained or imposed consistently with (the Fund) Agreement.” These requirements are cumulative.

It should be apparent that, contrary to the first two requirements, the third requirement has nothing to do with the contract itself or with the conduct of any private parties, but rather concerns the official acts of a member country vis-a-vis the Fund and the Articles of Agreement. The Fund made it clear that the third requirement is subject to its regulatory authority: “the Fund is prepared to advise whether particular exchange control regulations are maintained or imposed consistently with the Fund Agreement.” IMF Decision No. 446-4, SELECTED DECISIONS, supra note 53, at 234. Through the third prong of the test, therefore, the Fund can determine the availability of the Article VIII, section 2(b) defense to private parties, who are not, as such, directly subject to the Fund’s regulatory authority.

66. MANN, LEGAL ASPECTS OF MONEY, supra note 60, at 372.


68. MANN, LEGAL ASPECTS OF MONEY, supra note 60, at 402, 428. For pre-Bretton Woods surveys, see Domke, Foreign Exchange Restrictions (A Comparative Survey), 21 J. COMP. LEGIS. & INT'L L. 54 (1939); Freutel, Exchange Control, Freezing Orders, and the Conflict of Laws, 56 HARV. L. REV. 30 (1942).
The Article VIII, section 2(b) privilege is particularly valuable for a debtor country facing a deteriorating external debt ratio and the risk of default, since it prevents foreign lenders from enforcing their contract rights in the courts of any other member of the Fund. The concept of conditionality is already available in Article V, section 3, with stand-by arrangements. A stand-by makes available to the debtor sufficient foreign currency to pay debt service and avoid default, at least temporarily. The availability of the Article VIII, section 2(b) defense in enforcement actions brought against borrowers in the debtor country would have the same effect as an automatic stay of all collection actions against a business filing an application for reorganization under Chapter 11 of the U.S. Bankruptcy Code. Since the benefit for a defaulting debtor country is the same under both provisions of the Articles, the costs should also be the same. If a member must subject itself to the burden of Fund conditionality to obtain a stand-by arrangement, it is not unreasonable to suggest that it should face the same burden to enjoy the privilege of Article VIII, section 2(b) protection from external creditors. It is submitted that conditionality should be extended from Article V, section 3 to Article VIII, section 2(b).

69. This issue was extensively belabored in the briefs submitted on rehearing in the Allied Bank litigation. It should be noted that the traditional rule against extraterritorial recognition of exchange controls is supported by ample authority in the United States. See generally Cent. Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellshaft, 15 F.Supp. 927 (S.D.N.Y.), aff'd mem., 84 F.2d 993 (2d Cir.), cert. denied, 229 U.S. 585 (1936), and its progeny. There is, however, authority to the contrary, both in the United States and in England. See, e.g., Perutz v. Bohemian Discount Bank in Liquidation, 110 N.Y.S.2d 446, 304 N.Y. 533, 110 N.E.2d 6 (1952); Frankman v. Anglo-Prague Credit Bank (London Office) (1948) 1 All E.R. 337; Frankman v. Anglo-Prague Credit Bank (1948) 2 All E.R. 1025; Zivnostenska Banksa National Corporation v. Frankman (1949) 2 All E.R. 671; Kahler v. Midland Bank, Ltd. (1948) 1 All E.R. 811; 2 All E.R. 621. All these cases are discussed in detail in Gold, FAIC, supra note 61, at 28-30, 50-55, 75-76, 78-79, 134-39; 16-17; 18-19, respectively.

70. For a complete discussion of Articles V (3) and VIII (2)(b) of the Fund Agreement see generally A.F. Lowenfeld, supra note 67, at 32-42, 323-349, 366-376. In the same book, Lowenfeld presents several illustrations of how the Fund Agreement and the IMF operate in an international monetary crisis.

71. It has been said that a member "buys a reasonable amount of time as well as foreign exchange" when it resorts to a stand-by arrangement. Id.

72. 11 U.S.C. Sections 103(a), 362, 901(a) (1982). This was the core of the now withdrawn decision of the Second Circuit in Allied Bank I, 733 F.2d at 26.

73. Throughout this paper it will be assumed that the operation of Article VIII, section 2(b) is unaffected by the time when exchange controls are imposed, relative to the time when an exchange contract is made. The most important consequence of this assumption is that exchange contracts which at the date of their conclusions are consistent with, but during their lives become contrary to, the exchange regulations of a member maintained or imposed consistently with the Fund Agreement are covered by Article VIII, section 2(b). This is not, indeed, a settled proposition. Authoritative commentators and courts hold conflicting opinions on the issue. See e.g. Mann, Legal Aspects of Money, supra note 60, at 377-79; Gold, The Fund Agreement in the Courts, in IMF Staff Papers 199, 202, 202 n.60;
Traditional conditionality establishes a link between the Fund's financial assistance to a member with balance of payment difficulties and the adoption by such member of economic adjustment policies (so called "austerity measures"), with the double purpose of correcting the balance of payments disequilibrium and assuring that the revolving nature of the Fund's resources is maintained. The notion of conditionality arose out of the question, left open at Bretton Woods, of whether the resources of the Fund would be made available to members as of right or under conditions set by the Fund. Since the text of the original Agreement was vague enough to support both positions, conditionality developed entirely out of the Fund's practice. Although "Fund conditionality requirements" are now expressly provided for in Article V, section 3, conditionality, as a general category it is capable of further expansion in connection with other aspects of the Fund's activity. As Sir Joseph Gold


The author of this article concedes without hesitation that this assumption is vital to the thesis of this paper. See infra note 120. The author, however, believes that nothing could be accomplished by an extended discussion of the issue here. The issue of subsequent exchange controls is not likely to be resolved once and for all, but must rather be faced by each individual court in each individual case based on precedent in each individual jurisdiction.

74. In general, IMF-sponsored adjustment programs embody monetary and budgetary policies that are consistent with reasonable price stability; exchange rate, interest rate, trade and other policies, aimed at improving efficiency and strengthening the productive base of the economy; and a prudent external debt management policy. Remarks by J. de Larosiere, Managing Director of the IMF, before the Institute of Foreign Bankers in New York (May 2, 1984), reprinted in IMF Surv., May 21, 1984. Fund supported programs emphasize a number of major economic variables, such as domestic credit, the financing of the public sector, and external debt, as well as some key elements of the price system, including the exchange rate, the interest rate, and, in some cases, the prices of commodities that bear significantly upon the public finances and foreign trade. Conditionality, IMF Surv., September 1984, at 2. The implementation of IMF-sponsored austerity measures is monitored with the help of performance criteria, the choice of which is dictated by the particular conditions of the member country involved. Id. The impact of Fund-supported programs on income distribution, employment, and social services, depends on the policies chosen to implement the program. Id. at 3. Such choices are left entirely to the government of the member involved. Id. Typically, the necessary adjustment efforts are highly unpopular, as they cause a severe restriction in the member's economy. Such unpopularity accounts for most of the problems encountered by the Fund in forcing a member with balance of payments difficulties to commit itself to strong adjustment efforts. The approach of the Fund to economic adjustment and the "mix" of policies typically emphasized by the IMF are the subject of continuous debate among economists. The Fund's continued focus on the control of domestic demand as the primary variable has been the target of much criticism as it may "threaten to be destructive of national prosperity in terms of output, employment, and development. The IMF's Role in Developing Countries, Fin. & Dev., September 1984.


76. Id.

77. Sir Joseph Gold wrote that "no part of the development relied on the language in the original Articles that could be deemed to be explicit or beyond controversy." J. GOLD, LEGAL AND INSTITUTIONAL ASPECTS OF THE IMF: SELECTED ESSAYS 54 (1979).
stated in 1978, conditionality is implicit in a number of provisions and the development in the past "illustrates an evolution of fundamental importance that is possible when sufficient leeway is made available by the drafters of the text." Article VIII, section 2(b) indeed affords "sufficient leeway" for the development of a new kind of conditionality.

The legal character of conditionality, as it applies to the Fund's financial assistance, reinforces the conclusion that it need not be restricted to a member's access to the Fund's general resources. Fund conditionality is not the equivalent of a borrower's undertakings in connection with a loan; rather it is a member's "pledge" to use the resources of the Fund in accordance with the obligations under the Agreement and the policies of the Fund. The Articles use terminology appropriate to an exchange transaction in connection with conditionality and never use the language of loans and credits. In other words, the purpose of conditionality is not to ensure the prompt repayment of the upper credit tranches, but rather to ensure that the Fund's resources are used to promote the stability of the international financial system and the prompt correction of disequilibria and distortions.

The extension of conditionality from Article V, section 3, governing access to the general resources of the Fund, to Article VIII, section 2(b), governing the availability of an affirmative defense to collection actions, finds support in the non-contractual character of conditionality, which makes it an appropriate legal instrument in both contexts. A decision of the Fund in 1979 makes clear that "stand-by arrangements are not international agreements and therefore language having a contractual connotation will be avoided in stand-by arrangements and letters of intent." Article XXX(b) defines stand-by arrangements as decisions made by the Fund in response to requests by members to approve a stand-by arrangement. The request is normally accompanied by a letter of intent, setting forth the terms and conditions upon which the member is willing to gain access to the Fund's general resources. The cited decision of the Fund rejected the interpretation of stand-by arrangements as the Fund's acceptance of a member's offer to implement the austerity measures contained in the letter of intent.

If a member's letter of intent and the Fund's decision to approve a stand-by were in the same relationship as offer and acceptance in the law of contracts, it could be argued that conditionality simply means a mem-

78. Id.
79. Article V, section 3(b)(i).
82. IMF Decision No. 6056 (79/38), SELECTED DECISIONS, supra note 53, at 23.
83. Id.
84. Article XXX(b).
85. GOLD, LEGAL CHARACTER, supra note 81, at 2.
ber's undertaking to implement an adjustment program given in consideration for the Fund's financial support. Stand-by arrangements would then be mere loan agreements. The non-contractual nature of stand-by arrangements, however, signifies that conditionality is an aspect of the unilateral power of the Fund to approve certain transactions or acts of a member as consistent with the Articles of Agreement and the Fund's policy and purposes. As a special kind of "qualified approval," conditionality need not be connected solely with IMF money. Instead, it can be invoked by the Fund whenever a member seeks to enjoy a privilege, the availability of which depends upon such member's actions being consistent with the Fund Agreement.87

IV. ARTICLE VIII, SECTION 2 CONDITIONALITY AND THE USE OF EXCHANGE CONTROLS BY DEBTOR COUNTRIES IN THE INTERNATIONAL DEBT CRISIS

A. The "Maintained or Imposed Consistency With [The Fund] Agreement" Requirement of Article VIII, Section 2(b)

The privilege of Article VIII, section 2(b) protection from foreign creditors is expressly made conditional upon the actions of a debtor country in resorting to exchange controls that are "maintained or imposed consistently with [the Fund] Agreement." These words refer to provisions of the Articles other than Article VIII, section 2(b).88 The Articles recognize exchange controls in three main provisions. Article VIII, section 2(a) provides that a member may not "impose restrictions on the making of payments and transfers for current international transactions" unless they are approved by the Fund or are authorized by other provisions of the Articles. Article XIV, section 2 establishes a limited immunity from Article VIII, section 2(a) for those members who wish to avail themselves of transitional arrangements before undertaking to perform certain obligations, including the obligation to avoid restrictions forbidden by Article VIII, section 2(a). Such members may "maintain and adapt to changing

86. Id.
87. Such is the case for both Article V, section 3 and Article VIII, section 2(b). Article V, section 3 provides that "the Fund shall examine a request for a purchase to determine whether the proposed purchase would be consistent with the provisions of (the Fund) Agreement. . . ." Article VIII, section 2(b) provides that "exchange contracts that involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with (the Fund) Agreement shall be unenforceable in the territories of any member."
88. Gold, Exchange Contracts, supra note 60, at 800.
89. Two other, less significant, provisions refer to exchange controls: Article VII, section 3(b), which allows any member, after consultation with the Fund, "temporarily to impose limitations on the freedom of exchange operations in (scarce currencies);" and Article XI, section 2, which allows any member complete freedom to "impose restrictions on exchange transactions with non-members or with persons in their territories unless the Fund finds that such restrictions prejudice the interests of members and are contrary to the purpose of the Fund."
circumstances the restrictions on payments and transfers for current international transactions that were in effect on the date on which [they] became members. 99 Finally, Article VI, section 3 allows any member to “exercise such controls as are necessary to regulate international capital movements,” provided that such controls will not “unduly delay transfers of funds in settlement of commitments.”

For purposes of this paper, the transitional arrangements of Article XIV, section 2 can be disregarded, because that derogation from the prohibition of Article VIII, section 2(a) is limited to the exchange controls “in effect at the date on which [a country] became a member.” 91 Article VIII, section 2(a) applies fully to any new exchange control regulations introduced by those Fund members still under the transitional regime of Article XIV. 93 Therefore, most situations of the kind at issue in Allied Bank, where exchange control regulations were resorted to as a response to an external payments crisis, would be outside the scope of Article XIV, regardless of whether the country imposing the exchange controls had accepted the obligations of Article VIII. For purposes of this paper, therefore, Article VIII, section 2(b) is triggered by two different kinds of exchange controls: those affecting current international transactions, provided that the prior approval of the Fund is obtained pursuant to Article VIII, section 2(a), and those affecting capital movements, provided that they are authorized by Article VI, section 3. The only difference between the two situations is that the former requires the positive approval of the Fund, while the latter does not. This distinction has important implications for the proposed concept of “Article VIII, section 2 conditionality,” which is premised upon a need for Fund approval of a particular transaction.

B. The Nature of International Debt Payments Under the Fund Agreement

Since the concept of Article VIII, section 2 conditionality only oper-

90. Article XIV, section 2. This provision, however, mandates that such members shall “as soon as conditions permit” lessen or withdraw restrictions maintained under the transitional regime. Article XIV, section 3 gives the Fund authority to put pressure on members under the transitional regime if it believes that “conditions are favorable for the withdrawal of any particular restriction, or for the general abandonment of restrictions, inconsistent with the provisions of any other articles of (the Fund) Agreement.”

91. Article XIV, section 2. Once a member has given the IMF notice that it is no longer availing itself of the transitional arrangements, such member may not return to them. Article XIV, section 1. Furthermore, if a member withdraws a restriction, or abandons all restrictions, it may not reintroduce them under the transitional arrangements exception to Article VIII, section 2(a), but must instead obtain the Fund’s approval. Gold, Exchange Contracts, supra note 60, at 780.

92. Such members must obtain the Fund’s approval under Article VIII, section 2(a) even though they are still imposing other restrictions under the transitional regime, whether in the original or in an adapted form, that were in force when the member entered the IMF. Id. See, e.g., J.K. Horsefield, The International Monetary Fund 1945-1965: Twenty Years of International Monetary Cooperation, Vol. I: Chronicle 248-50 (1969).
ates when exchange restrictions affect current international payments, it is necessary to ascertain whether typical international loans involve current or capital transactions under the Articles. At first glance, both kinds of transactions would appear to be present, since an international debt requires interest and fee payments as well as repayment of principal.

Debt service payments regularly due to foreign lenders typically involve, for the greater portion, interest and fees for services performed in connection with the loans. Interest and fees constitute “payments and transfers for current international transactions.” Article XXX(d) of the Fund Agreement contains a definition of current transactions:

Payments for current transactions means payments which are not for the purpose of transferring capital and includes, without limitation:
(1) all payments due in connection with foreign trade, other current business, including services, and normal short term banking and credit facilities;
(2) payments due as interest on loans and as net income from other investments;
(3) payments of moderate amount for amortization of loans and for depreciation of direct investment; and
(4) moderate remittances for family living expenses.

Paragraph (2) of the definition expressly covers interest payments and paragraph (1) includes fees for banking and credit services.

The repayment of the principal component of debt service also falls within the definition of current international transactions. The expressions “amortization” and “moderate amount” in paragraph (3) of Article XXX(d) clearly refer to normal repayment schedules of long-term loans. The question of what is meant by “moderate amount” cannot be answered precisely. Local experience and commercial practice must be the controlling standards. A commentator, however, has said that “amortization payments which, for example, equal one-twentieth of the amount of a 20-year loan would certainly appear to qualify everywhere” as current transactions. Another commentator suggested that the treatment of principal components of debt service as current payments for purposes of

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93. The actual composition of debt service payments depends, of course, on the terms of the loan.
94. Article VIII, section 2(a).
95. Article XXX(d).
96. Edwards, supra note 59, at 396. This author noted that, while exchange regulations relating to capital movements in the country of the borrower or in that of the lender could prohibit the loan from being made without triggering Article VIII, section 2(a), if the loan is lawfully made the exchange control regulations of the borrower’s country must allow him to pay interest on the loan and reasonable amounts for amortization of the principal, as these payments become due, because they are treated as current payments by the Fund. Id.
97. Id. at 395 n.55.
99. Id.
exchange restrictions is justified by the regularity of such payments and by the disruption caused by their interruption, even if economists and accountants treat all repayments of principal as capital items.100

The question whether the full repayment of the principal of a loan in one lump sum, as opposed to payments of regular debt service, is a current or capital transaction is not so clear. The characterization of full repayment under the Articles is particularly important in a situation like the one at issue in Allied Bank, because of the acceleration clauses typically inserted in loan agreements. An acceleration clause makes the full amount of a loan due upon the happening of an event of default. If other loans to the same debtor contain cross-default clauses, default on a single loan can trigger a chain reaction whereby staggering amounts become immediately due to foreign creditors.

Common sense would seem to dictate that full repayment of a loan, just like the original making of the loan, be classified as a capital transfer. Article XXX(d)(1), however, characterizes as current “all payments due in connection with . . . normal short-term banking or credit facilities.” Three questions must be answered in order to decide whether a particular loan falls within the definition of such facilities: what are “banking and credit facilities?” what is “normal?” and what is “short-term?” A commentator from within the Fund wrote that the facilities at issue are,

[t]hose banking and credit facilities which are necessary to keep trade moving and to sustain current business operations. This is in contrast to those capital transactions referred to in Article VI, section 1(b)(i) which are needed to promote or expand operations above the present level by direct investment and transfers of working capital and which therefore can be regarded as being more than the “facilities” needed for current operations.101

The same commentator stated that “normal” facilities are those consistent with the customary practice in the particular trade or business for which the facility is made available.102 This variable definition also applies to “short-term,” therefore, no concrete rule can be fashioned.103

A plausible argument can be made that most of the recent commercial bank lending to developing countries for general balance of payments

100. Edwards, supra note 59, at 395 n.55. That the legal definition of current payments under the Articles of Agreement differs from the definition subscribed to by economists is a calculated effect, rather than an anomaly. A commentator noted that “the divergencies were adopted by the Drafters of the Articles to attain certain policy objectives.” Evans, supra note 98, at 30.

101. Evans, supra note 98, at 35.

102. Id.

103. Id. Evans noted that at the time when the original Articles were drafted, a one-year limit was normally placed on obligations incurred for current purposes and concluded that “a period of more than one year would probably not generally be considered ‘short-term.’” Id. It should be kept in mind, however, that such a limit is not explicitly set forth in any provision of the Fund Agreement and that the Fund practice does not support any rigid test of the meaning of “short-term.”
purposes fits the definition of the Article XXX(d)(1) facilities and therefore gives rise to current transfers. Other types of bank financing and inventory financing may or may not fall within the definition of such facilities, depending on their terms. It should be noted that the same loan may originally be a capital transfer and later become a current one pursuant to Article XXX(d)(1). This is particularly true for rescheduled loans and new credits extended in connection with the rescheduling, because of the "maintenance of trade" versus "expansion of trade" test under Article XXX(d)(1). In any event, each loan must be examined in light of its origin, purpose, terms, and history to conclude whether it falls within the scope of the Article XXX(d)(1) facilities.

C. The Allied Bank Scenario: Exchange Controls Affecting Regular Debt Service Payments

Given the current nature of regular debt service payments (and possibly full repayment of principal) under the Articles, when a member seeks to impose exchange control regulations that might affect the ability of borrowers in such a country to make payments to foreign lenders when due, the Article VIII, section 2(a) prohibition against restrictions on current international transactions may be triggered. In that case, the proposed exchange controls will be consistent with the Fund Agreement only if the Fund's prior approval is secured. The need for such approval provides the Fund with an opportunity to extend conditionality to the Article VIII, section 2(b) privilege of unenforceable claims.

The approval of the Fund, however, is not required for non-restrictive regulations of current payments. In its interpretation of Article VIII, the Fund stated that "the guiding principle in ascertaining whether a measure is a restriction on payments and transfers for current transactions under Article VIII, section 2, is whether it involves a direct governmental limitation on the availability or use of exchange as such." Article VIII, section 2(a) applies "regardless of the motivation for the restrictions and the circumstances in which they are imposed." The Fund could find that restrictions are in existence even in the absence of formulated regulations prescribing such restrictions, as evidenced by the strict position taken by the Fund on payment arrears. Payment arrears arise from governmentally imposed delays in making foreign currency

104. See supra note 101 and accompanying text.
105. Article VIII, section 2(a) prohibits restrictions on current payments, while Article VIII, section 2(b) covers exchange control regulations. The term regulations is broader than the term restrictions, because regulations may be non-restrictive. Gold, Exchange Contracts, supra note 60, at 782. Consequently, non-restrictive regulations affecting current payments and transfers are consistent with the Fund Agreement without the need for approval by the IMF. Accordingly, they automatically trigger the protection of Article VIII, section 2(b).
106. IMF Decision No. 1034 (60/27), Selected Decisions, supra note 53, at 241-42.
107. Id. at 242.
available for payments recognized as legitimate under a country's exchange control system. The Fund stated that "undue delays in the availability or use of exchange for current international transactions that result from governmental limitations give rise to payment arrears and are payment restrictions under Article VIII, section 2(a). . . . The limitation may be formalized, as for instance compulsory waiting periods for exchange, or informal or ad hoc." Under these principles, any governmental regulation interfering with the availability of foreign exchange needed to make debt service payments to foreign lenders when due would fall within the Article VIII, section 2(a) prohibition against restrictions on current payments.110

If Article VIII, section 2(a) is triggered, the approval of the Fund is necessary before the Article VIII, section 2(b) defense can be claimed. It is through the need for such approval that Article VIII, section 2 conditionality comes into place. In other words, through the need for Article VIII, section 2(a) approvals, the availability of the Article VIII, section 2(b) defense by a debtor country, seeking to impose the exchange restrictions, can be conditioned upon adoption of austerity measures of the type normally associated with stand-by arrangements under Article V, section 3.

The mechanism for Article VIII, section 2 conditionality is already in place. The Fund has declared that before it will grant approval of proposed restrictions on current payments it must be "satisfied that the measures are necessary and that their use will be temporary while the member is seeking to eliminate the need for them." The decision to approve the proposed exchange controls can be subjected to conditions at

109. Paragraph 1 of the Conclusions attached to IMF Decision No. 3153 (70/95), Selected Decisions, supra note 53, at 244. The Fund reasoned that "restrictions resulting in payment arrears arising from informal or ad hoc measures do particular harm to a country's international financial relationships, because of the uncertainty they generate. This uncertainty is particularly harmful to the smooth functioning of the international payments system and has pronounced adverse effects on the credit worthiness of the debtor country, which may extend beyond the period of the existence of the restrictions." Id. at 244. An undue delay is defined by the Fund as "a substantial delay beyond that usually required for ascertaining the bona fides of exchange applications or the time that can be regarded as normally required for the administrative processing of applications for exchange." Id.

110. Realistically, a debtor country with a deteriorating foreign debt ratio and a shortage of foreign currency will primarily focus on debt service payments in its efforts to stop the hemorrhage of currency through exchange restrictions. Debt service is, in most circumstances, a major cause of a payment crisis for developing countries and there would not be much of a point in restricting other kinds of external payments only. Nowzad, Debt in Developing Countries: Some Issues for the 1980's, Fin. & Dev., March 1982, at 14.

111. IMF Decision No. 1034 (60/27), Selected Decisions, supra note 53, at 242. Rule H-4 of the Fund's By-Laws, Rules and Regulations (40th ed. 1983), provides that the request for approval must be in writing and state the reasons for the request. Rule H-5, id., provides that the decision to approve or not to approve is made by the Executive Board of the IMF. These procedures parallel closely those, for the approval of a stand-by arrangement.
the discretion of the Fund.\textsuperscript{112} The Fund’s decision on payment arrears implies this point explicit by declaring that a member requesting approval under Article VIII, section 2(a) “should be expected to submit a satisfactory program for [the] elimination [of the payment arrears].”\textsuperscript{113} In many ways, therefore, Article VIII, section 2 conditionality is already implicitly used by the Fund, whenever approval of restrictions on current payments is requested by a member.

All that is needed to establish Article VIII, section 2 conditionality is an express link between Article VIII, section 2(a) approvals and Article VIII, section 2(b) unenforceability of exchange contracts, insofar as international loan agreements are concerned. Such a link is readily available because restrictions approved by the Fund are ipso facto “maintained or imposed consistently with [the Fund] Agreement.”\textsuperscript{114} Accordingly, the availability of Article VIII, section 2(b) relief for a debtor country in a liquidity crisis depends on the Fund’s approval of the exchange restrictions sought to be imposed by such country to deal with a shortage of currency to service external debt.

D. A Variation on the Allied Bank Scenario: Exchange Controls Affecting Repayments of Principal Only

Since Article VIII, section 2 conditionality requires that the Fund be

\begin{itemize}
\item \textsuperscript{112} All that is needed to make this process entirely parallel to the stand-by arrangements procedure is to require a member seeking approval to impose exchange restrictions on current payments to submit a “letter of intent” to the Fund, setting forth the purpose, type, and duration of the restrictions, as well as the policies and objectives of the adjustment program in support of which the restrictions are sought to be imposed. The Fund’s decision granting approval under Article VIII, section 2(a) would then have to incorporate by reference the terms of the “letter of intent” and should expressly refer to the protection of Article VIII, section 2(b) as a necessary complement of the adjustment program. Such reference would comply with the procedure announced in IMF Decision 446-4, Selected Decisions, supra note 53, at 233, where the Fund undertook to “advise whether particular exchange control regulations are maintained or imposed consistently with the Fund Agreement.” Id. at 234. The Fund’s decision could be pleaded in the courts of all members as conclusive evidence on the issue of unenforceability of a contract pursuant to Article VIII, section 2(b).\textsuperscript{113} IMF Decision No. 3153 (70/95), Selected Decisions, supra note 53, at 245. As a matter of fact, the Fund in this decision assumed that a member seeking approval of restrictions giving rise to payment arrears would also request a stand-by arrangement and that the same adjustment program would apply to both approvals:

Fund financial assistance to members having payment arrears should be granted on the basis of performance criteria or policies with respect to the treatment of arrears similar to the criteria or policies described in the preceding paragraph for the approval of the payment restrictions. In general, the understandings should provide for the elimination of the payment arrears within the period of the stand-by arrangements.

\textit{Id.}

\textsuperscript{114} Edwards, supra note 59, at 483; Gold, Exchange Contracts, supra note 60, at 784. Sir Joseph Gold wrote that “if the IMF has approved regulations, to hold that nevertheless they are inconsistent with the purposes of the IMF would mean that the IMF has failed the direction in the last sentence of Article I: ‘the Fund shall be guided in all its policies and decisions by the purposes set forth in this article.’” Id.
given an opportunity to intervene, there cannot be an imposed Fund conditionality if no current restrictions are imposed. This means that a debtor country could attempt to make available to domestic borrowers the protection of “Article VIII, section 2(b) conditionality,” by solely restricting the repayment of external debts in one lump sum, while not interfering with the availability of foreign exchange for regular debt service payments. So long as full repayment of a loan does not fall within the definition of current transfers in Article XXX (d)(1) (the loan not being trade-related or short-term) such exchange restrictions would only affect capital movements. It is possible that this conduct would allow a debtor in bad faith to default on an international loan by, for example, ceasing debt service payments and still seeking to take advantage of the Article VIII, section 2(b) defense in an action for breach of contract brought by foreign lenders in the court of another member. In fact, the borrower could argue that capital controls are authorized by Article VI, section 3 and therefore, are automatically “maintained or imposed consistently with [the Fund] Agreement” without the need to request the Fund’s approval. If the restrictions were indeed authorized by Article VI, section 3, the courts of all members would be forced to deny the enforceability of international loan agreements, insofar as acceleration clauses and cross-default clauses are concerned, because they would be contrary to the legitimate exchange controls of another member.

This does not mean that the courts of all members would be powerless to grant relief to creditors against a debtor in breach, because Article

115. The problem with this scenario is that conditionality effectively forces a member seeking to impose exchange restrictions to implement an adjustment program aimed at correcting the causes of the member’s difficulties and thereby eliminate the need for the restrictions. Without conditionality, such adjustment efforts, which are normally highly unpopular politically, might never be undertaken.

116. See supra text accompanying notes 101-103.

117. Article VI, section 3 provides that “members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments.” A “control” authorized by Article VI, section 3 can be defined as a governmental action directly related to the availability or use of exchange for making capital transfers, regardless of whether such control is restrictive or nonrestrictive. J. Gold, International Capital Movements Under the Law of the International Monetary Fund (IMF Pamphlet Series No. 21, 1977) [hereinafter cited as Gold, Capital Movements]. This definition of controls under Article VI, section 3 makes the term coextensive with “exchange control regulations” in Article VIII, section 2(b), insofar as capital movements are concerned. Id. at 6.

118. It is safe to assume that all regulations included within the Article VI, section 3 authorization are consistent with the Fund Agreement. This is not, however, to say that all capital controls are within the Article VI, section 3 authorization, as will be shown infra, text accompanying notes 121-131.

119. If this argument were accepted, there would be no occasion for the Fund to apply conditionality to the imposition of exchange restrictions imposed by debtor countries to deal with their external debt problems. The benefit of Article VIII, section 2(b) would thus be available to debtor countries “at no cost” and adjustment efforts might never be undertaken.
VIII, section 2(b) only applies to exchange contracts, and not to court orders. Payment in full of the outstanding amount of the loan, plus any eventual damages, would be due by the defaulting borrower as a judgment debtor, not as a contract debtor. Moreover, the judgment debt would arise from the breach of a contract whose terms are in no way contrary to the exchange regulations of any member, since by hypothesis, the country of the borrower would not interfere with the making of debt service payments in accordance with the terms of the loan.

While Article VIII, section 2(b) does not address the situation where a court order is contrary to the legitimate exchange controls of any member, other doctrines, such as act of state or international comity, may be relevant. Nevertheless, it seems unlikely that any court would refuse to grant relief against a defaulting debtor who breached in bad faith, because the debtor's country, arguably also in bad faith, tried to shield the debtor from such relief through foreign exchange restrictions. The *Allied Bank II* holding that the Costa Rican exchange restrictions constituted an extraterritorial taking of property, and were therefore not entitled to the protection of the act of state doctrine, strongly supports this conclusion, at least when the situs of the debt is outside the country of the defaulting debtor. When the situs of the debt is in the debtor's own country, international comity (or lack thereof) can be claimed to deny recognition to exchange controls on capital transfers when they interfere with the enforcement of judicial remedies against a debtor in breach. Again, *Allied Bank II* can be used as authority for such a proposition.

Similar issues would be raised if a debtor country restricted both full repayment of external debts and the making of debt service payments, but the Fund's approval for the latter restrictions, affecting current payments, were neither sought nor granted. The conclusions reached in the case where only capital controls were imposed would be even more compelling in this case. Since the loan agreement on which the borrower defaulted would not be contrary to any legitimate exchange regulations of a member, unapproved current restrictions being inconsistent with the Fund Agreement, the courts of any member would still have full power to enforce the contract according to its terms. The debtor country would then be in an even worse position to claim that its capital controls should be respected by a foreign court on grounds of comity or act of state, because such country would have breached its obligations under an international treaty.

E. *Some Reflections on the Policy of the Fund Agreement: Article VI, Section 3 Capital Controls and International Loans*

Even though a debtor country would be unable to defeat Article VIII, section 2 conditionality through Article VI, section 3 capital controls (with the possible exception of acceleration and cross-default clauses), there is something disconcerting about the statement that Fund members can, consistently with the Fund Agreement, prohibit the repayment of international loans pursuant to Article VI, section 3. It is submitted that
such a statement is overbroad and possibly repugnant to the true policy underlying the Articles. Article VI, section 3, in fact, is not an unqualified, blanket authorization for any exchange restriction purporting to regulate capital movements. The Agreement itself, as well as the history and practice of the Fund, imposes various limitations on a member's ability to control capital transactions. Capital controls, for example, are prohibited by Article VI, section 3 if they "unduly delay transfers of funds in settlement of commitments." The meaning of this clause is ambiguous and it may relate to current or capital transactions only or to both. A reasonable interpretation is that the clause refers to "commitments to make capital transfers entered into before a restriction is imposed on capital transfers." Under this interpretation, exchange controls that would impede the repayment of prior loans would be prohibited by Article VI, section 3. As such, they would be inconsistent with the Fund Agreement and the Article VIII, section 2(b) defense would be unavailable.

Moreover, the Fund's interpretation of Article VI, section 3 states that in regulating capital movements members should pay "due regard...to the general purposes of the Fund." Although the purposes of the Fund in Article I do not expressly address capital movements, there is ample evidence that Lord Keynes, as well as other drafters of the Bretton Woods Agreement, contemplated a distinction between loans from creditor countries to debtor countries to develop resources or maintain equilibrium, which they deemed desirable, from short-term speculative movements or flights of currency from deficit countries, which they viewed as

120. A possible, and very effective, argument against the availability of the Article VIII, section 2(b) defense in these circumstances would be that in general, foreign exchange restrictions imposed after the conclusion of a contract do not come within Article VIII, section 2(b). This position is supported by Dr. Mann, who maintains that "Article VIII(2)(b) is concerned with the effectiveness of contracts, that is to say, with their initial 'validity' rather than the legality or possibility of their performance." Mann, Legal Aspects of Money, supra note 60, at 377. Accordingly, he wrote, "contracts which at the date of their conclusion are consistent with, but during their lives become contrary to the regulations cannot be caught by [the text of Article VIII(2)(b)]." Id. at 378.

For purposes of analysis in this paper, however, it is indispensable to assume that subsequent exchange restrictions do in fact trigger the protection of Article VIII, section 2(b). See supra, note 73 and accompanying text. The very concept of "Article VIII, section 2(b) conditionality" is rendered meaningless by a realization of this assumption, insofar as exchange restrictions are used as a means to deal with payment crises after incurring external debt. It is therefore impossible to rely on the argument outlined above in this paper. To maintain that subsequent restrictions on current transactions are within the Article VIII, Sections 2(b) protection, but subsequent restrictions on capital transactions are not, would be a little like wanting to have your cake and eat it, too.

121. Article VI, section 3.
122. Gold, Capital Movements, supra note 117, at 55 n.22.
123. Id. Sir Joseph Gold wrote that the argument against assuming that the clause relates exclusively to current transactions is that such transactions are mentioned expressly in the preceding clause. Id. There are, however, arguments in favor of a contrary interpretation. Id. See, e.g., Edwards, supra note 59, at 456 n.357.
It can reasonably be concluded that the freedom to control capital movements was not intended to impede international transfers of productive capital. While the distinction between productive capital and speculative capital is far from clear in practice, it is reasonable to assume that most commercial bank loans to foreign governments for general balance of payments support, as well as most bank loans for investment projects and financing of inventory, constitute productive capital flows.

Although the purposes of the Fund in Article I contain no explicit reference to productive capital, several implicit references to it have been suggested. One of the purposes of the IMF is "to assist . . . in the elimination of foreign exchange restrictions which hamper the growth of world trade." Sir Joseph Gold suggested that among the restrictions to be eliminated are those that inhibit the flow of productive capital. Other implicit references to productive capital might be seen in Article I(ii), which mentions the "expansion and balanced growth of international trade" as one of the purposes of the Fund, and in Article I(iii), concerning the promotion of exchange stability. Moreover, after the second amendment to the Fund Agreement, Article IV, section 1 refers to the exchange of capital among countries as an essential purpose of the Fund. A plausible argument can be made that, insofar as capital controls imposed by debtor countries make it impossible for borrowers to repay foreign lenders, they disrupt the flow of productive capital from creditor countries to deficit countries. To the extent that this disruption hampers the balanced growth of world trade, and impedes the free exchange of capital among members, the exchange restrictions affecting capital transfers conflict with the purposes of the Fund. As such, they are not authorized by Article VI, section 3 and therefore, are inconsistent with the Fund Agreement.

125. See generally Gold, Capital Movements, supra note 92, at 7-12.
126. Id. at 8. Productive capital simply means "a more than temporary addition to the capital stock of the recipient country." Id. at 9. Productive capital should be contrasted with speculative capital. The former creates long-term, equilibrating flows, the latter creates short-term disequilibrating flights from the currency of a country whose economy is weakening. Id. at 6-7.
128. Article I, section 4.
130. Id. at 13.
131. The Fund’s interpretation of Article VI, section 3 expressly mandates that a member’s regulation of capital movements not interfere with the provisions of Article IV. IMF Decision No. 541 (56/39), Selected Decisions, supra note 53, at 116. Article IV, section 1(iii) provides that a member must not manipulate exchange rates in order to prevent balance of payments adjustment or to gain an unfair competitive advantage over other members. To the extent that capital controls conflict with these mandates, they are prohibited by Article VI, section 3.
V. ARTICLE VIII, SECTION 2 CONDITIONALITY AND THE ALLIED BANK SITUATION

It is interesting to see how the situation at issue in the Allied Bank litigation could have been handled if Article VIII, section 2 conditionality had been used. If such a procedure had been available when Costa Rica had to confront its economic crisis and the consequent shortage of foreign currency, the Costa Rican government would not have declared a unilateral halt to the payment of debt service to foreign lenders. Instead, Costa Rica would have requested the Fund to approve exchange control restrictions affecting current payments and it would have agreed with the Fund on an adjustment program to be implemented to remedy the country's economic crisis, so that in due time the exchange restrictions could be withdrawn. The Fund would have approved the restrictions under Article VIII, section 2(a) conditioned upon the adoption of austerity measures. If, following a default of debt service, the foreign lenders had sought to exercise their creditors' remedies in the United States courts, the Costa Rican borrowers would have simply had to plead the Fund's decision to secure a dismissal of the action because of Article VIII, section 2(b). Faced with the inability to enforce their contracts in the courts of any member, all the foreign lenders would have had no choice but to join in the rescheduling of the debt. At the same time, the lenders would have had the comfort of the Fund's supervision of Costa Rica's adjustment efforts and could have confidently looked forward to a resumption of regular payments, pursuant to a schedule agreed upon by the Fund and Costa Rica. The foreign lenders would not have had the opportunity to interfere with the rescheduling or the adjustment process by resorting to litigation, as Fidelity did in Allied Bank. At the same time, the rights of lenders would have been safeguarded and investors' confidence would not have been disrupted because of the Fund's role as "guarantor" of the entire rescheduling and adjustment.\(^{132}\)

If Article VIII, section 2 conditionality had been used to handle the Costa Rican debt crisis, the cooperative adjustment of international debt problems under the auspices of the IMF, so highly praised by both the Allied Bank II\(^{133}\) court and the U.S. government, would have been strengthened, while all the drawbacks complained of by the lenders in their criticism of the Allied Bank I\(^{134}\) decision would have been avoided. This conclusion is supported by an examination of the arguments offered by the parties and amici in the course of the Allied Bank litigation.

The United States government, as amicus,\(^{135}\) argued on rehearing

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132. In a lot of ways, the outcome would have been identical to that normally secured through stand-by arrangements and Article V, section 3 conditionality, as, for example, in the Mexican crisis of 1982.
133. 757 F.2d 516 (2d Cir. 1985). See supra note 5 and accompanying text.
134. 733 F.2d 23 (2d Cir. 1984)(withdrawn). See supra, note 1 and accompanying text.
135. See supra note 3 and accompanying text.
that the *Allied Bank I* decision was inconsistent with the “strategy of voluntary cooperation” heretofore adopted to deal with the debt crisis. According to the *amicus*, such a strategy requires strong adjustment efforts by debtor countries and cooperative action on the part of the international financiers. This strategy works best when the IMF serves as an “objective mediator,” by approving the economic austerity measures developed by the debtor, establishing external financing requirements, and acting as a catalyst in arranging new loans. The brief for the United States cited numerous U.S. government sources to show that the United States strongly supports this approach, including a strong role for the IMF. They argued that this approach is disrupted by judicial recognition of a country’s unilateral suspension of payments on its foreign debt. This position met with full approval of the Second Circuit in *Allied Bank II*, which held that international cooperation and negotiation in the context of private international debt difficulties is highly desirable and demands that lenders display full confidence in the validity and enforceability of their contract rights. If there were unilateral deferments of debt service on external loans by debtor countries through foreign exchange restrictions, there would be a real danger that borrowers would be in a position to “jawbone” their foreign lenders. The bargaining process would become skewed and unbalanced, and cooperation between the parties would become impossible. Article VIII, section 2 conditionality, however, is the opposite of unilateral rescheduling. Article VIII, section 2 conditionality would maximize the chances of effective cooperation between borrowers and lenders by giving the IMF strong, direct leverage in dealing with both. All of the parties involved would have a strong incentive (and no viable alternative) to join in the “cooperative adjustment of international problems” truly under the auspices of the Fund.

Both the United States government and the Clearing House, as *amici*, criticized the analogy drawn by the *Allied Bank I* court between Costa Rica and a debtor filing for reorganization under Chapter 11 of the U.S. Bankruptcy Code. *Amici* argued that the lack of a “previously recognized neutral body acting as a kind of bankruptcy court” and the lack of fundamental procedural safeguards to protect the interests of all creditors make the two situations radically different. *Amici* argued that the

137. *Id.* at 9.
138. *Id.* at 10 n.6.
139. 757 F.2d at 519.
140. This analogy was one of the main reasons why the Second Circuit in *Allied Bank I* affirmed the lower court’s decision in favor of the defendants. See *supra* notes 34-36 and accompanying text. The same court in its *Allied Bank II* decision made no mention of the analogy. See *supra* note 38 and accompanying text.
analogy was faulty because a debtor cannot be allowed to "declare itself to be bankrupt and then dictate the terms of its creditors' remedies," without any assurance that an "impartial plan of adjustment" will be adopted. All of these concerns would be addressed if Article VIII, section 2 conditionality were used, because the Fund would indeed assume the role of a neutral third party. The Fund would approve and oversee the debtor's adjustment efforts, thereby safeguarding the interests of all creditors. Procedures could be put in place for periodic consultation between creditors and the Fund so as to avoid an unregulated "cramdown" of a reorganization agreement between a debtor country and a majority of its creditors on an unwilling minority.

All the parties in Allied Bank recognized the critical link between lenders' confidence in the enforceability of their loan agreements and their willingness to extend new credit to sovereign borrowers. A continuous flow of foreign commercial lending to sovereign debtors is essential if a generalized solvency crisis is to be avoided and the stability of debtor countries preserved. The recognition of unilateral deferments on payments of foreign debt would make the banks even more reluctant to put new money into a country that is rescheduling its external debt, while an extension of conditionality to Article VIII, section 2(b) would increase their willingness to do so. It is well known that lenders' confidence is boosted by the adoption of IMF backed austerity measures by debtor countries in connection with stand-by arrangements. If the Fund can require of sovereign debtors the adoption of similar austerity measures as a condition for granting approval of exchange restrictions under Article VIII, section 2(a), there is no reason why foreign lenders should not be equally reassured. In fact, Article VIII, section 2 conditionality would greatly increase the Fund's leverage in dealing with commercial lenders as

Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1984) [hereinafter cited as Clearing House Brief].

142. Clearing House Brief, supra note 9 at 3.
143. Clearing House Brief, supra note 141, at 27.
144. United States Brief, supra note 136, at 13 n.9.
145. See, e.g., Clearing House Brief, supra note 141, at 23, and United States Brief, supra note 136, at 7.
146. A recent commentator noted that "from the borrowing countries' perspective, the debt problem is an economic growth problem. Their main concern is to acquire enough foreign exchange to import the necessities to sustain economic growth while simultaneously paying debt service . . . . These dual objectives of growth and debt service are at times in conflict. But if the banks do not opt for growth, their chances of repayment are substantially reduced. Thus, the banks are willing, in conjunction with a financial stabilization program, to put new money into a country that is rescheduling debt." Meissner, Debt: Reform Without Governments, 56 FOREIGN POL'Y 81, 82-83 (1984).
147. Lipson, Bankers' Dilemmas: Private Cooperation in Rescheduling Sovereign Debts at 2 (1984, unpublished) [hereinafter cited as Lipson, Bankers' Dilemmas]. The author writes that "as far as both creditors and debtors are concerned, the IMF's credits are far less important than its approval of the proposed austerity measures. Without such approval, and the continuing oversight that goes with it, creditors will not reschedule sovereign debt." Id.
SOVEREIGN DEBT RESOLUTION

well as borrowers, because of the binding effect of Article VIII, section 2(b) on private contract creditors. It has been written that after the Mexican crisis, the Fund has increasingly gone beyond a mere supervisory role with regard to austerity measures and has played an active role in arranging an overall financing package for the debtor.\footnote{148} The Fund has gone so far as to indicate a level of new commercial lending that should be part of the overall adjustment program and to refuse to sign a stabilization agreement until that level was met.\footnote{149} Article VIII, section 2(b) can be a formidable lever available to the Fund to pressure foreign banks to extend new credit since it effectively bars them from any judicial or administrative remedy for default.\footnote{150} Consequently, Article VIII, section 2 conditionality would invigorate and assure a flow of new money to rescheduling debtors, instead of interrupting it.

The main argument raised by the borrowers in Allied Bank, supporting recognition of the Costa Rican exchange restrictions, was that voluntary rescheduling is always vulnerable to the attempts of a recalcitrant creditor bank to secede from the restructuring, to demand special privileges, to call a default on its loans, and to secure a judgment and execution in a foreign court, thereby causing the entire rescheduling effort to crumble.\footnote{151} The defendants noted that the “rogue bank” is often “beyond the influence of either its peers or its government,”\footnote{152} and suggested that granting recognition to foreign exchange restrictions in the United States courts is “the last restraint on a recalcitrant creditor and provides the means for judicial action which does not place the fate of a restructuring exclusively in the hands of private sector arm wrestling.”\footnote{153} Plaintiff and amici, on the other hand, tried to convince the court that the problem of recalcitrant banks was of no concern.\footnote{154}

The increasing difficulty and fragility of the process of voluntary debt rescheduling, due to the unwillingness of smaller banks to cooperate with the larger creditors, is well known.\footnote{155} The danger of a “domino ef-
fect" triggered by a default called by a smaller bank is constantly a threat hanging over the entire rescheduling process. Although there are very harsh informal sanctions against recalcitrant banks, the danger that the rescheduling will "unravel like a cheap sweater" and a "mad scramble of creditors for assets" will be unleashed cannot be avoided. There are increasing doubts about the continuing ability of the large international banks to secure voluntary cooperation from all creditors by "private sector arm wrestling." Allied Bank II may very well decrease such ability to a large extent, since it is now proven that a single creditor bank can refuse to join the rescheduling and can obtain judicial relief against the debtor. Article VIII, section (b) would ipso facto resolve the problem of recalcitrant creditors, because it would foreclose any hope of obtaining satisfaction of their rights outside the restructuring process. This is indeed what happens in a domestic reorganization of a business under Chapter 11 of the Bankruptcy Code once a plan of reorganization has been adopted.

VI. ARTICLE VIII, SECTION 2 CONDITIONALITY AND THE FUND'S ROLE IN THE INTERNATIONAL DEBT CRISIS: THE NEEDED SYSTEMIC SOLUTION

These thoughts on the potential for Article VIII, section 2 conditionality raise some fundamental issues for future debate concerning the role of the IMF in the international debt crisis. The main question is whether the traditional instruments used by the Fund to deal with the growing burden of external debt, namely conditionality under the stand-by arrangements of Article VI, section 3 are adequate to deal with an international financial system that is profoundly different from the one where such instruments were first developed. In today's system, international banks are no longer simple channels for short-term capital movements induced by trade or speculation, but are also principle suppliers of

156. Lipson again writes that "the threat to call a formal default and force the acceleration of payments is another potential source of leverage for small creditors. . . . Since all international loan agreements contain cross-default clauses, some observers have suggested that a single default could start a prairie fire. . . ." Id.


158. Lipson, Bankers' Dilemmas, supra note 147, at 19.

159. The day after the Allied Bank II decision, the Wall Street Journal quoted a lawyer associated with the case as saying that the decision "is going to encourage small banks to demand repayment of overdue debt and make international restructurings much more difficult." Wall Street Journal, Mar. 19, 1985, at 4, col. 1.

160. Sir Joseph Gold wrote that:

a development of recent years that was not foreseen at the time when the original Articles were negotiated is the emergence and enormous growth of international capital markets in various parts of the world. The development of these markets, which for convenience can be referred to collectively as the Eurocurrency market, has become a cardinal element of the international monetary system.

GOLD, CAPITAL MOVEMENTS, supra note 117, at 2.

161. Typical international capital flows are generated by the need to settle trade and
productive capital to fuel the growth of developing countries. While in the old scenario international banks were able to precipitate a nation's currency crisis indirectly by amplifying the pressures generated by other actors, mainly speculators, in the new scenario large banks are in a position to cause such crises directly because of their status as contract creditors.

The drafters of the original Articles were mostly concerned with current transfers and payments for trade-related transactions and with international flows of speculative capital, or "hot money." Capital flights away from weakening currencies were particularly disruptive of international monetary stability. When a nation's economy weakened or strengthened, making its currency a candidate for adjustment, the banks acted as conduits for speculators, or as speculators themselves, and were the instruments of a "run" of the currency. The real battle was between speculators selling or buying foreign currency and central banks buying and selling domestic money. The battlegrounds were the foreign exchange markets and the controlling factor was the level of reserves available to counter speculation. When the pressure became too intense, central banks would call the IMF to their rescue; stand-by funds would become available to replenish reserves and a severe austerity package would be introduced to restore confidence in the currency. Article V, section 3 conditionality became the perfect instrument to manage this kind of crisis.

In the 1970's, however, the system changed because of the great success of commercial banks in recycling the petro dollar glut. By increasing their balance of payments lending to unprecedented levels, commercial banks became direct actors in the system, rather than mere conduits or magnifiers of pressures generated elsewhere. Given their enormous net exposure toward developing countries, commercial banks are now in a position to cause an international solvency crisis by simply refusing to reschedule sovereign debts. The fact that banks have everything to lose from a generalized default of international loans, does not change the conclusion that the battle today is no longer between speculators and central...
tral banks, but rather between contract creditors and debtors with cash flow problems. The battleground is no longer the exchange markets, but the markets for the developing countries’ exports, their domestic markets for imports and the money markets of New York City with their fluctuating yields. The crises today are not caused by speculative fever, but by a steadily deteriorating external debt ratio in a world of high interest rates.

So far the Fund has had to rely on its traditional instruments to address the problems posed by this new scenario. Beginning with the Mexican crisis, the Fund, on the invitation of the creditor and debtor countries, has greatly increased its direct participation in multilateral negotiations to reschedule the external debt of several developing members. The Fund’s new role, however, has had to rely on the old script of stand-by arrangements and Article V, section 3 conditionality. These old instruments might be increasingly inadequate for the new task.

While the Fund’s involvement via a stand-by arrangement undoubt-

166. Sir Joseph Gold wrote that “the disturbances of the international monetary system and the growth of a vast international capital market that is not subject to international regulation have led to suggestions that the formal powers of the Fund in relation to capital transfers should be increased. These suggestions have made no progress.” GOLD, CAPITAL MOVEMENTS, supra note 117, at 46.

167. Id. at 47. The Fund maintains a closer liaison with private financial institutions and with other international organizations on the volume and terms of financial flows and on the debt problems of developing members. In the rescheduling process, the Fund has provided technical and advisory services, has made financial assistance available to debtors to assist them in their efforts to resume normal economic relations and their development programs, and has made impartial evaluations of progress by debtors following the renegotiation. Id.

168. Gold provided a clear summary of the Fund’s use of stand-by arrangements to deal with the international debt crisis:

In reaching understandings with members on financial support for their economic and financial programs, the Fund emphasizes policies that will help a member to eliminate the conditions responsible for a disequilibrating outflow of capital or to establish the conditions that will promote the inflow of equilibrating or productive capital. For example, some members in persistent balance of payment difficulties have accumulated arrears on current payments and have faced the possibility of default in servicing external debt. These difficulties have had a detrimental effect on capital inflow and have induced capital outflow, with the result that the member’s problems have been intensified. The Fund sought, therefore, to reach understandings with a member on policies that will improve its medium-term balance of payments prospects and in this way provide for a continuation of debt service and encourage capital inflow. Programs supported by the Fund often include provisions dealing with management of the member’s external debt and limitation of the amount of medium-term external debt to be undertaken or guaranteed by the public sector and sometimes the private sector. The Fund pays much attention to the question whether a member’s borrowing abroad is to support a development program or is for general budgetary or balance of payments purposes. The Fund may advise a member that the volume of borrowing for these purposes may mask a need for adjustment, which will become more difficult if the foreign indebtedness does not increase the capacity to service it.

Id. at 46-47.
edly causes a strong boost in foreign lenders' confidence and increases their incentive to remain in the balance of payments financing business,\textsuperscript{169} the Fund's role is indirect and through persuasion, instead of being direct and binding. The Fund has a powerful influence on international private lenders, but lacks any direct regulatory authority upon them. In other words, the Fund lacks any direct leverage over recalcitrant lenders, except for the ultimate threat of refusing its assistance altogether and watching the system collapse. The positive conclusion of the rescheduling process depends upon the good will and wisdom of creditor banks and their ability to compel recalcitrant banks to contribute their share.

The Fund has so far been remarkably successful in bringing lenders and borrowers together on the appropriate adjustment programs and in persuading private lenders to produce enough new credit to support them. The process, however, is constantly vulnerable to the demands of "holdout" or "rogue" banks, who can always resort to litigation to enforce their creditors' remedies. The size and number of these recalcitrant lenders might very well increase as the size and number of debt reschedulings increase. The process is therefore skewed, because the Fund's powerful leverage over debtor countries via conditionality is not paralleled by any direct authority of the Fund over private lenders. There are reasonable grounds to fear that the old instruments used by the Fund will not succeed in eliminating the risk of a system collapse.

Article VIII, section 2 conditionality could be the needed systemic and institutional solution, in a situation like Allied Bank. Using Article VIII, section 2(a) in combination with Article VIII, section 2(b), the Fund would be able to extend indirectly its regulatory authority to private international lenders. The proposed approach would give the Fund a good measure of direct control over the debt restructuring process, because Article VIII, section 2(b) would indeed become the functional equivalent of a reorganization in bankruptcy. The binding effect of Article VIII, section 2(b) on the courts of all members makes it the equivalent of an automatic stay of all collection actions by international creditors. As a price for such immediate and complete, if only temporary, relief, debtor countries would

\textsuperscript{169} Sir Joseph Gold again summarized this effect very concisely:

Approval by the Fund of a stand-by or extended arrangement for a member under which the member can purchase foreign exchange is a signal to other potential lenders, whether international, public, or private, that the member's policies are adequate to bring about balance of payments adjustment. Not infrequently, these potential lenders await announcement of favorable action by the Fund and then make their own resources available. This finance may be substantially in excess of the resources provided by the Fund. Moreover, other lenders may make the continued availability of the resources they agree to provide dependent on the member's observance of the terms of the arrangement with the Fund and the member's continued ability to obtain foreign exchange from the Fund in accordance with the arrangement.
have to renounce unilateral deferments on external payments through foreign exchange restrictions and accept the conditions of an IMF backed adjustment program. The incentive for a defaulting debtor country to seek the Fund's assistance would indeed be great. Article VIII, section 2 conditionality would also make the system symmetrical by giving the Fund equal leverage over both lenders and borrowers. Article VIII, section 2 conditionality could become the linchpin of the Fund's contribution to solving the external debt crisis of developing members.
Redefining Taxation of International Entities: The Unitary Controversy (A Constitutional Approach)†

MARK B. BAKER*

INTRODUCTION

The use of the unitary tax method by various states in the United States has engendered increasing controversy in the past few years. This method of taxation has its origins in efforts by state taxing authorities to tax the full income of corporations doing business both within and outside the state.†

Congress has failed to enact legislation that effectively limits the states' authority to tax income of corporations resident or doing business within their territories. Nor has the Supreme Court successfully articulated meaningful delineations of the scope of state taxing authority. As a result, the states have been given free rein to operate in this area, often giving rise to difficult jurisdictional problems. Traditionally, states have sought to tax the out-of-state income (both U.S. and foreign) of corporations domiciled within their boundaries by considering only the income of the corporation's subsidiaries located in the state. The more recent target of taxation has been not only these subsidiary companies, but also the foreign parent companies of these domiciled subsidiaries. Such activities come under the category of unitary taxation.

Three constitutional issues are raised by the practice of the unitary taxation method. First, the fourteenth amendment due process clause² requires that strictly lawful procedures be followed by the states. Second, the interstate commerce clause³ embodies the national interest in assuring that excessive state taxation does not impede the free flow of commerce among the states. Both of these issues attend any situation where the income of a multijurisdictional corporation is taxed, regardless of whether the taxing state attempts to reach beyond United States borders. When a state does seek to tax income outside U.S. borders, however, the

† This article does not reflect the Reagan Administration's recent announcement to preempt state unitary tax legislation. However, the relevance of Professor Baker's analysis remains unchanged. (Eds.)

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third constitutional issue surfaces under the foreign commerce clause: to assure states do not infringe upon the authority of a nation to regulate commerce with foreign nations. This article examines these constitutional issues and reviews the recent responses of the U.S. Executive and Congress to this issue.

I. WHAT IS UNITARY TAXATION?

The unitary method of taxation was a response to the increased complexity of corporations conducting business activity in several jurisdictions. It was created to assess the income of a functionally related enterprise (the "unitary business") operating in more than one state. Taxing authorities found that it was especially difficult to assess the income attributable to any given state, and other methods of taxation failed to do so accurately. Formula apportionment provides a means of determining a reasonable share of the total income of a multijurisdictional corporation by imputing it to a single jurisdiction. A state first determines whether a unitary business exists; if a business is a part of a unitary enterprise, the state will apportion the total income of the unitary business between the taxing jurisdiction and the rest of the world, using a formula. The unitary method of formula apportionment is employed by forty-five states and the District of Columbia. The formulas vary, but the most widely adopted formula is that used by California, which bases its assessment of income on the proportion of the unitary business' total payroll, property, and sales located within the State.

4. Id.
6. The other two means of taxing corporate income are separate accounting and specific allocation. Hellerstein, supra note 1, at 116. Specific allocation, which traces income to a single source, is not widely used in the taxation of multijurisdictional corporations since there is difficulty in ascertaining the specific source of income generated by such a corporation. Id. at 116-117. Under the separate accounting method, income attributed to a certain geographic or functional area of the multijurisdictional enterprise is treated separately from other parts of the enterprise. Id. at 117. See infra notes 74-78 and accompanying text.
7. The terms "unitary method" and "formula apportionment" are used interchangeably.
9. Id.
10. Hellerstein, supra note 1, at 117-18. "By averaging the ratios of the taxpayer's property, payroll, and sales within a state to its property, payroll, and sales throughout the business, the formula yields a fraction that can be applied to the taxpayer's net income to determine the portion taxable by the state." Id. at 118.
The unitary method of taxation is used to assess income not only of operations within several of the United States, but also of business operations in other countries, resulting in the state taxing foreign corporations. This result occurs either when the foreign parent corporation has a subsidiary doing business in a state using the unitary method, or when a parent company with foreign subsidiaries is itself a resident of the state, dependent, of course, upon the existence of a unitary business relationship between the parent and the subsidiary or affiliate. The unitary method, when used to tax such an enterprise, is referred to as "worldwide combined reporting." Ten states now use the worldwide combined reporting method.

II. Due Process

A state may not tax value earned outside its territory absent some connection between itself and the activity sought to be taxed. The due process clause imposes two restrictions on states. First, some minimal connection between the income-generating activity sought to be taxed and the taxing state must be established. The Supreme Court has included in this requirement that part of the business take place within the state and that some bond of control or ownership must exist between the state and remaining parts of the "unitary business." The second requirement imposed by the due process clause is that the "out-of-state activities of the purported 'unitary business' be related in some concrete way to the in-state activities." In essence, this requirement mandates the existence of a unitary business. If there was doubt in anyone's mind that apportionment of income required the presence of a unitary business, that doubt was allayed by the Court's decision in ASARCO, Inc. v. Idaho State Tax Commission. ASARCO is a New Jersey corporation having its principle commercial headquarters in New York. Its primary business in Idaho, the taxing state, is silver mining, though it also mines other metals in other states. Idaho sought to tax the dividends, interest

13. Weissman, supra note 8, at 48 n. 2.
14. As of this writing the ten states that use worldwide reporting are Alaska, California, Idaho, Indiana, Montana, New Hampshire, North Dakota, Oregon (although repeal of its law will become effective January 1, 1986) and Utah. Massachusetts until recently used worldwide combined reporting; however the Massachusetts Supreme Judicial Court has held that the state tax commissioner lacks the authority to use this method in the absence of regulations aparsing taxpayers of the law. See Polaroid Corp. v. Comm'n of Revenue #53479, 1984. See also Sheppard, No Unitary Method in Massachusetts, 25 Tax Notes 1057 (1984).
15. Hellerstein, supra note 1, at 121.
income, and capital gains of ASARCO's five foreign subsidiaries. The Court held that intangible income, such as the dividends, interest, and capital gains realized by a corporate taxpayer from investments in affiliated corporations, will be apportionable income only if a unitary business relationship exists between the corporation whose securities generate the income and the corporation receiving the income.\textsuperscript{21} Two earlier Supreme Court cases, \textit{Mobil Oil Corp. v. Commissioner of Taxes of Vermont} and \textit{Exxon Corp. v. Wisconsin Department of Revenue},\textsuperscript{22} can be distinguished because the corporations in those cases operated unitary businesses, whereas \textit{ASARCO} proved that the essential factors which evidence the existence of a unitary business were wholly absent.\textsuperscript{23}

In \textit{ASARCO}, the Court "assumed that the position of Idaho [was] that a unitary business relationship between ASARCO and the dividend paying companies is a necessary prerequisite to its taxation of the income in question, but that the unitary business concept should be expanded to cover the facts of the \textit{ASARCO} case."\textsuperscript{24} The \textit{amicus curiae} brief of the Multistate Tax Commission,\textsuperscript{25} however, espoused a theory that, had this position been adopted by the Court, would have broadened the concept of the unitary method dramatically. The view set forth in the brief was that "there can exist a relationship between stock investments and the business of the owner of the investments which is sufficient alone to justify the apportionment of any income from the investments."\textsuperscript{26} The Court did not address this theory, and its holding that a unitary business relationship is required would seem to preclude any possibility that anything less than that would suffice. The ruling in \textit{ASARCO} left open hope for multinational corporations. First, it held that the dividends, interest income, and capital gains of foreign subsidiaries would not, under these circumstances, form a portion of the tax base of a corporation. The decision was significant if for no other reason than it was the first time in fifty years that an income taxpayer had successfully shown a due process violation with regard to the elements of nexus and rational relationship.\textsuperscript{27} More-

\textsuperscript{21} Id. at 329-330. See Peters, \textit{Supreme Court Requires Unitary Relationship before States Can Tax Investment Income}, 57 J. Tax'n 314 (1982). Query: would it be different if the income at issue were operating income? The Court didn't differentiate in \textit{Mobil Oil Corp. v. Comm'r of Taxes}, 445 U.S. 425 (1980), nor in \textit{Exxon}, 447 U.S. 207.

\textsuperscript{22} \textit{Mobil}, 445 U.S. 425; \textit{Exxon}, 447 U.S. 207.

\textsuperscript{23} \textit{ASARCO}, 458 U.S. at 320-324.

\textsuperscript{24} Peters, \textit{supra} note 21, at 315.

\textsuperscript{25} The Multistate Tax Commission is the "administrative agency of the Multistate Tax Compact, whose purposes include the promotion of accuracy, equity, uniformity and convenience in the state tax treatment of multistate and multinational businesses. There are nineteen member states and ten associate member states of the Compact." Hellerstein, \textit{supra} note 1, at 114 n. 6. The constitutionality of the Compact was sustained in \textit{U.S. Steel Corp. v. Multistate Tax Comm'n}, 434 U.S. 452 (1978).

\textsuperscript{26} Peters, \textit{supra} note 21, at 315.

\textsuperscript{27} The last time the Court had found such an argument persuasive was in \textit{Hans Rees}, 283 U.S. at 134-135. Unsuccessful attempts included \textit{Moorman Mfg. Co. v. Bair}, 437 U.S. 267 (1978); \textit{Butler Bros. v. McCollan}, 315 U.S. 501 (1942); \textit{Norfolk & W. Ry. v. North Caro-
over, multinationals could still hope at this point that the Court would find unconstitutional state taxation on a worldwide basis. It should be noted, however, that Idaho conceded that ASARCO was not a unitary business, a fact that substantially weakens the impact of the decision in favor of the corporation.

Alcan Aluminum Ltd. v. Franchise Tax Board of the State of California illustrates that the significance of the determination of whether a business will be classified as a unitary business cannot be underestimated, for it is this determination that will decide the method of taxation that will be used. The requirement that a unitary business exist before worldwide combination reporting is used is susceptible to a great many more qualifications and much more complexity than that of the first requirement of nexus.

The United States Supreme Court affirmed the California Supreme Court decision in Butler Brothers v. McColgan, which set forth the seminal definition of a unitary business. The California Supreme Court determined that a unitary business is one characterized by unity of ownership, unity of use, and unity of management. This definition has been criticized as overbroad, and indeed, almost any multijurisdictional corporation could fit this description. The California court's further comments indicate that each situation will have to be decided on its own facts and whether those facts demonstrate interdependence. The Supreme Court, in its decisions, has announced several distinguishing characteristics of the unitary business beyond the three unities announced in Butler Brothers.

From its initial efforts to determine the scope of the unitary business, the Court has said that the existence of a "vertical" enterprise suffices. Vertical enterprises are those whose different components, such as drill-


32. Weissman, supra note 8, at 65. See also Keesling & Warren, The Unitary Concept in the Allocation of Income, 12 HASTINGS L.J. 42, 47-48 (1960).
33. The court wrote, "[i]f the operation . . . of the business done within the state is dependent upon or contributes to the operation of the business without the state, the operations are unitary; otherwise, if there is no such dependency, the business within the state may be considered to be separate." Edison California Stores v. McColgan, 30 Cal.2d 472, 183 P.2d 16, 21 (1947).
34. 315 U.S. at 508.
ing, refining, and sales, are in different states. A strong argument can be made for taxing such an operation because each component part does derive from the taxing state some benefit that may justify a tax imposition. This central operations criterion has been used to justify both taxing of component parts in states of the United States and in integrated businesses operating across national boundaries.

The principle was later extended to horizontal operations, which are defined as a series of similar operations under common management, control, or both, or that share risks. Interrelations will exist between the affiliated firms, but one is not the customer of the other. The Court has recognized the problem of the practice of tax avoidance, whereby companies doing business in a state seek to dodge some of their tax burdens by setting up apparently discrete entities elsewhere. The logic is more strained here, however. Assuming that the rationale a state relies on to tax income earned outside its borders is that some of the resources of that state were used to generate the income, the argument is much weaker in the case of an enterprise that is horizontally integrated.

In its recent cases, the Court appears to have retained its previous distinction between vertically integrated businesses and those businesses engaged in the same line of business. In Exxon, an oil company conducting marketing activities in Wisconsin challenged that state’s formula apportionment which took into consideration all of its operating income, arguing instead that the state should tax only the company’s marketing activities. Similarly, in Mobil, an oil company challenged Vermont’s inclusion in its tax base income received by the company in the form of dividends from subsidiaries and affiliates doing business abroad. In both of these cases, the Court found the existence of a unitary business. The continuous flow and interchange of common products between subsidiaries and domestic corporations noted in Mobil and Exxon were sufficient to constitute a unitary business relationship.

On the contrary, no unitary business was found to exist in Woolworth Co. v. Taxation and Revenue Department of New Mexico. At issue in Woolworth, as in Mobil, were dividends of four foreign subsidiaries of the F.W. Woolworth company, a corporation domiciled in New York and operating a chain of retail stores throughout the United States.

38. See Butler Bros., 315 U.S. 501.
39. A possible rationale for permitting the use of the unitary method in this situation might be derived from examination of the enterprise’s “operational interdependence” which would ascertain the degree of interdependence between subsidiaries controlled by a parent corporation. See Hellerstein, Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business, 21 Nat’l Tax J. 487, 501-503 (1968).
40. See infra notes 64-68 and accompanying text.
42. Woolworth owned all of the outstanding stock of three of the foreign subsidiaries and approximately 53% of another. Id. at 362.
TAXATION OF INTERNATIONAL ENTITIES

The subsidiaries in question conducted retail sales similar to those operated by Woolworth in the United States. The Woolworth Court noted a critical distinction between a retail merchandising business . . . and the type of multi-national business . . . in which refined, processed, or manufactured products (or parts thereof) may be produced in one or more countries and marketed in various countries, often worldwide. In operations of this character, there is a flow of international trade, often an interchange of personnel, and substantial mutual interdependence.43

The same kind of interaction and interdependence did not exist between the corporation and the subsidiaries as existed in Mobil and Exxon. Similarly, ASARCO's silver mining and its subsidiary's (Southern Peru) autonomous business were found to be insufficiently connected to permit the companies to be classified as a unitary business.44 The distinction between vertically integrated enterprises, which supply a stream of products and services, and affiliated corporations may not be as cut and dried as it first appeared, as evidenced by the Court's comment that Woolworth potentially had authority to operate its subsidiaries as integrated divisions of a single unitary business.45 It was unclear how Woolworth would be able to conduct its business as an "integrated" rather than a "discrete" business, since its subsidiaries were engaged in the same kind of business—not providing raw materials to or purchasing products from Woolworth.46 The statement suggests that under some circumstances, a horizontal business might be considered to be a unitary enterprise.

Centralization of management and control occupied a lesser role in ascertaining the existence of a unitary business in ASARCO and Woolworth.47 The Court still looked into the "nature and extent of intercorporate sales, the actual exercise of control by ASARCO over the affiliated corporations, and the centralization of management services,"48 but it failed to find a sufficient management or control linkage in ASARCO49

43. Id. at 371 (footnote omitted). However, the Court did not decide Woolworth on the grounds that it was not a vertically integrated business.
44. Peters, supra note 21, at 315.
45. Woolworth, 458 U.S. at 362.
46. 458 U.S. 354.
47. See Peters, supra note 21, at 318.
48. Id. at 314.
49. The Court recognized that there were some occasions when the corporations conducted transactions with each other. There also were some centralized services as well as the use of a patent for a fee. In short, the potential for ASARCO to exercise control over the companies existed. However, the majority did not find compelling the factors the dissent found persuasive; the dissent recognized a relationship between ASARCO's investment decision making and business conducted in the taxing state. It also emphasized the importance of the investments on the business conducted by ASARCO in the taxing state and the business advantages, such as stability, source of raw materials and outlet for products derived from the investments.

The majority conducted a detailed analysis of only the one subsidiary that would be most likely to be named a unitary business, Southern Peru. ASARCO owned 51.5% of
The Court summarized the major relevant issue to be whether contributions to the income of the subsidiaries or affiliates resulted from the taxpayer's activities in the taxing state. Because the extent of managerial control did not rise to the level of creating a unitary business, the state's attempts to tax the income in question were no more than a "mere effort to reach profits earned elsewhere under the guise of legitimate taxation."

An argument somewhat similar to the corporate form argument is one that alleges that the constitutionality of a unitary tax will depend on the accounting system. Exxon's challenge of the Wisconsin unitary tax focused on both prongs of the due process test. Exxon argued that its separate accounting is evidence that neither prong of the due process test was satisfied.

The Supreme Court apparently adopted Wisconsin's argument that a state is justified in applying its apportionment formula merely by virtue of the existence of a unitary business within the state. Most striking, though, was the definitive way in which the Court dispensed with the issue of separate accounting. Exxon had argued that Wisconsin should use separate accounting rather than apportionment and thereby include income only from the marketing activities. After Exxon, however, a company's separate accounting for tax purposes will not be binding on a state.

Although a company may still use separate accounting to prove

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Southern Peru's outstanding stock and received 35% of its copper output. The Court, however, found other aspects of the relationship controlling. Pursuant to a management contract with Southern Peru, ASARCO could elect only 6 of the 13 directors, though a vote of 8 was necessary to pass any resolution. ASARCO was only one of Southern Peru's stockholders; a unanimous vote of all four was required to alter the articles or by-laws. Based on these and other findings of the trial court, the Court found Southern Peru to be a discrete enterprise, operating independently of ASARCO and not otherwise controlled by ASARCO. The majority rejected Idaho's argument that corporate purpose should define a unitary business.

The Court did not find pervasive the presence of several common directors, frequent informed communications, or that major financial decisions by the subsidiaries required parent approval. Also, the Court gave little weight to the fact that the parent and subsidiary published unsolicited financial statements.

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50. In Woolworth, the Court examined the three requisite elements of a unitary business. See supra text accompanying note 31. First, the Court found "little functional integration" between the parent and the subsidiary. The subsidiaries were free to choose their own store sites, advertising, accounting, legal purchasing, personnel, training, and financing. 458 U.S. at 364-365. Second, the Court found that management was not centralized and that "each subsidiary operated as a distinct business enterprise." Id. at 366. Finally, the Court observed, that economies of scale were intentionally ignored. Id. at 366-368. Support for the last two elements—centralized management and economies of scale—was evidenced by separate offices (with one exception), and the absence of exchange of personnel, central merchandise or management training, any central nonretailing policies or tax planning, department or section devoted to overseeing the foreign subsidiary operations, or formal interchange of ideas between parent and subsidiary management. Id.

52. Exxon, 447 U.S. at 221.
53. Id.
that certain income is unrelated to the business' activities,\textsuperscript{54} it cannot use separate accounting to avoid a state's application of its apportionment formula if a portion of the unitary business is found to exist within the state.\textsuperscript{55}

The type of income received by the corporation has no bearing on whether a state will be allowed to tax. Only in \textit{Exxon} was the taxable income dispute over operating income. Operating income is clearly more susceptible to taxation under the unitary principle, since that money would be used to further the business, part of which has been established to exist in the taxing state. In \textit{Mobil}, however, the dispute concerned dividend income received by a nondomiciliary corporation. The Court's decision to allow taxation established that the due process clause does not preclude inclusion of foreign source dividend income from subsidiaries and affiliates in the apportionable tax base of a nondomiciliary corporation.\textsuperscript{56} Dividend income was also at issue in \textit{ASARCO} and \textit{Woolworth}, and though the Court held these sums not taxable by the states, the decision was based on the absence of a unitary business relationship rather than the type of income.\textsuperscript{57}

The analysis in \textit{Mobil} shows that the corporate form of a business enterprise will not be a decisive factor in determining the existence of a unitary business. The \textit{Mobil} Court stated:

Superficially, intercorporate division might appear to be a more attractive basis for limiting apportionability. But the form of business organization may have nothing to do with the underlying unity or diversity of a business enterprise. Had appellant [\textit{Mobil}] chosen to operate its foreign subsidiaries as separate divisions of a legally as well as functionally integrated enterprise, there is little doubt that the income derived from those divisions would meet due process requirements for apportionability. .. Transforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business, and accordingly it ought not to affect the apportionability of income the parent receives.\textsuperscript{58}

Thus, the multicorporate form will not in and of itself shield income distributed as dividends from apportionment in the enterprise's tax base if a unitary business is found to exist, "for the linchpin of apportionability in the field of state income taxation is the unitary business principle."\textsuperscript{59} The

\textsuperscript{54} In determining whether certain income will be taxed, the Court "looks to the 'underlying economic realities of a unitary business,' and . . . [if the income will be nontaxable, it] must derive from 'unrelated business activity' which constitutes a 'discrete business enterprise.'" \textit{Id.} at 223-224 (quoting \textit{Mobil}, 445 U.S. at 439, 441-442).

\textsuperscript{55} \textit{Weissman, supra} note 8, at 81. \textit{See also John Deere Plow Co. v. Franchise Tax Bd.}, 38 Cal. 2d 214, 238 P.2d 569 (1951), \textit{appeal dismissed}, 343 U.S. 939 (1952); \textit{Butler Bros.}, 315 U.S. 561.

\textsuperscript{56} \textit{Hellerstein, supra} note 1, at 126.

\textsuperscript{57} \textit{ASARCO}, 458 U.S. at 330; \textit{Woolworth}, 458 U.S. at 372.

\textsuperscript{58} \textit{Mobil}, 445 U.S. at 440-441.

\textsuperscript{59} \textit{Id.} at 439.
taxpayer must show that underlying economic realities warrant the formal and legal distinction between the separate corporate entities. 60

Exxon and Mobil struck fear in the hearts of corporate executives; the opinions reflected a continuation of judicial restraint from earlier cases, but afforded no further delineation of the unitary business or restrictions imposed by the due process clause. The Court’s unwillingness to announce a single definition of a unitary business was equivalent to an announcement that, absent congressional action, the states would continue to enjoy broad leeway in taxing a portion of a corporation’s worldwide income. 61

With the decision of ASARCO and Woolworth came rekindled hope that the Court, in the absence of repeatedly requested congressional action, would limit the scope of the states’ taxing power. Some thought this would signal a return by the Court to a closer economic analysis of interstate and international tax issues. Further, in the absence of due process restrictions, surely the Court would seize upon the commerce clause. The Supreme Court’s most recent opinion addressing the unitary taxation method, Container Corp. of America v. Franchise Tax Board, 62 corrected these ill-placed hopes.

Container is a Delaware corporation headquartered in Illinois whose business activities involved the production and distribution of paperboard and paperboard-based packaging. 63 Container controlled twenty foreign subsidiaries in Western Europe and Latin America during the three-year period at issue, though Container and its subsidiaries were highly decentralized. 64

In its due process clause argument, Container focused on one of the major inherent problems of formula apportionment, alleging that formula apportionment was inaccurate due to differing wage and profit rates between the parent corporation and its foreign subsidiaries. 65 Such an argument, however, had little chance of success after the Court’s decision in Mobil, 66 on which the Container court relied heavily. Because Container was found to be carrying on a unitary business, “a state may apply an apportionment formula to the taxpayer’s total income to arrive at a rough approximation of the corporate income attributable to activities within the state.” 67 While neither formula is perfect, the Court found that separate accounting results in no greater accuracy than formula apportionment. Only gross miscalculations of taxes will warrant a state tax being

60. Id. at 440-441.
61. Hellerstein, supra note 1, at 151.
62. 463 U.S. 159.
64. Id.
65. See 463 U.S. at 174-5, where Container disclosed the amount of money required to produce one dollar of net income during the years in question.
66. See supra text accompanying note 61.
67. 117 Cal. App. 3d at 1003, 173 Cal. Rptr. at 131.
struck down, and here the Court found none that would merit such a remedy.68

III. COMMERCE CLAUSE & FOREIGN COMMERCE CLAUSE

The use of the unitary method of taxation prompted complaints of commerce clause violations from many corporations. The Supreme Court had identified the major restraint imposed by the commerce clause to be that a state tax may not unconstitutionally burden interstate commerce by subjecting a multijurisdictional enterprise to taxation not borne by a single jurisdictional business.69 Such a situation arises due to multiple taxation.

The Supreme Court addressed the commerce clause restrictions on implementing the unitary tax in Complete Auto Transit, Inc. v. Brady.70 Complete Auto added predictability to commerce clause challenges to unitary taxes by establishing a four-part test. The unitary tax will be upheld if it “is applied to an activity with a substantial nexus with the taxing State, if [it is] fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.”71

However, when a foreign corporation is taxed, internationally accepted standards establishing principles for taxation become involved. Two important sets of rules for this purpose are: “(1) those defining a permanent establishment, such as a branch or subsidiary corporation, that can be taxed by the host country; and (2) those specifying the procedures to be used to account for transactions between related parties in measuring the income of a permanent establishment.”72 Under this second set of rules, the branch or subsidiary is to be treated as a separate entity. This is often called the “water’s edge” or “arm’s length” rule. It is practiced by the federal government73 and the Internal Revenue Service.

68. The Court found that only a 14% discrepancy in taxable income allocable to California resulted from application of the unitary tax as would have resulted from Container’s own separate accounting method. 463 U.S. at 174-5 nn. 11-12, 184. Although 14% seems not to be an insignificant amount, the Court compared it to the situation in Hans Rees. North Carolina’s one-factor formula assessing taxable income on the basis of tangible property was struck down after a finding that a 250% discrepancy in taxable income attributable to the taxing entity resulted from the application of the formula method. 283 U.S. at 135. Hans Rees imposes a theoretical limit on the permissible distortion resulting from formula apportionment. It is unlikely, however, that a taxpayer will be able to make the requisite showing that “there is no rational relationship between the income attributed to the state and the intrastate values of the enterprise.” Container, 463 U.S. at 180 (quoting Exxon, 447 U.S. at 220) and that the income apportioned to a state is “out of all appropriate proportion to the business transacted in that state.” Id. (quoting Hans Rees, 283 U.S. 123, 135.)

69. See Mobil, 445 U.S. at 442-446.
71. Id. at 279.
72. SPECIAL REPORT, supra note 28, at 998.
73. Id., at 998 n. 18.
in the form of section 482 adjustments. 74 It is also used in concluding foreign tax treaties. 75 This approach treats transactions occurring between related foreign and domestic corporations as being performed at arm's length: "income attributable to the foreign entity is calculated by reference to a transaction between individual parties." 76

The significance of the divergent practices of federal and state taxing authorities arises from the power of Congress "to regulate commerce with foreign nations." 77 Moreover, the Constitution forbids states from making separate arrangements with foreign governments. 78 Suggestions to make the states conform to federal practice have long been discussed and considered. 79 Yet Congress has still failed to act on any proposed legislation. Based on this lethargy, the Court has been reluctant to prescribe that states' taxing practices emulate the federal mode. In Mobil, where such treatment was said to be mandatory, the Court stated, "[a]bsent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States." 80

The Court did not take a definitive stand on the issue until Japan Line Ltd. v. County of Los Angeles. 81 In Japan Line, the Court found unconstitutional Los Angeles' local property tax on Japanese cargo containers which had already been taxed in Japan. The Court held that the commerce clause will not allow a state to "impose a [fairly apportioned,] non-discriminatory ad valorem property tax on foreign-owned instrumentalities (cargo containers) of international commerce" 82 used exclusively in furtherance of such commerce. Although it recognized that "interstate commerce must bear its fair share of the state tax burden," 83 the Court said that multiple taxation may well be offensive to the Commerce Clause. 84 The Court, therefore, identified two more hurdles, in addition to the requirements of Complete Auto, 85 that must be overcome to validate

74. "Section 482 of the Internal Revenue Code and the regulations promulgated pursuant to the Code make it clear that commonly controlled entities are to be treated as if they were separate entities for the purpose of determining taxable income from intercompany transactions." Weissman, supra note 8, at 54. See Treas. Reg. 1.482-1(b)(1) (1968). The regulations under section 482 are designed to require that all intercompany transactions be conducted at arm's length and allow the Internal Revenue Service to intervene by correcting any understatements of income or other misallocations which do not accurately reflect the tax conduct of two otherwise uncontrolled taxpayers.

75. For example, the OECD treaty and the model income tax treaty issued in June 1981 reflect a "water's edge" rule. SPECIAL REPORT, supra note 28, at 998.

76. Id.

77. U.S. CONST. art. I, § 8, cl. 3.


79. See infra notes 131-137 and accompanying text.

80. 445 U.S. at 448.


82. Id. at 435-36.

83. Id. at 444. (quoting Washington Revenue Dept. v. Ass'n of Washington Stevedoring Cos., 435 U.S. 734, 750 (1978)).

84. Id. at 446.

85. See supra text accompanying note 71.
a tax on interstate commerce. These factors are "the enhanced risk of multiple taxation" that may result from simultaneous application of state taxes and taxes imposed by a foreign government, and the possibility that "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential."

*Japan Line* can be distinguished from earlier cases where multiple taxation was alleged. For example, in *Mobil*, the Court noted that "the factors favoring use of the allocation method in property taxation have no immediate applicability to an income tax." Also, *Japan Line* involved multiple taxation at the international level, whereas *Mobil*, which had conceded the power of the state of its commercial domicile to tax 100% of its foreign source dividends, was ultimately concerned solely with multiple taxation among the states. While multiple taxation resulting from different states’ taxes might burden foreign commerce, the Court could ultimately remove the burden, if it so chose, because it has the power to mandate and restrict state taxing measures. In *Japan Line*, however, the Court lacked a similar power since it had no authority to dictate the taxing measures of one of the taxing entities—Japan. The Court, therefore, lacked the ability to enforce full apportionment by all potential taxing bodies. Moreover, actual multiple taxation existed in *Japan Line*, since Japan had already taxed the full value of the cargo containers. Consequently, any levy on them by a state would result in double taxation. These factors compelled the Court to deny Los Angeles the power to tax the Japanese containers at all.

The second restriction imposed on unitary taxation by the commerce clause after *Japan Line* was that a state tax could not prevent the federal government from speaking with one voice when regulating commercial relations with foreign governments. The Court looked at factors other than the fact that *Japan Line* involved a foreign taxing entity. Also miti-

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86. *Japan Line*, 441 U.S. at 446.
87. Id.
88. Id. at 448-51. The *Japan Line* Court noted some of the problems inherent in the taxation of entities involved in international commerce:

A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the State imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions . . . If other States followed the taxing State’s example, various instrumentalities of commerce could be subject to varying degrees of multiple taxation.

Id. at 450 (footnote omitted).
90. Id.
92. Id. at 452 n. 17.
93. Id. at 447-48.
94. Id. at 449.
gating against implementation of the unitary tax was evidence of federal government intent in the rationale behind the Customs Convention on Containers—to remove impediments to the use of containers as instruments of international traffic—to which both Japan and the United States were signatories.

After adopting additional criteria for determining the validity of a tax on foreign instrumentalities, the Court again had to consider what level of risk was appropriate. Two possible tests were available. The Court rejected the predominant national interest test, which called for national intervention if the state action fell clearly within the domain of national interests. Instead, it adopted the serious national harm test which was much more susceptible to the interests of states' autonomy. This test requires a showing of serious economic or political harm being done to the nation by failure of states to harmonize tax practices with the federal government and foreign governments.

In Container, the Court did not articulate further restrictions on states' authority to tax and thus did not broaden the factors in Japan Line. Container based its commerce clause claim on the issue of multiple taxation. Before the Supreme Court, the issue was whether California was required to employ the arm's length method of taxation. Since the claim involved international commerce, the two additional requirements mandated by Japan Line had to be applied.

In considering the first of Japan Line's criteria—that a state's tax should not increase the risk of multiple taxation, the Court distinguished property tax in Japan Line and income tax at issue in Container. The Court conceded the existence of double taxation, but it indicated that, absent demanding that the state not tax the multinational corporation at all, it was unable to present a cure. The Court refused to favor either the separate accounting method or the formula apportionment method since both result in double taxation. The Container Court

95. Id. at 453.
96. SPECIAL REPORT, supra note 28, at 1002.
97. Id.
98. Through its method of separate accounting, Container alleged that during the years in question, California's apportionment formula attributed an average of four million dollars more to domestic operations and four million dollars less to Container's foreign subsidies. Weissman, supra note 8, at 90 (citing Container's Brief). Furthermore, Container claimed that in one instance the California formula apportioned slightly less to Columbia than the Colombia subsidiaries paid in Colombian income taxes, while Container's Dutch subsidiary paid taxes equivalent to 97% of the pretax income attributed to the Netherlands by the formula. Based on these facts, Container argued that the tax violated the Court's two considerations outlined in Japan Line.
100. Id. at 185-6.
101. The Court noted that, although "double taxation is a constitutionally disfavored state of affairs, particularly in the international context, Japan Line does not require forebearance so extreme or one-sided [as to force upon the state the separate accounting methodology]." Id. at 193.
found no cure for multiple taxation, and refused either to espouse an absolute prohibition against double taxation in the foreign commerce realm\textsuperscript{102} or to require a state to adopt the arm's length approach.

The Court next considered whether California's tax of Container would "impair federal uniformity in an area where federal uniformity is essential.\textsuperscript{103} A state's tax would "violate this so-called 'one-voice' standard if it either implicates foreign policy issues . . . or violates a clear federal directive.\textsuperscript{104} Noting that the most obvious foreign policy implication is the threat that a state tax might offend U.S. trading partners and lead them to retaliate, the Court articulated three factors that prevented California's tax of Container from having adverse foreign policy implications.\textsuperscript{105}

First, the Court distinguished Japan Line, where the California tax in question created an automatic asymmetry in international taxation.\textsuperscript{106} Second, the Court emphasized that the tax here was imposed on a domestic corporation rather than a foreign enterprise.\textsuperscript{107} In a footnote,\textsuperscript{108} the Court stated that this factor would be less important in a case where a domestic corporation was owned by foreign interests.\textsuperscript{109} Finally, the Court noted that Container was subject to California tax in one way or another, and that the amount it paid was more a function of California's tax rate than of its allocation method.\textsuperscript{110} The Court estimated that disfavorable foreign response to this factor would be at most "attenuated.\textsuperscript{111}

The Court also concluded that California's tax did not violate a federal directive, basing its decision primarily on its reading of congressional intent.\textsuperscript{112} The Court first noted that federal tax statutes do not preempt state use of the unitary tax.\textsuperscript{113} Although tax treaties usually mandate the use of the arm's length methodology, that requirement is usually waived by either signatory country in regard to its own domestic corporations. Moreover, none of the tax treaties have prescribed a specific tax system for states.\textsuperscript{114} Finally, the Court cited Congress' failure to enact legislation

\textsuperscript{102} \textit{Id.} at 189.
\textsuperscript{103} \textit{Id.} at 186 (quoting \textit{Japan Line}, 441 U.S. at 448). Interestingly, the Court voiced its own feelings of incompetence in trying to delineate foreign policy. Nevertheless, it proceeded to enumerate criteria for determination of state infringement on federal turf in the foreign policy context. \textit{Id.} at 194.
\textsuperscript{104} \textit{Id.} at 193-4.
\textsuperscript{105} \textit{Id.} at 194.
\textsuperscript{106} \textit{Id.} at 194-5 (quoting \textit{Japan Line} 441 U.S. at 453).
\textsuperscript{107} \textit{Id.} at 195.
\textsuperscript{108} \textit{Id.} n. 32.
\textsuperscript{109} See infra discussion of foreign-based multinational corporations.
\textsuperscript{110} \textit{Container}, 463 U.S. at 195.
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.} at 196.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} The Court also noted that on at least one occasion, Congress has attached a reservation declining to consent to a provision that would restrict states' authority to use the apportionment formula. See 124 CONG. REC. 18400, 19076 (1978).
regulating state taxation.115

IV. THE PREDICAMENT OF FOREIGN CORPORATIONS WITH DOMESTIC SUBSIDIARIES

The Court’s decision in Container left open the question of whether the worldwide unitary method may be applied to tax the worldwide income of a foreign corporation that has a U.S. domestic subsidiary. It has been predicted that the next case regarding the unitary tax will be such a case.116 Westinghouse is currently seeking certiorari, hoping that the Court will reach the issue of the appropriateness of applying the unitary tax to domestic subsidiaries of a foreign corporation on its set of facts.117 Similarly, Alcan Aluminum, Ltd., a Canadian corporation with a U.S. subsidiary subject to California’s unitary tax, is challenging its imposition by seeking certiorari after the District Court’s dismissal of the action on the ground that it lacked standing to sue.118 The Supreme Court refused to hear Shell Petroleum, N.V.’s appeal, despite the fact that the ten EEC countries urged the Court to review it.119 Nevertheless, Shell illustrates some of the major problems inherent in a situation where a state seeks to assess taxes due on a domestic subsidiary whose parent is a foreign multinational corporation.

Shell Petroleum, N.V. (SPNV), a Netherlands holding company having a place of business in the Netherlands, alleged that the California Tax Board assessed or planned to assess additional taxes under the California tax apportionment formula on two of its subsidiaries—Shell Oil and Scallop Nuclear. SPNV contended that the Board, in finding a unitary business to exist, would combine the income of all the companies worldwide that are more than fifty percent owned, directly or indirectly, by SPNV.120 Such an application, SPNV alleged, would result in gross disproportion between the income attributed to California activities and the income actually earned by Shell Oil and Scallop Nuclear in California.121

As discussed earlier, the earlier Supreme Court cases have continually held that the taxpayer’s accounting system will not impeach the validity of the taxing formula. This is true even when factors affecting international commerce and trade relations were found to exist.122 The rationale for application of formula apportionment in these situations,

120. Shell Petroleum N.V. v. Graves, 709 F.2d 593, 595 (9th Cir. 1983).
121. Id.
122. See Mobil, 445 U.S. 425; Exxon, 447 U.S. 207; Container, 463 U.S. 159.
however, is much weaker. The only economic or constitutional justification for applying the formula apportionment method is based on the assumption that a dollar spent on sales, property or payroll in one jurisdiction will yield the same result if applied to the same use in another jurisdiction. The assumption rarely holds true when applied to various states, but it is never true when applied to different nations, whose economies and societies are far from homogeneous. The costs of property, payroll and sales are usually much lower in foreign countries, resulting in a disproportionate amount of income being attributed to the United States, and more specifically, the state applying the unitary tax method.

Similar circumstances prompted Alcan to challenge California’s imposition of tax on the unitary business it found to exist. Alcan owned a subsidiary that conducted business in California. Although the subsidiary operated in the red, the formula attributed income to the California subsidiary since California combined the worldwide income of the Canadian parent corporation. The truth of the subsidiary’s losses was substantiated by the fact that the Internal Revenue Service had investigated Alcan several times during the years in which California sought to assess taxes (1972-81), and it determined that section 482 adjustments were necessary. That Alcan shut down its California operations further shows the truth of the subsidiary’s unprofitability. Foreign trading partners are understandably aggravated at the prospect of paying taxes on a business that is already losing money, merely because of its location within a unitary tax state, and threats of relocation and retaliation have followed.

The foreign multinational corporation will not be able to protect its rights adequately when state taxing authorities impose a tax on its worldwide income simply because the corporation’s subsidiary is located within a unitary tax state. Although the domestic subsidiary will be able to bring

123. See generally, Smith, supra note 5.
124. Sony Corporation attested to this fact before the task force. See infra notes 149-159 and accompanying text. According to Sony, a disproportionate amount of income is attributed to the United States under the apportionment method because the costs of property, payroll, and sales are higher. Sony cited its specific problem to be the discrepancy in efficiency between its Japanese and Californian television manufacturing operations: even though its Japanese operations are more efficient, part of the income generated by the operation is attributed to California because the costs in California are higher. Most of the complaints lodged at the Nov. 16 task force hearing concerned the distortions of income in favor of the taxing state resulting from application of worldwide formula apportionment. Sheppard, Unitary Group’s Task Force Begins to Assess Proof of Harm, 21 TAX NOTES 821 (1983).
125. Weissman, supra note 8, at 56. Another factor that will contribute to the distortion in income attributed to a jurisdiction is if the activities of two components of a unitary business are not matched; i.e., one is labor intensive while another is capital intensive. Also, fair attribution may be difficult due to fluctuating exchange rates.
127. See supra note 74.
129. See generally Smith, supra note 5.
suit in the state court to protest the imposition of a tax that has already been paid, that subsidiary cannot invoke a tax treaty between the U.S. and the country in whose territory its parent corporation is domiciled. This is true even though the spirit of the treaty is clearly violated. Similarly, the foreign parent will not be allowed to bring suit in the federal courts because it lacks standing. The parent can invoke the treaty rights; however, they are likely to be held inapplicable since the tax at issue was levied on the subsidiary—not the parent, and for matters of standing, the presence of "unitary business" will not be considered.\(^3\)

**V. Congressional/Executive Response**

As the phenomenon of unitary tax has burgeoned into an omnipresent onus on corporations, and the problems accompanying the method have become more and more visible, Congress has offered little solace.\(^1\) Although Congress has been called upon to allay the difficulties, its response thus far has yielded only narrow legislation that falls far short of an adequate remedy.\(^2\) On other occasions, Congress has feigned interest, evidenced by bills and hearings that, in the end, have yielded no legisla-

\(^{130}\) See Smith, \textit{supra} note 5; see generally Shell 570 F. Supp. 58.


One of the other pieces of federal legislation limiting state tax authority under Congress' commerce powers was likewise a direct reaction to a Supreme Court decision. In Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972), the Court upheld enplaning charges as reasonable amounts charged to defray the costs of building or maintaining airport facilities used by the passengers. Congress responded by prohibiting the states from imposing user charges in connection with carriage of persons in air commerce. 49 U.S.C. § 1513 (1976).

In recent opinions, the Supreme Court has invited Congress, if it is dissatisfied with the Court's laissez-faire approach, to enact meaningful legislation. Bills have been introduced in Congress which propose to prohibit the states from using the worldwide unitary method, but no hearings have yet been scheduled.

A major problem with the proposed legislation is that, without clarification of the Administration's stance, it is doubtful whether the legislation can muster enough support. The Executive Branch, which rarely involves itself in the area of state taxation, has been conspicuously active concerning the topic of unitary tax, though its signals have been ambivalent and increasingly phlegmatic. The Administration filed an amicus curiae brief supporting the anti-unitary tax position in Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.; however, its failure to file one in Container despite urgings from corporate interests and foreign governments might have been critical. After the Container case had been decided, foreign representatives again approached the administration, urging that it file for Supreme Court rehearing of the case. Great Brit-


137. Id.

138. Id. Bob Ragland, Director of Taxation at the National Ass'n of Manufacturers, said that, without support from the Administration, supporters of anti-unitary tax legislation "aren't going to go out on a limb" for the legislation. New Unitary Approach, supra note 116, at 69.


142. The Supreme Court did not find the failure to file a brief dispositive of the Administration's view, but concluded nonetheless that, in the Administration's view, federal interests were "not seriously threatened by California's decision to apply the unitary business concept and formula apportionment." Container, 463 U.S. at 196.

ain's Prime Minister Margaret Thatcher was especially vocal. Moreover, after a meeting of the Cabinet Council on Economic Affairs, top Reagan Administration officials recommended to President Reagan that the Administration oppose the worldwide unitary tax. Reagan instead referred the issue back to the Cabinet Council, an action that was seen as a stalling tactic.

At the same time as President Reagan announced his intent not to file a petition for rehearing of the Container case, the Administration announced the creation of a working group to study the international application of worldwide unitary taxation. The working group held its first meeting in November, 1983. Composed of representatives of the federal government, state governments, and the U.S. business community, the group was assembled to consider: the definition of a unitary

145. Bernick, supra note 136, at 901.
147. Id.
148. Id. This act, too, can be viewed as foot dragging. The creation of a working group was the least decisive of four options suggested and presented to the Cabinet Council by a Treasury Department option paper. The other options presented were as follows: First, it described the Conable-Mathias position, now contained in S. 1225 (H.R. 2196) that the states not be permitted to use the unitary method. Another option was that it do nothing on the ground that no federal question is involved. A third option was that the application of the unitary method be limited in the case of foreign corporations with U.S. subsidiaries. Sheppard, Chapoton Labels Unitary Tax Method an Irritant in International Relations, 21 Tax Notes 439 (1983).
149. Reagan announced that the purpose of the working group was to study the unitary issue and to develop a federal policy on the unitary method that is "conducive to harmonious international economic relations, while also respecting the fiscal rights and privileges of individual states." New Unitary Approach, supra note 116, at 69. (citing press release of Donald T. Regan, Sept. 23, 1983).
151. The members of the Working Group, who were chosen by the Administration, are: Phillip Caldwell, Ford Motor Co. & Business Roundtable
Owen L. Clarke, National Ass'n of Tax Administrators
Kent Conrad, Multistate Tax Commission
Gov. George Deukmejian, California
Clifton C. Garvin, Exxon Corp.
Robert E. Gilmore, Caterpillar Tractor Co.
Gov. Scott Matheson, Utah
Charles I. McCarty, BATUS, Inc.
business; application of the three-factor (payroll, sales, and property) apportionment formula in the international context; uniform rate setting and information sharing among the states; the desirability of federal legislation; and the possibility of information sharing between federal and state governments. Each member of the working group in turn selected a representative to serve on the task force, whose purpose was to provide technical expertise in implementing the policies decided on by the working group.

Representatives of states' interests have been particularly obstinate. They have refused to consider any options until some national harm has been demonstrated, and have threatened to boycott if the alternative of federal legislation was not withdrawn. They became a bit more amiable when it was pointed out that their very presence in the work group indicated that the Reagan Administration considered use by the states of the unitary tax harmful to national interests. The states' representatives have also pushed for "full accountability," alleging that double taxation was rarely at issue, but that, instead, corporations had income on which they paid no tax. Assuming that corporations do have income that is not required to be reported anywhere, the states would require that all income be reported somewhere, or a legitimate excuse be given for not reporting. Although this approach seems more than slightly avaricious,
"full accountability" has been adopted as a goal of both the task force and the working group. States have said that they will consider an alternative to formula apportionment only if they are convinced that business investment and jobs are at stake, and they can be sure that they will lose no revenue.159 Given the obstinance of the states and the equally firm positions of corporate interests, it is not surprising that the group's study has resulted in less than revolutionary findings and resolutions.

VI. Conclusion

For several reasons, states support the unitary tax method over the separate accounting method, the only apparent alternative.160 The primary interest states have in the unitary method is the revenue its implementation generates. States also complain that the use of the separate accounting method would create serious administrative problems. States also argue from the vantage point of fairness, positing that they will be unable to accurately assess the tax liability of an enterprise if formal apportionment is disallowed. Tax burdens will be shifted inequitably to smaller businesses if the multinationals are allowed to avoid their tax burden. Proponents of the unitary method argue that concepts of state sovereignty require that they be allowed to employ formula apportionment and cite self-correcting forces, such as judicial supervision and state competition, as sufficient to prevent the occurrence of national harm.

The difficulties created by the use of separate accounting, however, are far less burdensome than those created by the use of the unitary method. Either method engenders administrative problems, but the burden seems much more appropriately placed on states, who can retrieve tax information from the federal tax authorities161 than to burden corporations with massive paperwork with which they might be unable to comply.

Use of the unitary method in the international arena may have serious ramifications. Discontented trading partners may choose to trade with other countries rather than risk imposition of tax on the worldwide income of their own multinationals. The lack of tax harmonization may lead other countries to retaliate against United States interests operating in their territory and may lead to serious impairment of trade relations, including the inability to conclude tax treaties.162

159. Sheppard, supra note 157.
160. Sheppard, supra note 150, at 525.
161. At least some of the information necessary to assess tax liability under the separate accounting method is already given to the states, since most states' laws require that the federal government report to the states when making a § 482 adjustment. Sheppard, supra note 124, at 822.
162. The United States is party to at least 30 tax treaties. In testimony before the Foreign Relations Committee of the U.S. Senate, Laurence Woodworth, the Assistant Secretary of the Treasury for Tax Policy, reported:

We view tax treaties as an important element in the international economic
The problems arising out of states' use of formula apportionment demonstrate that, in the international arena, the unitary method should not be used. Each argument advanced by proponents of the unitary method is met by a problem that rises to the level of national harm and cannot be easily resolved. Unfortunately, a resolution does not seem forthcoming, since both the Judiciary and the Legislature await some definite signal from the Executive. The Executive Branch should abandon its stance of ambiguity and lethargy in favor of an affirmative position for international trade, for ultimately, the condition of relations with our foreign trading partners will affect the nation and the individual states much more than any problems proponents of the unitary tax can advance.

policy of the United States. One of our fundamental objectives is to minimize impediments to free international flows of capital and technology and this objective is fostered by having the broadest possible network of income treaties.

Among the major impediments to free capital and technology flows are the rules of national tax systems and their interaction with the systems of other countries. Tax treaties seek to eliminate, or at least mitigate the impact of these impediments.

Treaties accomplish the minimization of impediments by a variety of means, the principal ones being the elimination or reduction of double taxation and the elimination, to the extent possible, of discriminatory tax rules which distinguish unreasonably between domestic and foreign investment.

At the same time, tax treaties also serve other policy objectives—for example, the prevention of tax avoidance and evasion, and the fostering of international cooperation between the tax authorities of Contracting States.

Hearings on Tax Treaties, supra note 139, at 28 (Statement of Asst. Sec. of the Treas., Laurence Woodworth).

Chapoton, in a speech before the National Association of State Bar Tax Sections, in Washington, D.C., on Oct. 21, 1983, cited one instance of a country's refusal to continue tax treaty negotiation based on disapprobation of the unitary tax method. Sheppard, supra note 148, at 439.
In Personam Jurisdiction in Federal Courts Over Foreign Corporations: The Need for a Federal Long-Arm Statute

BARRY E. COHEN*

I. INTRODUCTION

Since the United States Supreme Court's approval of "minimum contacts" as a basis for state court jurisdiction over persons not present in a forum state, general purpose long-arm statutes have become part of the jurisprudence of almost every state. These statutes typically subject a party who is not present in a state to suit there, so long as the cause of action arises from certain contacts of the party in the state. An example of this type of long-arm jurisdiction is an action in one state to recover for personal injuries incurred within its borders, but resulting from the use of a defective product manufactured by a company with no physical presence in the forum. The distribution of the defective product in the forum state would generally be a sufficient state "contact" on which to assert personal jurisdiction over the distant manufacturer.¹

There is, however, no general federal law akin to a state long-arm statute which authorizes in personam jurisdiction in a federal district court. Such a void restricts the court's authority over persons who cannot be served with process within the geographic boundaries of the state in which the district court sits. Although some statutes that establish federal rights and remedies do authorize extraterritorial service of process in cases arising under them,² most do not. Thus, for many federal causes of action in which extraterritorial service of process is needed it is necessary to rely on Rule 4(e) of the Federal Rules of Civil Procedure.³ Rule 4(e) permits a federal plaintiff to utilize the long-arm jurisdiction provided by the law of the state in which the district court sits.⁴

An approach to long-arm jurisdiction which invests a federal court with the same degree of long-arm jurisdiction as a state court has little to command for itself. As it concerns alien corporations, current law on extraterritorial in personam jurisdiction in federal courts creates a significant loophole through which these corporations can avoid personal juris-

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2. See infra note 7.
3. Rule 4(e) permits extraterritorial service of process pursuant to federal law (where it is authorized) and, alternatively, under applicable law of the forum state.
4. See infra at 62.
diction in any federal court. This situation arises from the fact that Rule 4(e) looks to state law principles of extraterritorial personal jurisdiction, which (in both a statutory and constitutional sense), depend upon the alien corporation's activities or contacts with the forum state. If these contacts are insufficient to satisfy state statutory or fourteenth amendment due process criteria, the state long-arm statute cannot be invoked, and long-arm jurisdiction in that forum is unavailable. Moreover, if the alien corporation has no state contacts sufficient to permit the use of a state long-arm statute, but there are sufficient contacts with the United States as a whole to satisfy a fifth amendment due process test of jurisdiction, current law would permit such a defendant to escape federal jurisdiction under most circumstances.

With regard to a foreign corporation, current reliance on state long-arm jurisdiction may be interfering with policies embodied in the general and specific federal venue statutes of Title 28 of the U.S. Code. For example, section 1391(b), allows federal question cases to be brought, *inter alia*, in the district in which the claim arose. That district may not, however, be the one in which the defendant has sufficient contacts under state law to support in personam jurisdiction. Since a federal court is constitutionally permitted to exercise jurisdiction over any domestic corporation regardless of where located, Rule 4(e)'s dependence on state contacts effectively increases locational requirements of federal venue law (e.g., contacts with the forum state). When so viewed, Rule 4(e) may be unintentionally derogating from policies expressed in federal venue statutes and may be an unnecessary circumscription on a plaintiff's choice of fora.

The discussion which follows examines the current status of federal long-arm jurisdiction, the practical problems associated with its use, and the constitutional limits on federal in personam jurisdiction. The conclusion drawn is that a generally applicable federal standard for long-arm jurisdiction presents the possibility of a more rational assertion of in personam jurisdiction by federal courts over distant parties — especially alien corporations. Such a standard should be authorized either by statute or as an amendment to Rule 4 of the Federal Rules of Civil Procedure for use in federal question cases.

II. THE PROBLEM: THE USE OF STATE LONG-ARM STATUTES IN FEDERAL QUESTION CASES CREATES A GAP BETWEEN A FEDERAL COURT'S ACTUAL AND CONSTITUTIONAL REACH OVER DISTANT PARTIES

Several federal remedial statutes contain provisions for extraterritorial service of process in cases arising under them. Section 12 of the Clayton Antitrust Act, for example, provides:

Any suit, action or proceeding under the anti-trust law against a cor-

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5. In this article, "foreign corporation" refers to a United States domestic corporation not registered to do business in a particular state. An "alien corporation" is one incorporated in a foreign country.
poration may be brought not only in the judicial district whereof it is
an inhabitant, but also in any district wherein it may be found or
transacts business, and all process in such cases may be served in the
district of which it is an inhabitant, or wherever it may be found.
(emphasis added.)*

Section 27 of the Securities Exchange Act of 1934 is similar, authorizing
extraterritorial jurisdiction wherever a defendant is an inhabitant, trans-
acts business, or in any district in which an unlawful act has occurred.7

Under the Clayton Act, the "transacts business" test of anti-trust
venue has permitted long-arm jurisdiction to be exercised over corporate
defendants with no physical presence in the forum state.6 Long-arm jurisdic-
tion under the Securities Exchange Act has extended to defendants
with virtually no contacts with the forum state, when venue was based on
the occurrence of an unlawful act in that state.9

Many federally-created causes of action, however, contain no provi-
sions for extraterritorial service of process.10 In proceedings under such
statutes, in personam jurisdiction over a corporation which cannot be
physically served in the forum state depends upon state long-arm law,

nent part:
Any suit or action to enforce any liability or duty created by this title or rules
and regulations thereunder, or to enjoin any violation of such title or rules and
regulations, may be brought in any such district [wherein any act or transac-
tion constituting the violation occurred] or in the district wherein the defen-
dant is found or is an inhabitant or transacts business, and process in such
cases may be served in any other district of which the defendant is an inhabi-
tant or wherever the defendant may be found.

Other federal long-arm provisions are found in the Foreign Sovereign Immunities Act of
agency or instrumentality thereof may be made by mail wherever the party is located, if
other specified methods not available); federal interpleader, 28 U.S.C. §2361 (1982) (service
may be made in any district in which a party resides or is found) and the Miller Act §2, 40
U.S.C. §270b (1982) (where venue is proper, extraterritorial service of process is authorized
in suits by subcontractors on federal construction projects against sureties on payment
bonds).

(D.C. Cir. 1965); Lippa’s Inc. v. Lenox Inc., 305 F. Supp. 175 (D. Vt. 1969). For a review of
personal jurisdiction under Section 12 of the Clayton Act, see Hovenkamp, Personal Juris-
diction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis,
67 IOWA L. REV. 485 (1982); Note, Personal Jurisdiction Over Alien Corporations in Anti-
trust Actions: Toward a More Uniform Approach, 54 ST. JOHN’S L. REV. 330 (1980); Note,
Personal Jurisdiction Over Alien Corporate Parents and Affiliates in Antitrust Actions: A
Plea for Perspicuity, 5 SYRACUSE J. INT'L L. & COM. 149 (1977)
(N.D. Cal. 1980).
10. No federal long-arm jurisdiction is provided, for example, under the Civil Rights
Act of 1964; for federal trademark infringement (15 U.S.C. §1051 et seq.) in patent matters,
see Activox, Inc. v. Envirotech Corp. 532 F. Supp. 248 (S.D.N.Y. 1981); and in admiralty
actions, see DeJames v. Magnificence Carriers, Inc., 491 F. Supp. 1276 (D.N.J. 1980), aff'd
654 F.2d 280 (3rd Cir. 1981).
incorporated through Rule 4(e) of the federal rules, rather than upon any federal statute. Rule 4(e) provides, in pertinent part, that:

...Whenever a statute or rule of court of the state in which the district court is held provides...upon a party not an inhabitant or found within the state,. service may. . be made under the circumstances and in the manner prescribed in the [state] statute or rule.11

Thus, in situations where no federal statute is available, Rule 4(e) directs a federal plaintiff to the long-arm statute of the state in which the district court sits. In such a case, the in personam jurisdictional question depends upon an examination of the defendant's contacts with the forum state, even when there is a federal claim. Such a "state contacts" test in federal question litigation arises from the requirement in Rule 4(e) that when a state long-arm statute is relied on for service of process, service "is to be made under the circumstances and in the manner prescribed by the [state] statute..." Most state statutes will explicitly require examination of contacts with that state.12 Even for those states whose statutes are not so explicit, the fourteenth amendment imposes the same "state contacts" requirement; it permits them, as a matter of due process, to "exercise personal jurisdiction over a non-resident defendant only so long as there exist 'minimum contacts' between the defendant and the forum state."13

For statutory and/or constitutional reasons, when a district court relies on Rule 4(e) and a state long-arm statute for in personam jurisdiction, it will only examine contacts of the defendant with the state in

11. See supra note 4.
12. The District of Columbia statute is typical in this respect. It reads in pertinent part:

A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's —

(1) transacting any business in the District of Columbia;
(2) contracting to supply services in the District of Columbia;
(3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;
(5) having an interest in, using, or possessing real property in the District of Columbia; or
(6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia...

which the court sits. However, if the in personam jurisdiction of a federal district, court at least when hearing a federal question, is not constitutionally limited by the state-based territorial principles of the fourteenth amendment due process, and if venue is properly laid in a particular district, is it correct that the in personam jurisdiction of the federal court should nevertheless be no greater than that of a state court? Should not federal venue statutes (supplemented by use of forum non conveniens principles) determine where a domestic corporation (or an alien corporation doing business in the United States) must defend federal question litigation, rather than have state borders (which are only arbitrary boundaries of federal judicial districts in federal question cases) perform that function?

III. IN A FEDERAL QUESTION CASE THE IN PERSONAM JURISDICTION OF A FEDERAL COURT IS GREATER THAN THAT ALLOWED STATE COURTS UNDER FOURTEENTH AMENDMENT DUE PROCESS PRINCIPLES

Much of the Supreme Court's teaching on due process limitations on in personam jurisdiction of courts has arisen in review of state court (or federal court diversity) actions. The principal decisions in this area—such as *International Shoe v. Washington; Hanson v. Denkla* and *World-Wide Volkswagen Corp. v. Woodson,*—are fourteenth amendment due

14. Virtually all courts which have considered this point have so held. See infra notes 22-31 and accompanying text.

15. In a diversity action, of course, the federal court is merely sitting as a state court, and its use of a state long-arm statute, and its restriction to state contacts, follows directly from the principles of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). See, e.g., *National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 331 (1964) (Black, J., dissenting): "Neither the Federal Constitution nor any federal statute requires that a person who could not constitutionally be compelled to submit himself to a state court's jurisdiction forfeits that constitutional right because he is sued in a Federal District Court acting for a state court solely by reason of the happenstance of diversity jurisdiction."

16. In *International Shoe,* 326 U.S. 310 (1945), the question was whether certain contacts of employees of a Delaware corporation in the State of Washington could subject it to suit there for the collection of a state tax. The Court explicitly rejected the notion of "presence" as a basis for jurisdiction over a corporation, and described a qualitative test under the fourteenth amendment to determine whether the corporation's activities in the state are of such a quality and nature as to make the exercise of jurisdiction over it fair and reasonable.

*Hanson v. Denkla,* 357 U.S. 235 (1958), concerned the jurisdiction of a Florida state court over a Delaware trustee in an action by residuary legatees of the trust settlor. The Court followed the fact-dependent approach articulated in *International Shoe* but, in this instance, found the trustee's contacts with Florida insufficient, under the fourteenth amendment to warrant jurisdiction in that state.

*World-wide Volkswagen,* 444 U.S. 286 (1980), was a products liability action brought in an Oklahoma court by parties who had suffered injuries in an accident while driving through Oklahoma, in a vehicle purchased in New York. The Court held that the fourteenth amendment did not permit the New York automobile retailer that sold the car to the injured plaintiff and its wholesaler to be sued in Oklahoma. The *International Shoe* approach, which placed considerable weight on the convenience to a party of litigating in a distant state as a fourteenth amendment factor, was refined somewhat, as the Court noted that
process decisions. The requirements they impose as a matter of constitutional law arise from the limits of state government in our federal system.\textsuperscript{17}

Due process limits on the in personam jurisdiction of a federal court arise, of course, from the fifth amendment. The Supreme Court has not opined on whether \textit{International Shoe} principles (i.e., minimum contacts, fundamental fairness) would govern in determining the constitutional reach of a federal court in a federal question case. However, it is clear that the due process clause of the fifth amendment will not impose a \textit{state} contacts test of in personam jurisdiction. Indeed, as early as 1878 the Supreme Court held that,

nothing in the Constitution...forbids Congress to enact that, as to a class of cases or a case of special character, a circuit court — any circuit court — in which the suit may be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision.\textsuperscript{18}

Thus, any person (e.g., a domestic corporation) located anywhere in the United States could, constitutionally, be subject to the jurisdiction of \textit{any} federal court.\textsuperscript{19} Indeed, such was the precise holding in a case where the Federal Trade Commission sought to enforce an investigative subpoena against a corporation in the Northern District of Texas.\textsuperscript{20} The corporation had neither an office nor any other presence within the state. The fifth circuit, noting that the FTC had statutory authority for such an assertion of personal jurisdiction, held that it did not violate due process. According to the court,

[b]ecause the district court's jurisdiction is always potentially, and, in

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\textsuperscript{17} As the Supreme Court noted in \textit{World-wide Volkswagen}, the due process clause “acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” 444 U.S. 286, 292 (1979).


19. Continental Illinois Nat'l Bank v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 682 (1935) (jurisdiction over reorganization proceedings of a railway line extending over many districts and states may be conferred upon a single district court); \textit{Cf.} Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1946) (Rule 4(f), allowing service of process anywhere within a state embracing two or more judicial districts, is in harmony with the Enabling Act); Robertson v. Railroad Labor Bd., 268 U.S. 619 (1925) (limiting the Transportation Act of 1920's grant of jurisdiction to the district court where the defendant resides).

IN PERSONAM JURISDICTION IN FEDERAL COURTS

this case, actually co-extensive with the boundaries of the United States, due process requires only that a defendant in a federal suit have minimum contacts with the United States. . . . [The subject corporation]. . . . as a resident United States corporation, necessarily has sufficient contacts with the United States to satisfy the requirements of due process.21

The true International Shoe analogy in the federal system, however, is that of the alien corporation which has no presence in the United States, yet has certain “contacts” with the United States; for example, a foreign manufacturer whose products are distributed in the United States by an independent company. In this instance, the constitutional due process limits on the exercise of personal jurisdiction by a federal court should not depend on a party’s contacts with any particular state. Indeed, numerous lower court decisions have held that the fifth amendment test of due process in federal question cases is different from, but may be derived by analogy to International Shoe’s state-based minimum contacts test. Since the sovereign in a federal question case is the United States, these cases hold that appropriate contacts of the defendant with the United States as a whole will satisfy fifth amendment due process.22

Moreover, current federal statutory law in several areas appears premised on the assumption that in personam jurisdiction in federal question cases need not have any connection to state or judicial district contacts. In the area of securities regulation, for example, the occurrence in a particular district of an act or transaction constituting a violation of the securities laws is a basis for service of process anywhere the defendant may be found. In personam jurisdiction over a particular defendant in such cases is not related to the defendant’s own contacts with the state in which the district court sits.23

The jurisdiction of the Court of International Trade (formerly the Customs Court) is also not based on any state contacts. In actions brought by the United States against private parties to enforce import revenue laws, service of process may be made anywhere in the United States and abroad.24 Although the full reach of this court’s in personam jurisdiction does not appear to have been judicially determined, it plainly is not based on state contacts.25

21. Id.
23. See, e.g., Warren v. Bokum Resources Corp., 433 F. Supp. 1360, 1364 (D.N.M. 1977): “Given the extraterritorial service of process provision of §27, it is evident that so long as venue is properly laid in the forum district for claims brought under the 1934 Act, it is not necessary that each defendant have personally engaged in acts or transactions within the forum in order to sustain personal jurisdiction over him.”
25. Apart from its numerous statements that the process of a federal district court may run anywhere in the United States, the Supreme Court has not determined the specific
IV. ALTHOUGH NOT CONSTITUTIONALLY REQUIRED, RULE 4(e) NEVERTHELESS IMPOSES A STATE CONTACTS REQUIREMENT ON FEDERAL COURT IN PERSONAM JURISDICTION

While it appears that a state contacts test is not part of a fifth amendment due process limitation on federal in personam jurisdiction, most courts have viewed Rule 4(e) of the Federal Rules of Civil Procedure as requiring such contacts in cases where a specific statute does not authorize a different basis for long-arm jurisdiction.

Wells Fargo & Co. v. Wells Fargo Express Co., an action under federal trademark law, is a prime example. In Wells Fargo, the Ninth Circuit Court of Appeals considered the question of personal jurisdiction over an alien defendant who was being sued on a claim arising under federal law. The court had to decide whether it “may appropriately consider not only the alien defendant’s contacts with the forum state, but also the aggregate contacts of the alien with the United States as a whole.” The district court had found the defendant’s state contacts inadequate to satisfy fourteenth amendment due process. As noted above, federal trademark law (unlike the antitrust and securities laws) contains no provisions for the extraterritorial exercise of personal jurisdiction, and therefore the district court had relied on a state long-arm statute.

The Court of Appeals considered the argument that due process, in a federal claim in a federal court, will be satisfied by an aggregation of United States contacts. But, the court specifically rejected such an approach on statutory grounds: “[N]ot only must the requirements of due process be met before a court can properly assert in personam jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature.” Since the legislature (through the Federal Rules of Civil Procedure) had not authorized a national contacts basis for federal jurisdiction, the court considered itself unable to use it.

A similar result, which follows analogous reasoning, was reached in the arena of admiralty law. Admiralty is another area in which there is no federal statutory provision for long-arm jurisdiction. In DeJames v. Mag-
nificance Carriers, Inc., a foreign defendant's contacts with the forum state were held to be inadequate to satisfy state statutory and fourteenth amendment criteria. The court therefore considered whether a "national contacts" basis for personal jurisdiction could be utilized. From constitutional and policy perspectives, the court found such an approach unobjectionable:

[T]he court believes that it is not unfair nor unreasonable as a matter of due process to consider the nationwide contacts of an alien defendant in determining whether jurisdiction exists. . . . This court also believes that many good policy reasons exist for applying the national contacts theory, particularly in those federal question cases involving alien defendants. In addition to affording greater protection to the rights of domestic plaintiffs, the national contacts approach would promote greater uniformity of treatment in actions involving federal rights since the jurisdiction of the federal court would not depend upon the liberality or conservatism of the laws in the state in which the court sits.

As in Wells Fargo, however, the court was compelled to reject the theory because of Rule 4(e)'s requirement that extraterritorial services of process "is only possible in those situations where the in-state activities of the defendant would be sufficient to invoke the long-arm statute had the defendant been sued in state court".

In another decision, Edward J. Moriarity & Co. v. General Tire & Rubber Co., a district court went to some lengths to explain that, but for Rule 4(e), a national aggregated contacts basis for extraterritorial jurisdiction would be available to a district court. The case was an antitrust action in which the question presented was whether proper jurisdiction could be asserted over a Greek company, with no office in the United States but some contacts with the forum state. The court upheld jurisdiction based on state contacts and the state long-arm statute, but only concluding that it was precluded from considering national contacts as a measure of jurisdiction:

[W]e feel that the appropriate inquiry to be made in a federal court where the suit is based on a federally created right is whether the defendant has certain minimal contacts with the United States, so as to satisfy due process requirements under the fifth amendment. . . . Unfortunately, this course has not been left open to us by the federal rules or statutes. That is, neither Congress nor the Supreme Court has provided statute or rule whereby substituted service may be made upon an alien corporation having certain minimal contacts with the United States.

33. Id. at 1283.
34. Id.
36. Id. at 390. Other federal question cases similarly declining to adopt a national con-
Although the reasoning of these cases is sound and they appear to admit of no other result, there are nevertheless several district court opinions reaching directly contrary results (i.e. holding that aggregated United States contacts may be used to support extraterritorial jurisdiction, despite the absence of statutory authorization). An example, is Cryomedics, Inc. v. Spembly, Ltd., 37 a patent action in which a British company resisted the in personam jurisdiction of the district court in Connecticut. The company argued that it did not have sufficient contacts with that state to satisfy due process. The British defendant conceded, however, that its contacts with at least one other United States jurisdiction were adequate to satisfy due process if it was sued in that other forum.38

The district court did not consider the sufficiency of the British defendant’s contacts with Connecticut. Rather, it upheld jurisdiction based upon a “national contacts” analysis. The court reasoned that since a federal court is not subject to fourteenth amendment limits on state court jurisdiction, and since the British company had adequate contacts with other jurisdictions in the United States, jurisdiction in Connecticut was proper. The court did not address Rule 4(e) or any statutory basis for long-arm jurisdiction, resting its decision essentially on its general conclusion that extraterritorial jurisdiction under the circumstances of the case would be constitutional.39

Another district court decision upholding extraterritorial jurisdiction based on a national contacts test is Holt v. Klosters Rederi A/S.40 Holt was an admiralty action in which a Norwegian corporation contended it did not have sufficient contacts with the forum state to support jurisdiction under the state long-arm statute. The court upheld its own jurisdiction on the basis that “defendant’s contacts with the United States, both qualitatively and quantitatively, are constitutionally sufficient to enable this court to render a binding judgment against it.”41

Rule 4(e) did not enter into the court’s analysis in Holt. Because the litigation presented a claim under federal law, the court reasoned neither the law of the state in which it sat (i.e., the state long-arm statute) nor

38. Id. at 292.
39. Applying the criteria of “fairness” and “reasonability” used in International Shoe, the court pointed out that, inasmuch as the British defendant had no place of business anywhere in the United States, there could be little difference to it in convenience in defending in one east coast jurisdiction (where it had requisite “contacts”) versus another (where it did not). Id. at 292.
41. Id. at 358.
the fourteenth amendment were applicable. Rather, according to the court, the jurisdictional question was one under the fifth amendment, which looks to a defendant's contacts with the United States as a whole. The court did note that even if due process were satisfied, it might, nevertheless, be restricted in the exercise of in personam jurisdiction through a statute or rule of procedure. Having ignored Rule 4(e), the court found no such restriction in this case.

_Centronics Data Computer Corp. v. Mannesmann, A.G._,\(^{42}\) is another decision basing extraterritorial jurisdiction, at least in part, on aggregated national contacts. Despite its acknowledgment that a national contact test "has not yet been generally accepted and there is no specific statutory authority for it,"\(^{43}\) the court nevertheless relied on it. The court held that where the defendant is an alien and where there is no other forum in which to litigate a claim, the defendant's aggregated contacts with the United States can support extraterritorial jurisdiction.\(^{44}\) Rule 4(e) was not discussed.\(^{45}\)

None of the foregoing cases upholding extraterritorial jurisdiction based on national contacts are consistent with the Federal Rules of Civil Procedure. As noted above, Rule 4(e) authorizes service of process pursuant to federal or state statute, "under the circumstances and in the manner prescribed in the statute." To rely on a state long-arm statute for extraterritorial service of process (as these cases do), but to ignore the circumstances under which it may be invoked (i.e., the presence of appropriate minimum contacts with the state), is a plain misapplication of Rule 4(e).

A reading of these decisions reveals, instead, that the court in each instance was presented with a situation in which the exercise of its in personam jurisdiction was reasonable and constitutional, and made practical sense under the circumstances of the case. In several of the decisions, the courts appear to have utilized a national standard in order to prevent a situation where a foreign defendant would escape federal jurisdiction because of its limited contacts with any particular state. Under

\(^{43}\) _Id._ at 664.
\(^{44}\) The court addressed personal jurisdiction from both a national contacts and state contacts perspective, and appears to have based jurisdiction on both. As to state contacts, the court observed that if they were "the sole consideration, I would hold they were not sufficient to ground jurisdiction." _Id._ at 663. However, the court concluded that "[b]ased on the defendant's physical contacts with the State, their substantial contacts with the country as a whole, and New Hampshire's interest in protecting its corporate citizens injured as a result of torts such as those alleged here, I find that this court has jurisdiction." _Id._ at 668.
these circumstances, the courts ignored the requirement of a statutory authorization for in personam jurisdiction, and relied instead on their constitutional power to bring a particular defendant before them. On policy grounds the result may be correct, but on technical legal grounds it is undoubtedly flawed.

V. A General Federal Long-Arm Statute Would Cure the Anomalies and Inconsistencies in the Current State of the Law

It is difficult to identify a rationale for the inconsistent treatment of long-arm jurisdiction in federal legislation. To be sure, the presence of authorization for extraterritorial service of process in specific statutes is understandable. For example, federal interpleader is a procedure specifically created to adjudicate in a single proceeding, the conflicting claims of various persons. This procedure would have little practical value if it could not reach all interested parties, regardless of their contacts with a particular forum. Moreover, the nationwide jurisdiction of the Court of International Trade is explainable because there is only one such court in the United States.

On the other hand, it is difficult to explain why federal long-arm jurisdiction is available for antitrust and securities law actions, but not for admiralty, patent, trademark, and civil rights actions. And even among statutes with long-arm authorization, there are differences which are difficult to explain. Under the Clayton Act, for example, long-arm jurisdiction is available if venue is proper, with venue based on contacts with the forum state (i.e., presence or doing business). The securities law also collapses personal jurisdiction into venue and allows venue to be had in any district in which an unlawful event occurred. Long-arm jurisdiction over any defendant, regardless of its contacts with the district is then available if venue is proper.

It is likely that the differing statutory treatment of long-arm jurisdic-

46. See supra note 7.
47. See supra note 24 and accompanying text.
A distinctly minority view is that extraterritorial in personam jurisdiction under the antitrust laws may be exercised without regard to forum state contacts. See General Electric Co. v. Bucyrus-Erie Co., 550 F. Supp. 1037 (S.D.N.Y. 1982).
49. Rule 4(e)'s reliance on state long-arm statutes, when no federal statute is available, creates its own differences of in personam jurisdiction from judicial district to judicial district, since there are differences (albeit not great ones) among the long-arm statutes of various states.
This, however, is not the only example of differing treatment of federal question cases depending on the district in which suit is brought. Another is where federal law provides no limitation period on bringing a federal claim, in which case state law provides no limitation period. See, e.g., Holmberg v. Armbrecht, 327 U.S. 392 (1945).
tion under various federal laws occurred unintentionally, rather than as the result of deliberate legislative choice to authorize extraterritorial jurisdiction in one context and not the other, or to expand its scope in one instance and contract it in another. The legislative history of the long-arm sections of the anti-trust laws, for example, does not reveal any particular rationale or theory on which those sections were based, other than to maximize personal jurisdiction.\textsuperscript{50}

With regard to Rule 4(e), nothing in it or its history reveals a specific reason why long-arm jurisdiction in federal question cases is limited to situations in which there is specific statutory authorization, or a state long-arm statute. As originally adopted in 1937, Rule 4(e) read:

Whenever a statute of the United States or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

The provision is essentially the first sentence of the current rule, authorizing extraterritorial service pursuant to a federal statute. The Advisory Committee Note to this subpart merely states that various federal long-arm statutes available in specific causes of action "are continued by this rule."\textsuperscript{61}

Rule 4(e) was amended only once, in 1963, when what currently appears as its second sentence was added, permitting service of process pursuant to a state long-arm statute. It is clear from the Advisory Committee Note accompanying the new subparagraph that the amendment was intended to accommodate the development of the new principles of state extraterritorial jurisdiction following the landmark 1945 \textit{International Shoe} decision:

The second sentence, added by amendment, expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on nonresident parties (as well as on domiciliaries not found within the State). . . . The necessity of satisfying subject-matter jurisdictional requirements and requirements of venue will limit the practical utilization of these methods of effecting service. Within those limits, however, there appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts. [Citations omitted]. . . . If the circumstances of a particular case satisfy the applicable Federal law (first sentence of Rule 4(e), as amended) and the applicable State law (second sentence), the party seeking to make the service may proceed

\textsuperscript{50} The only discussion of long-arm jurisdiction in the legislative history of the Clayton Act is in S. REP. NO. 698, 63d Cong., 2d Sess. 49 (1914), where it is merely noted that the provision "require[s] no special explanation here."

under the Federal or the State law, at his option.\footnote{52} 

Why the Supreme Court did not go further in the 1963 amendment to Rule 4(e) and allow federal in personam jurisdiction to the fullest extent permitted by the Constitution, is not explained. However, it does not appear that the Advisory Committee ever considered such action.\footnote{53}

The absence of a general authorization for long-arm jurisdiction, whether by statute or rule, not only creates anomalies, such as alien defendants with U.S. contacts not being amendable to suit, but may actually frustrate Congressional intent as expressed in several venue statutes. Probably the most prominent example is the alien venue statute,\footnote{54} permitting an alien to be sued in any district. With such a provision, Congress has apparently determined that the relative convenience of a defendant is of no relevance if that party is an alien. Yet, when suit is brought under federal legislation in which a state long-arm statute must be used, a plaintiff must nevertheless search for a district court in a state in which the alien defendant has the “minimum contacts” necessary to satisfy the state long-arm statute. Thus, the freedom which Congress gave in section 1391(d) regarding choice of forum, Rule 4(e) takes away by imposing state contacts as an additional requirement for in personam jurisdiction.\footnote{55}

A fifth amendment “U.S. contacts” test of jurisdiction makes excellent sense in such a situation.

Even the general venue provision for federal question actions — authorizing suit in any district where all defendants reside or in which the claim arose,\footnote{56} may be undermined by a state contacts requirement. “State contacts” means that federal question litigation against multiple defendants residing in different districts, could occur in a single forum only if the plaintiff were fortunate enough to be suing defendants who had the necessary “minimum contacts” with that jurisdiction. If, for example, the claim arose in the Southern District of New York, and one of the defendants was a California corporation with no contacts in New York, but

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52. Id. at 4-32. Prior to International Shoe, the extraterritorial jurisdiction of state courts was still constrained by the territorial concepts of Pennoyer v. Neff, 95 U.S. 714 (1877). Thus, even in the case of pre-International Shoe non-resident motorist statutes, which conferred in personam jurisdiction over out-of-state motorists involved in automobile accidents in the state, the perceived need for in-state service was satisfied by the fiction of a state official (e.g. a commissioner of motor vehicle licensing) being deemed the out-of-state motorists’ in-state agent for service of process. See e.g., Hess v. Pawlowski, 274 U.S. 352 (1927).

53. The American Law Institute, in its 1969 Study of the Division of Jurisdiction Between State and Federal Courts, published a proposed new Title 28 of the U.S. Code in which, in §1314(d), nationwide service of process would be available in all federal question cases.


55. The requirement is also artificial as one to secure in personam jurisdiction because such jurisdiction, in a federal question case in a federal court, need not be based on state contacts to satisfy due process.

56. 28 U.S.C. §1391(b) (1982).}
with a branch office across the Hudson River in New Jersey, an action against all defendants could not be brought in the Southern District of New York.

Requiring the federal court in New York to depend on minimum contacts with that state in such a situation makes little sense. Constitutionally, the process of the New York court could extend to the California corporation, and the presence of its branch office in New Jersey assures that defending itself in New York would not be burdensome or inconvenient. 57

CONCLUSION

In an era of high-speed travel and instantaneous communications, reliance on state borders to determine the in personam jurisdiction of federal courts in federal question cases is an anachronism. The extension of federal in personam jurisdiction to the fullest extent permitted by the Constitution would facilitate the closing of a loophole alien corporations have used to escape federal jurisdiction, and would also economize federal litigation against multiple domestic parties by providing a single forum for adjudication of most claims. 58 It would also avoid the time and effort spent in litigating 12(b) motions based on lack of personal jurisdiction, when the issue is limited to the technicality of whether a large foreign corporation with extensive U.S. contacts has sufficient contacts with the forum state. Cases of legitimate inconvenience to litigants arising from such expanded jurisdiction could be resolved through careful application of the forum non conveniens doctrine.

Although a few courts have attempted to fashion such a federal long-arm jurisdiction on a common law basis, it appears that it is up to Congress or the Supreme Court (through an amendment to the Federal Rules of Civil Procedure) properly to achieve such a result.

57. Any burden or inconvenience that would occur if a “state contacts” test were abandoned—for example, if the branch office of the California corporation discussed in the text were located in Baltimore rather than Newark—could be addressed in a forum non conveniens motion.

58. From a policy perspective, there is little difference between federal venue statutes and modern principles of personal jurisdiction, since both direct litigation to a forum having some substantial relationship to either the claim or the defendants. Cf., 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE §1063 (1969).
CRITICAL ESSAYS

We have introduced this new "critical essays" section in order to accommodate the vast, yet often overlooked body of work written by legal scholars on contemporary political and policy issues. We frequently receive manuscripts in this subject area, and for years have decided against publication because so much of this work does not conform with the standard criteria for "law review articles"—either for lack of extensive documentation or fully developed legal analysis. However, the Journal recognizes the inextricable link between law, politics and policy, and we have decided to publish, on a periodic basis, those works which elucidate important positions on the most critical issues of our day.

"Critical Essays" is a forum for viewpoints. These articles are intended as articulate expressions of current concerns, by scholars and practitioners with expertise in the matters explored in this forum. Whenever possible, the Journal will allow the divergence of views on these matters to remain intact and uninhibited. It should be noted that the opinions expressed are solely those of the authors and not of the Journal. We welcome reader response.

The Board of Editors
Ignoring International Law: U.S. Policy on Insurgency and Intervention in Central America

Louis René Beres*

"I can assure you that in this Administration, our actions will be governed by the rule of law; and the rule of law is congenial to action against terrorists." Secretary of State George Shultz**

Early in May, 1985, undaunted by Congressional opposition to further funding for the contra rebels,1 President Reagan urged plans to embargo all trade between Nicaragua and the United States. These plans, representing the latest response to what the President calls Nicaragua's "aggressive activities in Central America,"2 express a continuing U.S. pattern of disregard for the normative requirements of international law. Nurtured by fear that Nicaraguan activities are "supported by the Soviet Union and its allies,"3 they are offered without any respect for the peremptory principles of non-intervention and self-determination.

Curiously, in defending its forceful actions against the Sandinista government, the Reagan administration no longer feels the need for legal justifications. Although these actions were originally defended largely in terms of the U.N. Charter's Article 51 provision for collective self-defense (i.e., that they were undertaken by the U.S. in law-enforcing response to alleged Nicaraguan support for anti-government rebels in El Salvador),4 the current position of the Reagan administration is grounded exclusively upon geopolitical considerations. As a result, the Reagan administration

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1. At the time of this writing, there is evidence that this opposition may end and that further support for U.S. military intervention in the internal affairs of Nicaragua will receive Congressional authorization.


3. Id.

seriously undermines worldwide respect for the rule of law. The most visible and dramatic manifestations of this country's "outlaw" behavior are: (1) its wanton disregard for the territorial and jurisdictional integrity of another state, and (2) its decision, announced on January 18, 1985, not to participate further in proceedings of the case brought by Nicaragua in the International Court of Justice. 5

Initially, the Reagan administration also sought to justify its support for contra activities in terms of the principle of humanitarian intervention. It has now muted this rationalization, however, in the face of obvious policy contradictions. Since the administration continues to support other regimes in the region that are vastly more repressive than that of the Sandinistas, 6 its alleged concern for human rights is merely a contrivance. Indeed, it is now plain that U.S. tactics in Central America are motivated entirely by Realpolitik and by the desolate machinations of anti-Sovietism.

From the standpoint of modern international law, humanitarian intervention certainly has its place. Operating within the severely limiting context of a decentralized and sovereignty-centered system—one without collective enforcement machinery—individual states must increasingly act on their own to protect and promote human rights. In this connection, however, the standard for permissible intervention must hinge, inter alia, on more than ideological motives and it must be applied uniformly wherever egregious violations are in evidence. The sharply divergent and in-


6. According to the opening paragraph of the AMNESTY INTERNATIONAL REPORT: 1984 listing for Nicaragua: "Amnesty International's concerns included trials of political prisoners which fell short of internationally accepted standards; the detention of prisoners of conscience; the detention of political prisoners after their sentence had expired; and the prolonged incommunicado detention of political prisoners in the custody of the Dirección General de Seguridad del Estado (DGSE), Department of State Security. Amnesty International welcomed the release in a December 1983 amnesty of most of the Miskito and Sumo Indian prisoners known to the organization, some of whom it had believed were prisoners of conscience." AMNESTY INTERNATIONAL REPORT: 1984 at 178.

A comparison with the opening paragraph of Amnesty's 1984 assessment of El Salvador suggests a significantly greater respect for human rights in the Sandinista regime. Regarding El Salvador: "Amnesty International remained gravely concerned about the continued involvement of all branches of the security and military forces in a systematic and widespread program of torture, mutilation, 'disappearance' and the individual and mass extrajudicial execution of men, women and children from all sectors of Salvadoran society. Paramilitary civilian defense squads which operated under military supervision as well as so called 'death squads' were also consistently named as having been responsible for such abuses." Supra at 148. Despite the Reagan administration's assurances that Salvadoran human rights have significantly improved after the latest elections, these assurances are utterly without empirical foundation. In the words of the Americas Watch Report on Human Rights and U. S. Policy in Latin America: "The human rights situation in El Salvador continues to be bleak and heading for no significant improvement." See WITH FRIENDS LIKE THESE 138 (C. Brown ed. 1985).
consistent policies adopted by the Reagan administration in Central America regarding “totalitarian” and “authoritarian” states fail to meet this standard.

Within the current system of international law, external decision-makers are authorized to intercede in certain matters that might at one time have been regarded as internal to a particular state. While, at certain times in the past, even gross violations of human rights were defended by appeal to “domestic jurisdiction,” today’s demands for exclusive competence must be grounded in far more than an interest in avoiding “intervention.” This trend in authoritative decision-making toward an expansion of the doctrine of “international concern” has been clarified by Lauterpacht’s definition of intervention:

Intervention is a technical term of, on the whole, unequivocal connotation. It signifies dictatorial interference, in the sense of action amounting to a denial of the independence of the State. It implies a demand which, if not complied with, involves a threat of, or recourse to, compulsion, though not necessarily physical compulsion, in some form.7

We can see, therefore, that intervention is not always impermissible, and that, indeed, any assessment of its lawfulness must always be contingent upon intent. Applying Lauterpacht’s standard, where there is no interest in exerting “dictatorial interference,” but simply an overriding commitment to the protection of human rights, the act of intervening may represent the proper enforcement of pertinent legal norms. This concept of intervention greatly transforms the exaggerated emphasis on “domestic jurisdiction” that has been associated improperly with individual national interpretations of Article 2(7) of the Charter and, earlier, with Article 15(8) of the Covenant of the League of Nations. By offering a major distinction between the idea of self-serving interference by one state in the internal affairs of another state and the notion of the general global community’s inclusive application of law to the protection of human dignity, it significantly advances the goal of a just world order.8 But there must be consistency. In Grenada, the Reagan administration—faced with a threat from what the President described as “leftist thugs”—responded

8. The importance of the changing doctrine of “intervention” to the shift in global “allocation of competences” was prefigured by the Tunis-Morocco case before the Permanent Court of International Justice in 1923. In this matter, the Court developed a broad test to determine whether or not a matter is essentially within the “domestic jurisdiction” of a particular state; “The question whether a certain matter is or is not solely within the domestic jurisdiction of a state is an essentially relative question: it depends upon the development of international relations.” Although this test is hardly free of ambiguity, it does clarify that the choice between “international concern” and “domestic jurisdiction” is not grounded in unalterable conditions of fact, but rather in constantly changing circumstances that permit a continuing adjustment of competences. It follows that whenever particular events create significant violations of human rights, the general global community is entitled to internationalize jurisdiction and to authorize appropriate forms of decision and action.
with a "liberating" invasion. In Guatemala, however, where almost a quarter of a million people have been exterminated during the past thirty years by a succession of military dictatorships, the administration favors the perpetrators of regime terror. Similar patterns of U.S. support are enjoyed by the Stroessner regime in Paraguay, which practices genocide against the Ache Indians under the approving eyes of the American embassy in Asuncion, and by the Pinochet regime in Chile, which defiles essential human rights on an almost equally savage scale.

Repression spawns rebellion. Although international law has consistently condemned particular acts of international terrorism, it has also made very clear that not all forms of insurgency are instances of terrorism. In fact, it has approved certain forms of insurgency that derive from "the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination. . . ." This exemption, from the 1973 General Assembly Report of the Ad Hoc Committee on International Terrorism, is corroborated by

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9. The invasion of Grenada by U.S. military forces took place on October 25, 1983: Led by 1900 U.S. Marines and Army Airborne Rangers, the invasion force also included 300 troops representing Jamaica, Barbados, Dominica, St. Lucia, Antigua and St. Vincent. By October 30, the invasion had been completed and the island—a microstate located in the southeastern Caribbean was "militarily secure." The stated U.S. governmental rationale for the invasion was to protect the 1100 U.S. nationals residing on Grenada, including some 650 students at the St. George's University School of Medicine, and to meet an urgent request by six Caribbean states that the U.S. assist in restoring political order on Grenada (states belonging to the Organization of Eastern Caribbean States (OECS), a regional body formed by treaty in 1981). Moreover, in view of the President's explicitly-stated concern over the 9000 foot airport runway then being constucted by Cubans at Point Salines (a facility feared as a potential fueling stop for Soviet planes carrying arms and other military equipment to Nicaragua and as a base for launching "subversive operations" throughout the lower Caribbean basin), the invasion was also intended to counter Soviet-Cuban influence in the region. Indeed, there is little question that its actual purpose was preeminently to depose the leftist military junta that had seized power after the coup against Prime Minister Maurice Bishop, and then to install a government to the United State's liking. None of these stated justifications, however, meets the requirements of international law. Although it is conceivable that the lives of U.S. citizens had been endangered, the actual military operation took the form of a wholesale assault against the authority structure of another government. To meet the expectations of long-standing customary international law, the intervention should have been severely restricted in application: i.e., it ought to have been conducted as a limited-purpose rescue mission.

As for the rationale of collective action, nowhere in the operative collective security provision of the 1981 OECS Treaty (Art. 8) is there an option to invite outside assistance against a member state (the U.S. is not a party to this Treaty). Furthermore, Article 8 deals with "collective defense and the preservation of peace and security against external aggression," yet there was no external aggressor. OECS Article 8 also requires unanimous agreement among member states before action can be taken, and that condition was never fulfilled. Finally, and this is perhaps the central flaw of the invasion's rationale, no state has the right under international law to intervene militarily in the affairs of another state because it finds another regime ideologically distasteful or potentially harmful. Rather, international law expects that every state be free to choose its own form of political institutions under the principle of "self determination". There is no support under international law for "anticipatory self-defense" if the danger posed is purely hypothetical.
Article 7 of the 1974 Definition of Aggression by the U.N. General Assembly.\(^\text{10}\)

International law has also approved certain forms of insurgency that are directed toward improved human rights where repression is neither colonial nor racist. Together with a number of important covenants, treaties and declarations, the U.N. Charter codifies many binding norms on the protection of human rights. Comprising a human rights “regime,” these rules of international law are effectively enforceable only by the actions of individual states or by lawful insurgencies (i.e., those that combine “just cause” with respect for the humanitarian rules of war.)

Where it is understood as resistance to despotism, revolutionary insurgency has its roots as accepted practice in the Bible and in the writings of ancient and medieval classics. Support for such insurgency is not the creation of modern international law. The tyrannicide motif can be found in Aristotle’s Politics, Plutarch’s Lives, and Cicero’s De Officiis. In the Preamble to the U.N. Charter, the peoples of the United Nations re-affirm their faith “in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small” and their determination “to promote social progress and better standards of life in larger freedom.”

Article 1 lists a main purpose of the U.N. as “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.” Similarly, in Article 55, the Charter seeks “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” And in Article 56, all members of the United Nations “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

Reinforced by an abundant body of ancillary prescriptions, this obligation stipulates that the legal community of humankind must allow, indeed require, “humanitarian intervention” by individual states in certain circumstances. Of course, such intervention must not be used as a pretext for aggression and it must conform to settled legal norms governing the use of force, especially the principles of discrimination, military necessity and proportionality. Understood in terms of the long-standing distinction between \textit{jus ad bellum} and \textit{jus in bello}, this means that even where the “justness” of humanitarian intervention is clearly established, the means

\(^{10}\) Interestingly enough, the most recent official U.S. government definition of terrorism does not allow for “just cause.” According to a September 1984 definition offered by the Department of State, Bureau of Public Affairs: “Terrorism is the use or threatened use of violence for political purposes to create a state of fear that will aid in extorting, coercing, intimidating or otherwise causing individuals and groups to alter their behavior.” See \textit{International Terrorism}, DEP’T. ST. BULL. (Sept. 1984). By this definition, of course, the 18th century revolutionary insurgency that led to the creation of the United States was \textit{pure terrorism}. Similarly, The U.S.-supported contras are also terrorists by this definition.
used in that intervention must not be unlimited. The lawfulness of a cause does not in itself legitimize the use of certain forms of violence.

We have seen, therefore, that contemporary international law concerning human rights is necessarily founded upon a broad doctrine of humanitarian intervention. Indeed, it is the very rationale of the prevailing human rights regime to legitimize an “allocation of competences” that favors the natural rights of humankind over any particularistic interests of state. Yet, there is no evidence that U.S. support for the contras is at all consistent with the imperative to oppose repressive governments. With such support, this country is not acting on behalf of the international law of human rights. Rather, it is acting only to restore authoritarian repression to Nicaragua. Although this design does not flow from any principled preference for regime terror, but solely from the presumption that such terror is a “necessary evil” in the struggle against Marxism, it represents a prima facie instance of aggression. Moreover, since U.S. support for contra rebels is directed against a country with which it has formal diplomatic relations, this aggression may represent a remarkably disingenuous instance of lawlessness.

In support of the principle that foreign intervention is unlawful unless it is understood as an indispensable corrective to gross violations of human rights, most texts and treatises on international law have long expressed the opinion that a state is forbidden to engage in military or paramilitary operations against another state with which it is not at war. Today, the long-standing customary prohibition against foreign support for lawless insurgencies is codified in the U.N. Charter and in the authoritative interpretation of that multilateral treaty in the 1974 U.N. General Assembly Definition of Aggression.

The legal systems embodied in the constitutions of individual states are a part of the international legal order and are, therefore, an interest that all states must defend against aggression. This peremptory principle was expressed by Lauterpacht. According to Lauterpacht, the following rule concerns the scope of state responsibility for preventing acts of insurrection or terrorism against other states:

International law imposes upon the State the duty of restraining persons within its territory from engaging in such revolutionary activities against friendly States as amount to organized acts of force in the form of hostile expeditions against the territory of those States. It also obliges the States to repress and discourage activities in which attempts against the life of political opponents are regarded as a proper means of revolutionary action.

Lauterpacht's rule reaffirms the Resolution on the Rights and Duties of Foreign Powers as Regards the Established and Recognized Governments in Case of Insurrection adopted by the Institute of International

Law in 1900. His rule, however, stops short of the prescription offered by the 18th century Swiss scholar, Emerich de Vattel. According to Book 2 of Vattel's The Law of Nations, which states that support insurgency directed at other states becomes the lawful prey of the world community:

If there should be found a restless and unprincipled nation, ever ready to do harm to others, to thwart their purposes, and to stir up civil strife among their citizens, there is no doubt that all others would have the right to unite together to subdue such a nation, to discipline it, and even to disable it from doing further harm.13

In the aftermath of the Holocaust, the philosopher Karl Jaspers considered the question of German guilt. In this connection, he wrote: "There exists a solidarity among men as human beings that makes each co-responsible for every wrong and every injustice in the world, especially for crimes committed in his presence or with his knowledge. If I fail to do whatever I can to prevent them, I too am guilty." Understood in terms of the Reagan administration's refractory disregard for ongoing crimes against humanity in Central America, Jaspers' doctrine suggests an urgent need to confront overriding Nuremberg obligations while there is still time. Should we, as Americans, continue to support only lawless forms of destabilization, we shall surely lose our historic commitment to justice.

From the point of view of the United States, the Nuremberg obligations are doubly binding. This is the case because these obligations represent not only current normative obligations of international law, but also the doctrinal obligations engendered by the American political tradition. By their codification of the principle that fundamental human rights are not an internal question for each state, but an imperious postulate of the international community, the Nuremberg obligations represent a point of perfect convergence between the law of nations and the jurisprudential/ethical foundations of the American Republic.

The United States has been committed to the idea of a Higher Law from its beginnings. Codified in both the Declaration of Independence and in the Constitution, this idea is based upon the acceptance of certain principles of right and justice that prevail because of their own obvious merit. Eternal and unchangeable, they are external to all acts of human will and interpenetrate all human reason.

This idea and its attendant tradition of human civility runs continuously from elements of Mosaic Law and Greek philosophy to the American Revolution of 1776. By its actual conveyance of higher law or natural law thinking into American political theory, John Locke's Second Treatise on Civil Government echoed a more than two-thousand year tradition that the validity of civil law must always be tested against pre-existent natural law. The codified American "duty" to revolt when governments

commit "a long train of abuses and usurpations" flows from Locke's notion that civil authority can never extend beyond the securing of man's natural rights.

Significantly, the Declaration of Independence codified a social contract that set limits on the power of any government. Its purpose was to define a set of universally valid constraints upon secular political authority. Since justice, which is based upon natural law, binds all human society, the rights articulated by the Declaration of Independence cannot be reserved only to Americans. Rather, they must extend to all human societies, and can never be revoked by positive or municipal law. It follows that the principles of our own Declaration of Independence must shape not only our own domestic political relations, but our relations with other peoples as well. To do otherwise would be illogical and self-contradictory, since it would nullify the timeless and universal law of nature from which the Declaration derives. Indeed, this idea was reaffirmed recently by Secretary of State George Shultz:

All Americans can be proud that the example of our Founding Fathers has helped to inspire millions around the globe. Throughout our own history, we have always believed that freedom is the birthright of all peoples and that we could not be true to ourselves or our principles unless we stood for freedom and democracy not only for ourselves but for others.¹⁴

Curiously, the United States, founded upon the principles of revolution, has become the archetype of counter-revolution. Guided by shortsighted economic considerations and supremacist politics, it has propped up oligarchies, spawned militarism and thwarted hesitant national struggles to enter the modern world. In this connection, Octavio Paz, the Mexican poet and essayist, has commented:

This is tragic because American democracy inspired the fathers of our Independence and our great liberals like Sarmiento and Juarez. From the 18th century onward, for us modernization has meant democracy and free institutions: and the archetype of this political and social modernity was United States democracy. History's nemesis: in Latin America the United States has been the protector of tyrants and the ally of democracy's enemies.¹⁵

Nuremberg established, beyond any doubt, the continuing validity of natural law. While the indictments of the Nuremberg Tribunal were cast in terms of existing or positive international law, the actual decisions of the Tribunal reject the proposition that the validity of law depends upon its "positiveness." The words used by the Tribunal ("So far from it being

¹⁵. Paz, Latin America and Democracy, in DEMOCRACY AND DICTATORSHIP IN LATIN AMERICA 9 (1982) (a special publication devoted to the voices and opinions of writers from Latin America, Foundation for the Independent Study of Social Ideas).
unjust to punish him, it would be unjust if his wrongs were allowed to go unpunished") derive from the principle *nullum crimen sine poena* (no crime without a punishment). This principle is a clear contradiction of the underlying thesis of positive jurisprudence, the idea of *nulla poena sine lege* (no punishment without a written law).

As an answer to the question, "What is law?", international law now rejects all solutions that substitute force for justice. Rather than accept a distinction between the "concept" and the "ideal" of law, international law now recognizes that concept and ideal coincide. In the fashion of all other legal systems, the law of nations is a branch of ethics. Taken together with the understanding that the supremacy of natural law has always been a part of the American political tradition, and that the current position of international law is largely an "incorporation" of this tradition, this conclusion signals a compelling imperative for change in the direction of American foreign policy on human rights.

To meet its obligations, the Reagan administration must first bring its policies into line with its stated principles. In its most recent issue of *Country Reports on Human Rights Practices* (1984), the U.S. Department of State stipulates that:

> our human rights policy has two goals. . . . First, we seek to improve human rights practices in numerous countries. . . . A foreign policy indifferent to these issues would not appeal to the idealism of Americans, would be amoral, and would lack public support. . . . As the second goal of our human rights policy, we seek a public association of the United States with the cause of liberty.16

These are decent and correct objectives of a nation's foreign policy. The problem, of course, is that they are not a truthful expression of our policy. They are intended exclusively for domestic and international political consumption. They have nothing whatever to do with the operational standards for U.S. involvement in other countries. They are a lie.

The Reagan administration embraces only one standard of judgment concerning American foreign policy: anti-Sovietism. Human rights have nothing to do with this standard. It follows from this standard that efforts to overthrow allegedly pro-Soviet regimes are always conducted by "freedom fighters" (even where these efforts involve rape, pillage and murder17 and where these regimes are substantially less repressive than

16. The Department of State is required to enforce the human rights provisions mandated by section 116(d) and 502B(b) of the Foreign Assistance Act of 1961 as amended. The Country Reports are also interesting for the strikingly different way they identify abuses in "authoritarian" and "totalitarian" regimes and for their sharply different assessments from those supplied by such independent human rights organizations as Amnesty International and Americas Watch. See supra note 6 and accompanying text.

17. Ironically, Secretary of State Shultz has often stated his commitment to the laws of war of international law, and to the understanding that these humanitarian rules of armed conflict apply as well to insurgent forces. According to Shultz: "The grievances that terrorists supposedly seek to redress through acts of violence may or may not be legitimate.
those of several U.S. allies) while efforts to oppose anti-Soviet regimes (even where these efforts are essentially non-violent and undertaken by the victims of genocidal regimes) are always conducted by "terrorists."

Consider President Reagan's press conference of March 21, 1985, where he stated that the 17 blacks recently shot by South African police had not been "simply killed," but were the excusable casualties of "rioting." Moments later, reacting to a question about Nicaragua, the president defended the use of force against a "Communist tyranny." In other words, rebellion against apartheid must always be peaceful, while opposition to Sandinista rule must inevitably be violent. (This from the president of a country founded upon the principle of "just cause" for revolution).

With this view, black South Africans—although understandably unhappy to be martyred by a uniquely repressive regime—are instructed to be "patient" as the U.S. continues its policy of "constructive engagement." At the same time, contra rebels—widely and authoritatively associated with the execution of noncombatants in Nicaragua and with death-squad activities in El Salvador and Honduras (not to mention their association with neo-Nazi groups in the United States)—are embraced by the President as "our brothers." These "freedom fighters," said the President on March 1, "are the moral equal of our Founding Fathers."

The central problem lies in this country's identification of East/West competition as the only meaningful axis of global conflict. Since such identification makes anti-Sovietism the centerpiece of its policy on human rights, the United States now fully accepts the pernicious doctrine that might equals right. Rejecting former President Carter's declaration of independence from "that inordinate fear of communism which once led us to embrace any dictator who joined us in that fear," it now offers a parody of lawful and pragmatic behavior. Like a moth dancing in its own flame, the U.S. is moved not by reason but by illusions of immortality.

The Reagan administration claims that it has now begun to change its earlier views on human rights. Yet, there has been nothing to transform its understanding of these rights as an instrument of the Cold War. Clinging to the Manichean imagery of remorseless conflict between the American Sons of Light and the Soviet Sons of Darkness, it is guided not by the exigencies of politics but by the imperatives of "theology." With such a desolate set of prescriptions, the President's trip to Bitburg Cemetery in West Germany becomes easy to explain: We must learn to overlook Nazism in order to compete effectively with the Soviets. Nazism was

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The terrorist acts themselves, however, can never be legitimate. And legitimate causes can never justify or excuse terrorism. Terrorist means discredit their ends." Bureau of Public Affairs, U.S. Dep't. of State, Current Policy No. 629, Terrorism and the Modern World 3 (Oct. 25, 1984).

bad, but he would have us believe, only Communism is unforgivable.

In one of his best stories, Jorge Luis Borges, the Argentine writer, describes a time in the future wherein governments no longer exist and politicians have gone on to do what they are most capable of doing (". . . some of them made good comedians or good faith healers. . . "). For the moment, however, we must continue to deal with national leaders who are hopelessly entombed by their barren imaginations and by the banal syntax of power politics. Living outside of history, in parentheses, these leaders will continue to oppose all forms of promising metamorphoses.

The United States now founds its human rights policy on the premises of unreason. During the next several years, this policy will fail completely in terms of its own Realpolitik objectives as well as an instrument of justice. In Nicaragua, for example, it is evident that the contras, even with U.S. aid, have no chance of overthowing the government. Moreover, the prospect of Nicaragua becoming a satellite of the Soviet Union is tied directly to Sandinista fears of continuing U.S. aggression. In other words, the current policies of the U.S. regarding Nicaragua are not only unlawful, they are also self-defeating. They threaten to create the very conditions they intend to prevent. Without a return to international law, the prophecies of "another Cuba" will be self-fulfilled.

Should the Reagan administration continue to turn its back on international law in Central America, the victims of U.S.-backed repression will eventually throw out their rulers. In the fashion of Nicaragua, each successor government will join an expanding legion of states opposed to the United States. Even more important, however, this country will lose its capacity to bear witness as a righteous nation. A sinister parody of its own best traditions, it will forfeit any remaining claims to moral leadership, claims that lie at the heart of our widely-alleged superiority to the Soviet Union.
Confusing Victims and Victimizer:
Nicaragua and the Reinterpretation of
International Law

ROBERT A. FRIEDLANDER*

"The United Nations is the most concentrated assault on moral reality in the history of free institutions, and it does not do to ignore that fact or, worse, to get used to it." William Buckley

"International law is that thing which the evil ignore and the righteous refuse to endorse." Leon Uris

From the time of its earliest beginnings down to the present day, public international law has been something less than a search for the Holy Grail. Roman precedent provided the fertile soil for the roots of international law, the writings of Augustine and Aquinas aided in its evolution, the development of sixteenth and seventeenth century classical theory provided a firm foundation, and it was finally implemented by the political realities surrounding the Peace of Westphalia. As it has evolved over the past four and one-half centuries, the prime purpose of the law of nations has been to prevent the emergence of a Darwinian global order. The discredited political credo of the ancient world was that "might made right." The charge of hostile critics in the present century, who argue that international law has failed to achieve its grandiose objectives, has been that international law is merely what the international lawyers declare it to be. A jaundiced contemporary observer might add that international law, when viewed from a U.N. perspective, is what the anti-Western bloc in the United Nations wants it to be.

International law does not consist of a fixed system of binding rules imposed upon nation-states by the collective will of a world community.

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The opinions presented in this article are solely those of the author and do not reflect in any way the views of the Subcommittee on the Constitution or of the Senate Judiciary Committee.

4. Cf., e.g., MOYNIHAN & WEAVER, supra note 1, at 39-288.
There is, for all intents and purposes, no compulsory judicial process. Professor Beres writes of a law of the U.N. Charter and implies that it contains a codified expression of international law. Professor Sohn optimistically, and unrealistically, entitled a casebook of a generation ago: *Cases on United Nations Law*, and then went on to write, in a second, revised edition about a "constitutional law of the United Nations." Yet, despite their admonitions and exhortations, post-Charter international law is not doing the job for which its advocates maintain it was intended.

Public international law is not a statutory system. It operates upon a horizontal rather than a vertical plane and lacks a generalized means of enforcement or coercion. Economic sanctions, as one form of coercion, have not worked well, even when legitimated at the world community level under the auspices of either the League of Nations or the United Nations. The international legal process functions now, as in the past, on the basis of comity, reciprocity, and mutuality. It is aided by treaties and conventions, which in turn rely upon the principle of *pacta sunt servanda*, the good faith obligation to carry out treaty terms.

Treaties and conventions historically have provided much of the substantive nature of international law, though custom and tradition (particularly in the form of general practice) have been held to be of almost equal significance. Professor D'Amato calls custom "perhaps the most basic and most important of the secondary rules of international law. . . ." Custom deals with a habitual activity more than a required pattern of activity. Not by accident is pre-Charter international law often called customary international law. Professor van Hoof, in his somewhat controversial study of the sources of international law, claims that "custom is in decline." A modern post-Charter tendency among the non-Western United Nations majority is to emphasize the third category listed by Article 38 of the Statute of the International Court of Justice—"the general principles of law recognized by civilized nations." The non-Western majority in the U.N. takes this view because they are able, by means of General Assembly declarations and resolutions, to refashion or to reinterpret existing international norms, as well as to invent new ones.

What, then, is left as to the definitional aspect of international law? Despite the extravagant claims made by its political advocates and academic acolytes, perhaps the most appropriate description is the famous statement made by Justice Potter Stewart about a more exotic subject, but which certainly can be made applicable to international law: I can't define it, and I can't explain it, but I sure as heck know it when I see it.

International law is like its municipal counterpart in the sense that its structure and institutions are merely reflective of the aspirations, ambitions, and conduct of humankind. Not all of these characterizations are particularly noble. In essence, public international law turns out to be a code of generalized behavior governing the relations of nation-states. It is not, as Professor Beres implies, a set of absolute principles to be enforced and obeyed by the world community of nations. Whatever international law is, it definitely is not a "branch of ethics."\(^{10}\)

Public international law deals with such things as recognition of new governments, creation of new states, the transfer of sovereignty, treaty interpretation, determination of national and international boundaries, self-defense, the laws of war—all being of prime importance in the turbulent and chaotic contemporary world. Whether it be Central America, the Middle East, or Southeast Asia, the fundamental challenge for the international legal system remains the same: How can stability and order be introduced into regions where radical change is the desired end, and violence accompanied by disorder is the accepted and even the legitimated means?

The twentieth century is unique in the history of international law in that twice, following two prolonged global conflicts, an international security organization was created representing the world community of nations. Each time the organization in question was given the express function of preserving a minimum standard of world order. Both the League of Nations and the United Nations were, in origin and by design, collective security mechanisms which were specifically intended to maintain and keep the peace. The League made a weak attempt and inevitably failed. The United Nations in this respect seems to be following the same path.\(^{11}\)

Before the Second World War, in fact dating back to its very origins, international law dealt primarily, if not exclusively, with nation-states. Individuals, at best, were merely the objects of international law and not the subjects. Since the end of the Second World War, largely as a result of the Nuremberg trials, the U.N. Charter, and the Universal Declaration of Human Rights have brought individuals within the protection of the international legal system. But so-called human rights "law" remains a questionable body of principles, confusing and confounding the more set-


tled norms (themselves still debated) of public international law. Professor Beres has added to the confusion, and to the scholarly cacophony, by melding together human rights, humanitarian intervention, and international law.

The claim that "contemporary international law concerning human rights is necessarily founded upon a broad doctrine of humanitarian intervention," is plainly in error. Humanitarian intervention, in the post-Charter decades, is a highly controversial concept which has occasioned a deep split among legal publicists. Humanitarian intervention can be a legitimate and necessary remedy in certain well-defined instances (i.e.-terrorists hostage seizure incidents), but non-Western support for this approach barely exists. The problem with Beres' analyses, and those by a number of other critics of the Reagan Administration, is that they coningle and coalesce principles, norms, and rights, using these terms interchangeably, without careful distinction and delimitation. Their theoretical view of the law as it ought to be, rather than of the legal order as it actually functions, implies—erroneously—that public international law is a vertical system of law enforcement instead of a horizontal network of mutuality and reciprocity.

From the time of the promulgation of the United Nations Charter, in the last week of June, 1945, until the present day, the U.S. Department of State has viewed the Charter of the United Nations as a multilateral treaty, and a number of prestigious commentators share this view. This means, first, that the U.N. Charter is not the fundamental law of the world community of nations, although it can be considered as the constitution of an international organization of sovereign entities. This signifies, in turn, that the Charter is binding upon a particular member, or group of members, in the same sense as the doctrine of *pacta sunt servanda* (or good faith obligation) operates with respect to the implementation of treaty provisions between signatory parties.

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13. International Law, supra note 10, at 82; Realpolitik, supra note 5, at 107-8.


Second, violation of those treaty obligations, or the refusal to abide by a specific obligation, raises the issue of how the failure to perform by one party to a multilateral treaty affects the other signatories, or the adversary signatory, in a confrontational situation. A fundamental question for the international legal order, still unresolved, continues to be: what role does the Charter play in the contemporary international legal system? Professor Beres, in a rare moment of candor, reluctantly admits that "[t]he state of nations is still the state of nature."

President Reagan's foreign policy assumptions, even those that have gone awry, have been favorably perceived by the majority of the American electorate, as contrasted with their decisive rejection of the ineffectual Carter record, which current liberal analysts prefer not to remember. A large portion of the general public believed that Carter had guessed wrong on Iran and had guessed wrong on Nicaragua, when he literally pulled the props out from under a weakening Somoza regime. The succeeding Reagan Administration, therefore, resolved to avoid any further misjudgments occasioned by compromise and vacillation, which also marked the generally unimposing Carter human rights record. Notwithstanding the fact that the Carter White House claimed the highest priority for a human rights agenda, the realities of the Carter program were confusion, disappointment, and frequent self-defeat.

For one thing, neither President Carter nor his State Department subordinates ever defined human rights clearly, either for its friends or its foes. For another, U.S. human rights implementation was properly viewed by other governments as being arbitrary, capricious, vague, and overbroad. In a final appearance before the Organization of American States General Assembly in late November, 1980, the recently defeated President assertively pointed with pride to what he claimed to be a new governmental conscience created in the Western Hemisphere. Due in good part to his efforts, Carter boasted, the cause of human rights had now become an "historic movement."

The succeeding Reagan Administration quickly proclaimed a willingness to aid the fight against radical terrorist insurrection or guerrilla insurgency in the Western Hemisphere. During the presidential campaign of 1980, candidate Reagan warned, with respect to the threat of growing Marxist subversion in Central America, that "[w]e are the last domino." Given the current security problems with Nicaragua and El Salvador, this statement was hardly far-fetched. Thus, the Reagan Administration correctly maintained that a hands-off posture in Central America would inevitably result in an adverse domino effect.

17. REALPOLITIK, supra note 5, at 5.
Most critics of U.S. policy toward Central America, such as Professor Beres, have yet to free themselves from the murky grip of the Vietnam quagmire. All three presidential administrations during the last decade found themselves immobilized by prior history and confrontational politics. It is undeniable that the Vietnam war dramatically exposed the limits of American power in a dangerously chaotic world. It is also self-evident that present U.S. policy in Central America represents, in part, a return to the principles of the Monroe Doctrine. This came about because Reaganism in international affairs, as in domestic philosophy, sought to revert to traditional values and to stress historic ideals.

Central America was chosen as the Administration's first ideological battleground in the world arena. There is no doubt that the Reagan strategy in Central America represents, basically, a return to the "Monroeism" of the past. However, foreign intervention should be no more permissible today than it was at the time of John Quincy Adams and James Monroe. Based on the premise that freedom is not divisible, the national interest is best served by opposing foreign governments propagating alien ideologies which initiate, sponsor, and sustain extremist insurgencies throughout the Western Hemisphere.

There also appears to be emerging, though rather tentatively, a "Reagan Corollary" to the Monroe Doctrine. So far, it has emphasized rhetoric (a Reagan trademark) over specific implementation. But its meaning is clear and gradually has been gathering congressional support. The premise under the Monroe Doctrine is simple and straightforward—that no foreign government or expansionist ideology should be able to impose its alien system by means of armed force from outside the Western Hemisphere. The "Corollary," as it applies to Latin American and Caribbean regimes, is that military aid and assistance will be given to any besieged non-Marxist Latin American state whose political independence and territorial integrity is violated by a hostile aggressor, espousing an expansionists ideology.

That premise explains the U.S. security guarantee to Honduras. and also explains the difference between the dangerous Soviet support of the Sandinistas and the current Reagan Administration policy. The latter is designed to protect not only the United States security interests, but also hemispheric freedom. Russian and Cuban involvement in Nicaragua has meant Marxist subversion in El Salvador, Costa Rica, and a growing military threat to the borders of neighboring Honduras. These pressures require a policy similar to those of the Reagan Administration in order to promote hemispheric peace.

The Monroe Doctrine has been, and remains, a generally recognized legal norm. During the past generation, particularly under Presidents Eisenhower, Johnson, and Nixon, the United States interpreted Monroe's

proclamation to be founded upon a previously asserted right to self-preservation, both for the United States and for the American continents. A "Johnson Corollary" was created in connection with the 1965 U.S. intervention in the Dominican Republic, wherein President Johnson justified that action as preventing a communist seizure of power in the Western Hemisphere. The Dominican intervention was subsequently endorsed by the General Assembly of the Organization of American States.

TRB, The New Republic's lead columnist, wrote that "the Reagan doctrine is the Brezhnev doctrine," and that the former implies that the United States will uninhibitedly "molest" any nation in its national desires. This argument ignores the factual reality. If there were any remaining doubts as to what the Sandinistas were up to in Central America, they should by now be dispelled from the continuing indications of Nicaraguan aid and assistance to the Marxist rebels in El Salvador. Nicaragua has provided a haven for Red Brigade and PLO terrorists, and there is more than mere suspicion that they have provided safe-refuge for other perpetrators of international terror-violence. Those advocates of Sandinista nobility and integrity seem to be rerunning the Vietnam story all over again. "[T]here is already a richly elaborated romanticization of the Sandinistas, much like the romanticization of the Vietnamese and Cambodian Communists."

Why the United States is held to an untenable standard by angry critics of American foreign policy (wherever that policy may be applied), while America's adversaries clearly are not, is one of the most perplexing questions of U.S. academic and intellectual life. Despite the propagators of political gloom and doom, American policy has worked in El Salvador and democracy continues to improve, if it has not yet prevailed. No journalist, to this writer's knowledge, has pointed to the fact that there

22. The Brezhnev Doctrine dates from 1968, when the First Secretary of the Soviet Union Communist Party declared that once a state had become part of the Communist system, it would not be allowed to revert back to its pre-Communist condition. Originally applied to Eastern Europe, it was later extended by implication to Central America, two years after the invasion of Afghanistan. See Joyner & Grimaldi, The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention, 25 Va. J. Int'l L. 621, 678-9 (1985).
27. For two examples of a worst case scenario by liberal critics of the Administration, see Watson, A Test For Democracy, Newsweek, Mar. 26,1984, at 42-45; Preston, What Duarte Won, N.Y. Rev. of Books, Aug. 15, 1985, at 30-35.
are tens of thousands of Nicaraguan refugees in Costa Rica, Honduras, Mexico, and the United States, who by the summer of 1985, numbered more than 50,000.28

The Soviet Union and its Cuban surrogates do not play by the rules, nor do they care how the game is constituted, as long as they can destabilize or dominate the other players. This has forced the U.S. to make some hard choices. Among the hardest was the decision of the Reagan Administration to refuse to litigate the merits of the Nicaraguan charges against the United States in the International Court of Justice (and to abstain from litigating Nicaragua's violations of international law). Much heat and considerable emotion have been generated by the U.S. withdrawal from the Nicaraguan case. Probably the most restrained criticism, as compared with that of Professor Beres, was the observation of two political scientists that "[i]n challenging the Court's jurisdiction and subsequently abandoning its proceedings, the United States has called into question the sincerity of its commitment to a public international order under the rule of law."29

The former Legal Adviser to the Department of State explained to the author of this essay that "[c]onfidentially, we knew before we went to the Hague that we were going to lose the case."30 In fact, any impartial observer could have warned the American delegation about making a special appearance to contest jurisdiction as unsound legal strategy. Of course, the World Court was going to take the case—if it did not, all that would be left to the Court in the future would be the power to decide the ultimate fate of contractual parties, territorial boundaries, and offshore fishing rights.

One can argue that the political makeup of the Court is inherently at odds with its juridical function. The dominance of nation-states would tend to show that Justices of the World Court are inherently biased in favor of their own national views (and more than susceptible to their own government's political agenda),31 but that also depends upon whose ox is gored. The United States, an unwilling participant in the Nicaragua case,32 readily agreed to World Court jurisdiction in the recent U.S.-Canadian fishing rights dispute, with a rather satisfactory outcome for the American position.33 The same was true of the Tehran hostages case,34 where the Soviet judge and the existing Islamic judge voted the way one

28. Senator David Durenberger (R., Minn.) has called it "a conspiracy of silence. . . ."
29. Joyner & Grimaldi, supra note 22, at 687.
would expect. Given existing political considerations, many other governments were too vulnerable to future injury to have the decision turn out adversely from the U.S. perspective. On the other hand, the decision meant nothing as far as subsequent world events were concerned.

There has been much hand-wringing over the American decision to refrain from participating in the adjudication of the merits of the Nicaragua case, largely centering on the need for an international rule of law. The real issue remains, however, whose rules and what law? The very fact that the Court virtually ignored its own prohibition against involving itself in an ongoing armed conflict, despite the nature of the Nicaraguan charges, and of the U.S. counter-charges, demonstrates that the World Court was primarily interested in extending its own competence and only secondarily interested in refining and defining the substantive issues.

Last, but certainly not least, is the question of the significance of World Court decisions in international law. Here, the answer is less than clear, since in World Court practice, stare decisis, is not recognized as an official technique of decision-making. Moreover, as Professor van Hoff has pointed out, the major effect of World Court jurisprudence is confined to the parties before the Court in a particular dispute. A number of authorities have despaired in recent years about the dwindling of the Court’s prestige and about the noticeable diminution of its influence. Consequently, the Court has utilized the Nicaraguan complaint to revive its flagging fortunes and to restore its fading image. The problem is that this re-energizing has occurred at U.S. expense.

Critics of the Reagan Administration have for the most part generated more heat than light (exacerbated by the Administration’s overblown rhetoric). On the other hand, as the Anglo-American journalist, Henry Fairlie, has cogently observed, “America is not an empire, and lives in a world in which it cannot claim to be an empire, but it has not yet defined its role.” As in the past, the argument between Administration supporters and Administration opponents, between liberal critics and conservative defenders, between polemicists and legalists, continues to be over the nature of that role. Nowhere has this been more dramatically focused than on Nicaragua.

The distinguished scholar, George Lichtheim, no unabashed admirer of U.S. foreign policy, has wisely written that “casting the United States in the role of the global aggressor results in nothing but further obfuscation.” The hard fact and cold reality is that the Soviet Union and its Cuban surrogate have created a Marxist-oriented fortress in Central

36. VAN HOOF, supra note 9, at 170-176, 267.
37. See id., at 173-175.
America in the guise of the Sandinista regime. One might well ask, if the Sandinistas were not fighting the rebel Contras, then what would they do with their oversized army and extensive military hardware? The Contras are in fact performing an important Central American security function, which is the prevention of Nicaraguan expansionism (in contrast to the Vietnam example, wherein Vietnam's neighbors have been unable, or unwilling, to prevent Vietnamese aggression).

Secretary of State, George Schultz, in a speech delivered on February 22, 1985, to the Commonwealth Club of San Francisco, put the essence of the Administration's concern clearly, cogently, and effectively;

There is a self-evident difference between those fighting to impose tyranny and these fighting to resist it . . . In each situation it must always be clear whose side we are on—the side of those who want to see a world based on respect for national independence, for human rights, for freedom and the rule of law. . . but where dictatorships use brute power to oppress their own people and threaten their neighbors, the forces of freedom cannot place their trust in declarations alone.

Name-calling and pious platitudes do not clarify issues and rarely sharpen intellectual debate. International law must be understood before it can be applied. To confuse victims with victimizers is a dangerous way of formulating national policies.

40. Schultz, *We Must Not Fail the Freedom Fighters*, Reader's Digest, June 1985, at 64.
The Nuclear Collision Course: Can International Law Be Of Help?

JOHN H.E. FRIED*

I. INTRODUCTION

During the four decades since Hiroshima and Nagasaki, the build-up of nuclear weapons has spiraled beyond the worst fears and most strenuous warnings. Although recent research has revealed that the effects of a major nuclear war would be even more catastrophic than hitherto expected (a nuclear night followed by nuclear winter), ever more sophisticated nuclear weapons are being produced and planned. There is the prospect of a new dimension to the arms race in outer space, competitive preparations by the superpowers for "star wars." The seemingly axiomatic conviction that nuclear war is unthinkable has been superseded by plans for protracted and winnable "limited" nuclear war. The fundamental question arises: Is the use of nuclear weapons permitted by international law?

Self-styled realists consider the question naive; they assert that states will pay little heed to law when their national interests are at stake. However, the realists are only able to advocate reliance on intensified force, and in today's world, intensified force ultimately suggests nuclear war.

Respect for the rules of international conduct is a basic requirement for a viable international community.¹ As Chancellor James Kent said in 1826:

A comprehensive and scientific knowledge of international law is highly necessary. . . . to every gentleman who is animated by liberal views and a generous ambition to assume stations of high public trust. It would be exceedingly to the discredit of any person who should be called to take a share in the councils of the nation, if he should be found deficient in all the great learning of this law. ²

Without international law (the sum total of treaties, customs and principles that regulate the mutual conduct of states), the world could

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¹ For a searching, non-legalistic analysis, see G. CRAIG & A. GEORGE, FORCE AND STATECRAFT: DIPLOMATIC PROBLEMS OF OUR TIME (1983).

² 1 J. KENT, COMMENTARIES ON AMERICAN LAW 19-20 (1826), cited by W. BISHOP JR., INTERNATIONAL LAW: CASES AND MATERIALS at 17 (2d ed. 1962).
not function, just as no society could function without domestic law. As domestic law deals, in part, with disturbances threatening the domestic community, so does international law include an elaborate body of rules concerning war between nations.

For a discussion of the impact which the international law of war must have on governmental policies, some facts should first be recalled:

(1) The international law of war is binding. Governments instruct their Armed Forces to respect the law of war. As the basic U.S. Army Field Manual says about the treaties on the law of war which it incorporates: “the treaty provisions quoted herein must be observed by both military and civilian personnel with the same strict regard for both the letter and the spirit of the law which is required for the Constitution and statutes. . . .” The basic U.S. Air Force Treatise on the conduct of armed conflict states that:

The law of armed conflict is essentially inspired by the humanitarian desire of civilized nations to diminish the effects of conflicts. . . . It has been said to represent in some measure the minimum standards of civilization. . . [I]ts permanence is ‘based on a general consciousness of stringent and permanent obligation’. . . . We in the Air Force constantly benefit from the existence of international law. . . .

(2) The international law of war is not imposed either on governments or on the military. Existing treaty rules were drafted at international conferences in collaboration with, and with the approval of, the military experts of the participating countries. Hence, the rules imply that the military found it useful to limit the extent of violence permissible against the enemy, because this equally limits the extent of permissible violence by the enemy.

(3) History shows that while the destructiveness of military technology has increased, so has the condemnation of war. By 1928, the Kellogg-Briand Pact prohibited war as an instrument of national policy. The U.N. Charter calls war a scourge. The General Assembly stigmatized a war of aggression as a “crime against international peace.” The Charter forbids not only use of force against the territorial integrity or political independence of any State (except in self-defense “if an armed attack occurs”) but forbids even the threat of force. These fundamental rules also prohibit the use or threat of use of any weapons against another country in

3. It is more precisely called “the law of armed conflict” in order to prevent the subterfuge that military hostilities, when called “police action” or the like, are not subject to the rules of war.


7. U.N. CHARTER arts. 2, para. 4, and 51.
military actions such as a “surgical strike” on any specific object or area or group of persons, a “demonstration explosion,” or an attack in pursuit of any political aim. These rules prohibit any pre-emptive or anticipatory attack. As one commentator stated: “[S]omeday tensions between the Soviet Union and the United States may be so high that the only security either nation will have against a war of annihilation will be the clear legal rule prohibiting anticipatory self-defense.”

(4) Society’s aversion to the cruelty of war (which is characteristic of our era) is relevant for the interpretation of rules that become binding when, despite all prohibitions, war occurs. These rules must be interpreted restrictively, insofar as they permit violence, and extensively, insofar as they forbid violence.

(5) Grave breaches of the law of war are crimes, regardless of whether or not those responsible for them are tried.

Keeping these considerations in mind, what are the implications of international law concerning the use of nuclear weapons?

II. FIRST-USE OF NUCLEAR WEAPONS

A. Nuclear Warfare Violates the Fundamental Rules of Combat

It is sometimes asserted that nuclear weapons are “ordinary weapons just as any other weapons” and, consequently, mankind must live with them or, as the case may be, die from them. Obviously, they are not “ordinary” weapons. Their effects threaten calamities beyond the capacity of conventional weapons. As has often been asserted, once the threshold between conventional and nuclear war is crossed, unparalleled catastrophe is unavoidable.

Even accepting, arguendo, that nuclear weapons are like other weapons, this assumption does not show that their use is permissible. To the contrary, the very assumption proves the illegality of nuclear warfare. For if nuclear weapons are weapons like any other then the rules for non-nuclear combat must also apply to nuclear combat. Any rule that prohibits the use of conventional weapons must also prohibit the use of nuclear weapons. The difference is that non-nuclear weapons can be used without violating the rules of combat, whereas nuclear weapons cannot.

This fact becomes apparent by reviewing the basic rules of combat laid down in the Hague Regulations of 1907, which were confirmed and


9. To point out the basic difference between nuclear and conventional warfare is, of course, not meant as advocacy for conventional war as the smaller evil. The very assumption that conventional war is “preferable” implies the inevitability of war. And as long as war plans provide for mixed conventional-nuclear combat from the onset of hostilities, rapid escalation into full nuclear war is assured.

adapted to modern conditions in the Geneva Conventions of 1949, four years after the advent of nuclear weapons. Although the Conventions of 1949 make no specific reference to nuclear weapons, it is precisely because special rules for nuclear weapons were never promulgated that general rules which forbid or restrict the use of any weapon must apply to nuclear weapons.

The ground rule of the entire law of war stipulates that "the right of belligerents to adopt measures of injuring the enemy is not unlimited." This means that the rules of war, and not the technological possibilities, determine the limits of permissible violence in war.

Another basic principle of the law of war specifically bans the use of an entire category of weapons, regardless of whether their use would be technologically possible or militarily advantageous: "it is especially prohibited to employ arms, projectiles, or materials of a nature to cause unnecessary suffering." 12

This rule protects not only civilians, but also the military forces (combatants). The U.S. Air Force Treatise states: "[T]he rule against unnecessary suffering applies also to the manner of use of a weapon or method of warfare against combatants or enemy military objectives." 13 It states further that, "[t]he rule prohibiting the use of weapons causing unnecessary suffering or superfluous injury is firmly established in international law," going back to the 1868 St. Petersburg Declaration which prohibited "the employment of arms which uselessly aggravate the suffering of disabled men or render their death inevitable." 14

Since nuclear arms are unquestionably of a nature to cause unnecessary suffering, their use is prohibited by this general rule. The prohibition applies also to the use of accurate "counterforce" nuclear weapons against "military objectives" (such as ammunition depots and silos where military personnel would be hit by them).

Nuclear warfare would also not respect what the International Red Cross calls "the very basis of the whole law of war," namely, the distinction between combatants and civilians. It is true that in every war, civilian casualties will occur although non-combatants are, in principle, immune. As the 1976 U.S. Air Force Treatise states: "This immunity of the civilian population does not preclude unavoidable and incidental civilian casualties which may occur during attacks against military objectives and which are not excessive in relation to the concrete and direct military

11. Id. art. 22.
12. Id. art. 23(e).
14. Id.
15. INTERNATIONAL RED CROSS, 4 COMMENTARY TO THE 1949 GENEVA CONVENTION 153 (1958)[hereinafter cited as COMMENTARY].
advantages anticipated.” 16

The proposition that “unavoidable and incidental” civilian casualties may result from otherwise legitimate military action may have to be tolerated by the harsh logic of war. But at what point do such incidental consequences, precisely because they are unavoidable, become so nefarious as to make a military action illegitimate?

The multi-million civilian death toll expected from even a limited use of tactical nuclear arms cannot be considered “unavoidable and incidental” and hence tolerable. The law of war carefully distinguishes between permissible destruction and prohibited devastation. It permits the destruction of military objects, yet it does not permit destruction beyond the limits it has set. The notions that a purpose of war is destruction for destruction’s sake; that destruction is a success in itself; that the more desolation caused, the better; that war may aim at preventing the enemy country’s recovery after the war’s end — are anathema to the honorable profession of arms. Three important provisions of the law of war state:

(a) Prohibition of indiscriminate destruction: “it is especially forbidden...to destroy...the enemy’s property, unless such destruction...be imperatively demanded by the necessities of war.” 17 “Property” here means any property movable or immovable, public or private, from a single object to an entire city.

(b) Prohibition of attacking or bombarding undefended places: “The attack or bombardment by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited.” 18 Thanks to this rule, Rome and Paris were saved from destruction in World War II when they were declared undefended, or open cities. Such cities could not be exempted from radioactive fallout caused by nuclear strategic area bombings or tactical precision attacks on defended places.

(c) Prohibition of attacks on civilian hospitals: “Civilian hospitals...may in no circumstances be the object of attack, but shall at all times be respected and protected by the Parties to the conflict.” 19 Obviously, hospitals could not be protected against radioactive fallout.

B. “Prisoners Will Not Be Taken”

The law of war states that members of the armed forces have the right to surrender, individually or in units, however large, and become prisoners of war. Thereupon, the enemy must provide them with shelter, food, medical care, clothing, etc. “until their final release and repatria-

17. Hague Convention, supra note 10, art. 23(g).
18. Id. art. 24.
This safety valve guaranteed by the law of war, which even in the fury of World War II saved millions of lives, would be closed in nuclear war. In the U.S.-Indochina war, when the U.S. combined intense conventional air warfare with ground warfare, large numbers of Indochinese soldiers were still taken prisoner. But, in long-distance nuclear war, the possibility to surrender would not exist. The situation would be the same as that of a declaration that "no quarter will be given." Such a declaration is among the methods of war "especially forbidden" by the Hague Regulations. 21

C. Nuclear Warfare Would Violate the Immunity of Neutral States

Nuclear warfare would not only transgress the law which regulates combat between belligerent states, but would also transgress the rules regulating the behavior of belligerents toward neutral states. The most sacrosanct of these is the time-honored axiom that "[t]he territory of neutral Powers is inviolate." 22 Disregard for this immunity of neutrals is considered a particularly grave outrage.

The 1976 U.S. Air Force Treatise states that "particular weapons or methods of warfare may be [considered] prohibited because of their indiscriminate effects. . .Indiscriminate weapons are those incapable of being controlled, through design or function. . . . Uncontrollable effects. . . may include injury to the civilian population of other States as well as injury to an enemy's civilian population." 23

The Secretary-General's Comprehensive Study on Nuclear Weapons declares: "In a nuclear war. . . all nations in the world would experience grave physical consequence from radioactive fallout. . . and during the decades after a major nuclear war, fallout would take a toll of millions worldwide in present and future generations." 24

It would be sophistry to assert that the catastrophe predicted for countries uninvolved in the nuclear conflict would not violate the immunity of their territory guaranteed by Hague Convention V. 25 Even if nuclear warfare could be conducted between belligerents in obedience to the rules of war, the disastrous consequences for the neutrals would prohibit it.

The situation of certain neutral states, namely those which harbor nuclear weapons of a belligerent state on their territory, is particularly

21. Hague Convention, supra note 10, art. 23(d).
22. Id. art. 1.
23. U.S. AIR FORCE TREATISE, supra note 5, at 6-3.
serious. They are exposed to unintended radiation effects of nuclear warfare between others and risk that the belligerent’s opponent will deny their status as neutrals.

For a state wishing to remain neutral in a war between others, it is not enough to abstain from fighting on either side. In order to claim the status of a neutral, the state must fulfill certain obligations. First, it must not allow “belligerents to use its territory as a base of operations in war.” The Hague Convention demands that “[a] neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.” Logically, and by universal practice, the arms of the interned foreign troops must also be seized. As the *U.S. Army Field Manual* states, these troops “must be disarmed.” Since, as the *Manual* explains, this refers to their “munitions, arms, vehicles, and other equipment,” nuclear weapons must also be seized.

These obligations would have to be fulfilled by any European NATO country which would decide to remain neutral in the event of a U.S.-Soviet war. However, NATO has systematically combined and interwoven its members’ preparations for instantaneous war, and nuclear weapons are available to U.S. forces on the soil of several European NATO countries. At the start of a U.S.-Soviet war, those claiming the status of neutrals would therefore have to seize such arms within minutes. This, of course, would be impossible. The Soviet Union would have to expect that U.S. nuclear weapons deployed in NATO countries would be used against it or its allies. Hence, the Soviet Union could rightly claim that those countries, although they do not actively participate in the war, do not have neutral status and it

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27. Hague Convention, *supra* note 10, art. 11.
29. *Id.* art. 536.
30. See NATO Treaty, June 19, 1951, 4 U.S.T. 1793, TIAS No. 2678. “If an armed attack on any NATO member occurs, each shall take “such action as it deems necessary, including the use of armed force.” (Art. 5). Hence, each NATO member has the sovereign right to take no action, military or otherwise. Furthermore, in order to exclude the interpretation that any NATO member must go to war whenever any other NATO member goes to war, the Treaty underscores the obvious, namely that each NATO member would take the fatal decision to go to war “in accordance with its constitutional processes.” (Art. 11) Evidently, neither the U.S. nor any other country would, without such safeguard, have entered the NATO alliance.

It should also be noted that the NATO Treaty does not specify the country or countries against which it is to apply. While having primarily the Soviet Union in mind, the Treaty applies to an attack by any State against a NATO State in the NATO area. Had the treaty established an automatic obligation to go to war, this would, in case of an attack by NATO member A against NATO member B, scurrilously require the other NATO member States to fight NATO member A. In fact, this could conceivably have occurred already if Turkey’s 1974 invasion of Cyprus and subsequent occupation of a large part of the island had led to war between NATO members Greece and Turkey.
may therefore destroy those weapons. 31

This principle applies equally to the non-NATO countries of the world that wish to stay out of a U.S.-Soviet war, but harbor U.S. nuclear weapons. 32 It also applies to Warsaw-Pact and non-Warsaw-Pact States in which Soviet nuclear weapons may be located. Thus, a U.S.-Soviet war in Europe would, from its inception, threaten to assume global dimensions because both sides would feel compelled to eliminate the danger of weapons available to the opponent in third countries.

D. Fate of Enemy Areas “Won” by Nuclear Attack

It has been necessary to conclude that the law of combat and the law of neutrality prohibit nuclear warfare. The same is true of the law of belligerent occupation.

The law of belligerent occupation is based on the proposition that it is the very aim of war to penetrate and thereupon to occupy parts or even the whole of the enemy's territory. From the moment of occupation, and for as long as the occupation lasts, “the authority of the legitimate power [has] in fact passed into the hands of the occupant.” 33 The occupant must “take all the measures in his power to restore, and ensure, as far as possible, public order and safety.” 34 “To the fullest extent of the means available to it, the occupying power has the duty of ensuring the food and medical supplies of the population.” 35 The occupant must “in particular, bring in [from outside the occupied territory] the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.” 36

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31. However, if the U.S. had not used nuclear weapons first (from whatever location), the Soviet Union would by its own no first-use pledge be prevented from using nuclear arms for the purpose.

32. The situation can be illustrated by referring to the Philippines and Japan. Two of the most important overseas American installations are in the Philippines. The Subic Naval Base is the U.S. Navy's largest logistical support base in the Western Pacific, and Clark Air Base (headquarters of the 13th Air Force) is the largest U.S. airbase in East Asia; the complex of bases is staffed by 15,400 military and Department of Defense personnel. See W. Bello, Springboards for Intervention, Instruments for Nuclear War, SOUTHEAST CHRONICLE, at 3, 5 (Apr. 1983).

In Japan, the U.S. presence consists of some 50,000 troops provided with aircraft, and major facilities such as naval ports and communications, command and control stations. A Marine Corps station, some 11,000 strong, is located at Iwakuni, 20 miles from Hiroshima. See G. Mitchell, Rearming Japan, IN THESE TIMES, at 12, 13 (Aug. 2, 1985).

The U.S. policy not to confirm or deny the presence of nuclear weapons also applies to the Philippines and Japan. If none are there, they could in a crisis be brought in quickly, whereupon the obligation of the host nation, to seize those weapons and intern the U.S. forces (pursuant to Hague Convention), would apply but could hardly be fulfilled.

33. Hague Convention, supra note 10, art. 42.

34. Id.

35. Id.

36. See Civilian Convention, supra note 19, art. 55. “Article 55, Geneva Civilian Convention, confirming extensive responsibility for the welfare of the occupied territory, imposes upon the occupying power the duty of ensuring food and medical supplies to the best
The vast obligations of the occupant (to which numerous others listed in the law of war would have to be added) apply to "the occupied territory," and hence also to occupied areas not directly affected by combat but where these supplies are needed.

However, the phrase, "[t]o the fullest extent of the means available to [the Occupant]" 37 qualifies the obligation in any occupied area. The significance of the qualification must be considered. In particular, the International Red Cross Committee's Commentary states:

The rule that the Occupying Power is responsible for the provision of supplies for the population places that Power under a definite obligation to maintain at a reasonable level the material conditions under which the population of the occupied territory lives. The inclusion of the phrase 'to the fullest extent of the means available to it' shows, however, that the authors of the Convention did not wish to disregard the material difficulties with which the Occupying Power might be faced in wartime (financial and transport problems, etc) but the Occupying Power is nevertheless under an obligation to utilize all the means at its disposal. 38

The Commentary then underscores the extent of the obligation: "Supplies for the population are not limited to food, but include medical supplies and any article necessary to support life." 39 In addition, [t]he duty of ensuring supplies is reinforced by an obligation to bring in the necessary articles when the resources of the occupied territory are inadequate. . . . The Convention does not lay down the method by which this is to be done. The occupying authorities retain complete freedom of action in regard to this, and are thus in a position to take the circumstances of the moment into account. 40

The Commentary concludes by suggesting some concrete measures that the occupant should take "in good time" 41 to facilitate imports to the occupied territory, for example, arranging for free transit subject to the occupant's verification and control.

The significance of the Commentary lies in the emphasis it puts on the legal obligation of belligerents not to let helpless enemy populations perish but "to support their life" 42 as well as possible by potentially major undertakings. The question arises whether the rules of belligerent occupation become irrelevant when, under the conditions of nuclear war,

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37. Id.
39. Id.
40. Id.
41. Id.
42. Id.
they can hardly be obeyed. How could either superpower, upon becoming the occupant, take “the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics”43 from thousands of miles away and “to the fullest extent of the means available to it,”44 as stipulated in the Geneva Civilians Convention? The superpowers’ own medical personnel and medical supplies, decimated by the war, could not even begin to take care of the casualties at home. A 1984 Report of the World Health Organization estimates that:

[t]he detonation of even a single 1-megaton bomb over a large city would kill more than 1.5 million people and injure as many. A ‘limited’ nuclear war with smaller tactical nuclear weapons totalling 20 megatons, aimed at military targets in a relatively densely populated area would exact a toll of about 9 million dead and seriously injured, of whom more than 8 million would be civilians, an all-out nuclear war. . . would result in more than 1000 million deaths and 1000 million injured people. . . Therefore, the only approach to the treatment of health effects of nuclear explosions is primary prevention of such explosions, that is, the prevention of atomic war.45

This counsel by W.H.O. experts is even more justified by two other aspects of nuclear war which these experts do not address directly.

First, the primary purpose of occupying enemy territory during war is to deprive the enemy of the capability of using the territory and its resources for military purposes; to wage war from it. To achieve this aim, it is not necessary, and therefore not legitimate under the military concept of “economy of force,”46 always to inflict great damage on that territory or its population. But a no-occupation strategy could not be carried out with restraint; it could only make the territory militarily useless to the enemy by devasting it.

Second, even after the end of nuclear hostilities, the “victor” would find its own country in a disastrous situation, and be unable to undertake the massive relief actions desperately needed by the defeated side, such as those rendered after World War II to the defeated Axis countries by the Allies — notably by the United States which was unscathed by the war.

Indeed, the cruelest irony of long-distance nuclear war is that there would be no occupation of enemy territory. Bombardments by long-range missiles and bombers are capable of destroying their targets (which would inevitably also produce large-scale lethal radiation beyond their targets) but are evidently incapable of occupying territory. In short, the enemy areas subjected to those bombardments would not be occupied because

43. Civilian Convention, supra note 36, art. 56.
44. Id.
this is neither intended nor physically possible. The survivors would be relinquished to their own misery. Anarchy, famine and epidemics would be left unchecked. This aspect of nuclear war is hardly ever mentioned.\footnote{U.S. Secretary of Defense Annual Report (1980).}

No rule of international law obligates a belligerent to occupy enemy territory which his attacks have “made ripe” for occupation. The law of war does not prescribe military strategy, but it sets the limits of permissible strategy. To occupy (“conquer”) enemy territory has been the essential goal in war, the very purpose of strategy, the pride of generals, and the hoped for justification of the sacrifices imposed by war, from Troy to Stalingrad, and from Richmond to Hanoi. Yet the question now is whether nuclear war technology makes occupation of enemy territory unfeasible, and therefore grants a belligerent the right to devastate enemy territory and take no responsibility for the fate of the survivors.

In fact, nuclear war would deprive the attacked opponent of the palliative that has made even the worst wars (until now) somehow survivable, namely, the occupation of the enemy territory “won” during the war, whereupon the occupant has had to provide the survivors with the essentials of life.

To leave the survivors of nuclear attack to oblivion is both morally repulsive and legally impermissible. It condemns possibly millions of people to horrible suffering subsequent to exposing them, illegally, to the attack itself. Moreover, the law of war (the Preamble to the Hague Regulations IV) \footnote{Hague Convention, \textit{supra} note 10.} generally forbids methods of warfare which, although not specifically forbidden, are contrary to “the usages established among civilized peoples, the laws of humanity, or the dictates of the public conscience.” \footnote{Id.}

\section*{F. The Law of Humanity and the Dictates of the Public Conscience Forbid Nuclear War}

We have so far surveyed specific rules of the international law on armed conflict which make nuclear warfare illegal. In addition, nuclear warfare is implicitly forbidden by a general rule appearing in the Hague Regulations of 1907.\footnote{Hague Convention, \textit{supra} note 10.} The makers of these Regulations, statesmen, generals and jurists, intended to create a truly comprehensive code of the law of war. However, knowing that the development of war technology was unforeseeable, they agreed that the Regulations had to provide for future developments, so as not to become incomplete and obsolete. Therefore, they inserted a general clause into the Preamble to the Regulations, known as the “Martens Clause.”\footnote{Id.} The Martens Clause stipulates that if methods of warfare are not foreseen by the Regulations, but are contrary
to "the usages established among civilized peoples, to the laws of humanity, to the dictates of the public conscience,"\textsuperscript{52} then they are forbidden by those overriding standards themselves, without the need for any additional treaty.

This principle, which a U.S. Nuremberg Tribunal called "more than a pious declaration," namely, "a legal yardstick,"\textsuperscript{53} is repeated in all major treaties on the law of war concluded since the advent of the nuclear age.

The urgent warnings by statesmen, religious leaders, medical authorities, physicists, environmentalists, and professionals in many other fields, including the military,\textsuperscript{54} and the intensity and ubiquity of the general protest movement "dictate" that governments abstain from initiating nuclear war.

Considering the obligation to respect the conscience of the world and remembering the more specific demands of the law of war discussed above, nuclear warfare is manifestly prohibited by international law.\textsuperscript{55} Yet, in spite of all this there exist arguments — and they are widely accepted — claiming the permissibility of nuclear warfare.

G. Arguments Asserting that Nuclear War is Permissible

The most influential of these arguments is that there exists no treaty which specifically outlaws the use of nuclear weapons. Hence, it is maintained, as long as such a treaty does not exist, there is no law that would forbid nuclear warfare.\textsuperscript{56}

\textsuperscript{52} Id.

\textsuperscript{53} IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No.10, , Nuernberg October 1946-April 1949, at 1340 [hereinafter cited as "T.W.C."].

\textsuperscript{54} See, e.g., the statements of American, British, Dutch, French, Greek, Italian, Portuguese and West German retired generals and admirals. GENERALE F"UR DEN FRIEDEN (G. Kade ed. 1982).


Professor Wolfgang Daubler points out that the view that existing international law unambiguously prohibits the first use (unzweideutiges verbot des Ersteinsatzes) of nuclear weapons is "almost universally shared by the science of international law" (fast einhellige Auffassung der Völkerrechts-Wissenschaft). W. Daubler, STATIONIERUNG UND GRINDGESETZ 54, 187 (1982). See also, J. Goldblat, Nuclear War Cannot Be Conducted with Obedience to the Rules of International Law, BULL. OF PEACE PROPOSALS 317 (Apr. 1982); see also papers presented by members of the American Society of International Law at a Conference on Nuclear Weapons and Law, ? NOVA L.J. (1982); Lawyers Committee on Nuclear Polcy, Statement on the Illegality of Nuclear Weapons (rev. ed. 1984).

\textsuperscript{56} See, e.g., Almond, Nuclear Weapons are Legal Tools, BULL. OF THE ATOMIC SCIENTISTS 32-35 (May, 1985).
The official position of the U.S. is expressed in its two most important military texts. The *U.S. Army Field Manual* states: "The use of explosive 'atomic weapons,' whether by air, sea or land forces, cannot as such be regarded as violative of international law in the absence of any customary rule of international law or international convention restricting their employment." The words "as such" can only mean that the restrictions contained in the law of war, especially those of the Hague Regulations of 1907 and the 1949 Geneva Conventions, apply also to what the Manual calls "explosive atomic weapons", but which evidently includes all nuclear weapons. Their employment is not illegal because they are nuclear weapons ("as such"). Rather, it is illegal because international law makes illegal the employment of any weapon that is "of a nature to cause unnecessary suffering."58

This is confirmed by the analogous formulation in the *U.S. Air Force Treatise* which states: "The use of explosive nuclear weapons, whether by air, sea or land forces, cannot be regarded as violative of existing international law in the absence of any international rule of law restricting their employment." Here the words "as such" in the 1956 *U.S. Army Field Manual* are replaced by the immediately following sentence: "Nuclear weapons can be directed against military objectives as can conventional weapons."60

The legal situation described in these statements should be clear: since no specific ban against nuclear weapons exists, the general rules of war apply to them. However, the U.S. texts conclude from this premise that nuclear weapons can be used in obedience to those rules. Such a conclusion is incorrect, even for limited or tactical warfare.

The unnecessary suffering of enemy combatants and the risks to civilians and friendly forces anticipated in even limited nuclear war, can be seen from a provision in the 1976 *U.S. Army Field Manual Operations*:

A soldier exposed to 650 rads... can be expected to die in a few weeks under battlefield conditions. Exposure in the 100 rad region usually has little effect. Accordingly, in conventional nuclear combat it would be prudent to subject front line enemy to 3,000-8,000 rads or more, enemy to the rear to 650-3,000 rads, and avoid subjecting friendly forces and civilians to an unacceptable dose level (100 or more rads).61

Another influential argument for the permissibility of nuclear war is the "total war" argument. The term "total war" may mean different things. If it means a total effort to defeat the aggressor (such as, total mobilization, drastic rationing of consumer goods, severe penalties for ab-

57. *U.S. Army Field Manual*, supra note 4, art. 35.
60. *Id.*
senteeism, prohibition of the use of motorcars for non-war purposes), it is an entirely legitimate policy. However, if it means a war of total ferocity, it is what the Nuremberg International Tribunal condemned as the "Nazi conception of total war:"

In the Nazi conception of 'total war'...the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity...and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, War Crimes were committed when and wherever the Fuhrer and his close associates thought them to be advantageous.62

The cliché that "this is an era of total war," has ominous implications. It fosters a nihilistic contempt of morality and law. It is brutalizing because it condones and accustoms society to mass atrocities. It is limitless: how much license does total war grant? It is unpatriotic because the claim of one own country's right to behave barbarously against the enemy authorizes the enemy to behave barbarously in return. Worst of all, it may nourish the belief that a nuclear holocaust is inevitable.

Finally, there is an argument which claims that "restrained nuclear warfare" would be rationally justifiable because it would limit the casualties and destruction to "acceptable" dimensions. Apart from the fact that restrained nuclear war would still be illegal, it cannot be assumed that such war would remain restrained. The late George B. Kistiakowski, Science Advisor to three U.S. Presidents, stated it was "totally unrealistic" to assume that a superpower nuclear war could be "controlled and limited," even under the counterforce doctrine, which intends to avoid direct attacks on population centers. "[I]t may start that way, but with millions of compatriots among the casualties from the counterforce strikes, with much of the military communications and command centers out of control...the launching of warheads will continue and accelerate with less and less central control...Thus, as an inevitable consequence of a limited nuclear war between the superpowers, the holocaust would come, the organized national societies would cease to function..."63 Kistiakowski went on to quote Krushchev's prediction that "the living will envy the dead," and added that this view is shared "by a large majority of senior statesmen and military leaders."64

62. 1 Trial of Major War Criminals Before the International Military Tribunal, Nuremberg, November 1945-October 1946, 277.
64. Id. See also Zuckerman, Nuclear Illusion and Reality 67 (1982): "escalation to all-out nuclear war is all but implicit in the concept of fighting a field war with 'tactical' and 'theatre' nuclear weapons." (quoting B.H. Liddell Hart, Deterrent and Defense 61 (1960)). The use of 'small' nuclear weapons to stop advancing troops would most likely escalate into "an illimitable and suicidal H-bomb devastation of countries and cities; the initial employment of nuclear weapons would rapidly escalate into an all-out nuclear war between the two alliances." Lodgaard, Nuclear Disengagement in Europe, 14 Bull. of Peace Pro-
III. The Concept of Military Necessity

Contrary to the concept of "total war," which is unknown to the law of war, the concept of "military necessity" — it may also be called "military emergency" — does exist in the law of war.

The meaning of the concept of military necessity was assiduously debated at the Nuremberg trials. Some defendants admitted that their actions in World War II violated the rules of war, but were excusable because these actions had been necessary in the emergency situation in which Germany found itself. The three U.S. Nuremberg Tribunals that were faced with this plea answered it unqualifiedly:

(1) Judgment in the Krupp case (31 July 1949):

The contention that the rules and customs of war can be violated if either party is hard pressed in war must be rejected. . . . It is an essence of war that one or the other side must lose, and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short, these rules and customs of warfare are designed specifically for all phases of war. . . . The claim that they can be wantonly — and at the sole discretion of any one belligerent — disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.65

(2) Judgment in the Fieldmarshal List, et al. (Hostages) case (19 February 1948):

As we have previously stated in this opinion, the rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation.66

(3) Judgment in the Fieldmarshal von Leeb, et al. (High Command) case (27 October 1948):

It has been contended in this case that military necessity includes the right to do anything that contributes to the winning of a war. . . . Such a view would eliminate all humanity and decency and all law from the conduct of war and is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations.67

These statements, made in reference to what is now called conventional

65. T.W.C., supra note 53, at 1347.
66. Id. at 1272.
67. Id. at 541; Also cited in U.S. ARMY, PUB. NO. 27-161-2, U.S. ARMY PUBLICATIONS 248 (Oct. 1962).
war, are even more valid for the nuclear weapons age.

The instructions of the U.S. military establishment on the concept of military necessity are clear. The Air Force defines it as “the principle which justifies measures of regulated force not forbidden by international law” and warns that it “is not the German doctrine, Kriegsraison, asserting that military necessity could justify any measures—even in violation of the laws of war—when the necessities of the situation purportedly justified it.” 68 The U.S. Army Field Manual also stresses that military necessity justifies only “measures not forbidden by international law” and adds that the laws of war “have been developed and framed with consideration for the concept of military necessity,” 69 i.e., that these laws have themselves established which legitimate measures may become necessary in war.

Our era’s aversion to war is so deep that it can engender a desire to punish the aggressor by all means available. Such emotion overlooks the truism that the decision to make war is commonly made by a small number of policy-makers. An American Nuremberg Tribunal, speaking of the “cataclysmic catastrophe” caused by the Third Reich’s aggressive wars, reasoned:

International law condemns those who, due to their actual power to shape and influence the policy of their nations, prepare for, or lead their country into or in an aggressive war...[b]ut those under them cannot be punished for the crimes of others. The misdeed of the policy-makers is all the greater in as much as they use the great mass of the soldiers and officers to carry out an international crime; however, the individual soldier or officer below the policy level is but the policy maker’s instrument. 70

The present conventional weapons arsenals guarantee a more cataclysmic catastrophe than World War II. Adding nuclear arms to this stockpile would not magnify the revenge against the guilty decision-makers, but instead would victimize the armed forces and the peoples of all nations.

IV. DANGER OF ACCIDENTAL, UNINTENDED NUCLEAR WAR

The most ominous threat posed to the world is the fact that nuclear war could be triggered, and was on some occasions almost triggered, because computers erroneously reported enemy nuclear missiles or bombers to be on the way, or because human beings misinterpreted computer reports and messages from sensors planted in various parts of the earth and from observation devices in outer space.

If it is pointed out that nuclear war technology leaves no alteration to

68. U.S. AIR FORCE TREATISE, supra note 5, at 1.
69. U.S. ARMY FIELD MANUAL, supra note 4, art. 3.
70. T.W.C., supra note 53, at 489.
reliance on such intrinsically unreliable determinants, the dilemma can be avoided only by the recognition that such type of warfare is forbidden by elementary standards of legality and morality.

V. NUCLEAR REPRISAL AGAINST FIRST-USE OF NUCLEAR WEAPONS

Reprisals are actions which are in themselves unlawful, but which become lawful when taken in response to unlawful actions by the other side. There can be no doubt that "the institutions of the reprisal is one of the most horrible aspects of the laws of armed combat. But in time of war it provides for almost the only sanction on violation of the law."\textsuperscript{71}

The rules of the Geneva Civilian Convention of 1949\textsuperscript{72} prohibit reprisals against civilians in enemy-occupied territories, but "do not protect civilians who are under the control of their own countries,"\textsuperscript{73} i.e., those rules which do not protect the civilian population in the belligerent countries. This is also the view of the Red Cross.\textsuperscript{74} However, the radiation caused by nuclear weapons used in reprisal would have the same effect on the civilian population of either side. A tragic dilemma exists in that there is no military method, except nuclear response, to force the first user (who by his first-use has shown his disregard of the law) to discontinue his nuclear attack. All plans for nuclear war take for granted the right of nuclear response to first-use, because proportionate reprisal is required by elementary military logic and legitimized by the law of war. Without the right of nuclear counter-attack, there would be unilateral nuclear war; the opponent who has built up his nuclear deterrence capacity for self-defense would be virtually defenseless.\textsuperscript{75}

On the other hand, it is questionable whether nuclear reprisal could achieve the very purpose of reprisal, namely, to induce the opponent to discontinue its illegal behavior. Instead, nuclear reprisal might induce the

\textsuperscript{71}STOCKHOLM INT'L PEACE RESEARCH INST. [SIPRI], THE LAW OF WAR AND DUBIOUS WEAPONS 47 (1976). "Reprisals serve as an ultimate legal sanction or law enforcement mechanism...to force an adversary to stop its extra-legal activity." See also U.S. AIR FORCE TREATISE, supra note 5.

\textsuperscript{72}Civilian Convention, supra note 19.

\textsuperscript{73}U.S. AIR FORCE TREATISE, supra note 5, at 4.

\textsuperscript{74}See COMMENTARY, supra note 15, at 45-47, 228 (1958). See also Diplomatic Conference on the Reaffirmation & Devel. of Humanitarian Law Applicable in Armed Conflict Protocol I [1977] U.N. JURID. Y.B. 95, U.N. Doc ST/LEG/SER.C/15. This protocol extends the prohibitions of reprisals against civilians in enemy-occupied countries to the civilian population in the belligerents' own countries. However, except for China (which acceded to Protocol I on Sept. 14, 1983, with effect as of March 14, 1984), the nuclear-weapon states have not yet become parties to the treaty. (Information Service of the U.N. Treaty Section, Sept. 4, 1985).

\textsuperscript{75}An examination by a Finnish scholar of over a dozen authoritative studies showed that only two denied the right of nuclear reprisal: Charlier, Questions Juridiques Soulevees Par l'evolution de la Science Atomique, 91 RECUEIL DE COURS 357 (1957); Brownlie, Some Legal Aspects of the Use of Nuclear Weapons, 14 INT'L & COMP. L. Q. 445 (1965); Ross, International Law and the Use of Nuclear Weapons, in ESSAYS IN HONOUR OF ERIK CASTREN 77 (1979).
first user to intensify and accelerate its nuclear attacks, although the law of war forbids counter-reprisal. Yet it remains true that if the victim of the first-use of nuclear weapons were deprived of the right to respond in kind, it would also be deprived of the right of response to consecutive nuclear attack. Ultimately, the country might have to accept the ever greater destruction of its territory with passivity.

The only way to solve the tragic dilemma is to prevent the first-use of nuclear arms. Without first-use, there can be no subsequent use, and the question about the legality of nuclear reprisal becomes moot.

VI. THE SIGNIFICANCE OF NO FIRST-USE PLEDGE

There exists a remedy for the fear of first-use of nuclear weapons. It obviates the need for the time consuming and laborious negotiation and subsequent ratifications of a treaty. The goal is obtainable by formal declarations which governments can make unilaterally at any time, and which, if they wish, become binding at once.

The legally binding character of states’ unilateral declarations, if given publicly and with an intent to be bound, was reasserted by the International Court of Justice in 1974, in a case that involved the testing of nuclear weapons:

Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking. Any undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.76

So far, two nuclear-weapon states have made such declarations; China in 1965 and the Soviet Union in 1982. The Soviet Union declared that “[t]he U.S.S.R. assumes an obligation not to be the first to use nuclear weapons.”77

76. Nuclear Tests(Aust. & N.Z. v. Fr.) 1974 ICJ 253, 257. The Court stated this in its judgment in the Nuclear Tests case in which Australia and New Zealand contended that French nuclear tests in the Pacific were illegal because France had publicly declared not to make them. For a critique of the Court’s stand as being too absolute, see Rubin, The International Legal Effects of Unilateral Declarations, 71 Am J. Int’l L. 1 (1977). For a reply to this critique see Sicault, Du Charactere Obligatoire des Engagements Unilateraux en Droit International Publique 83 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIQUE 3 (1979).

77. The full text of Foreign Minister Gromyko’s announcement at the 2nd U.N. Special Session on Disarmament on June 7, 1982 reads: “Guided by the desire to do all in its power to deliver the people from the threat of nuclear devastation and ultimately to exclude its very possibility from the life of mankind, the Soviet Union solemnly declares: The Union of Soviet Socialist Republics assumes an obligation not to be the first to use nuclear weapons. This obligation shall become effective immediately from the rostrum of the U.N. General Assembly.” U.N. Doc. PUR/A/S-12, PV 12, 21-52, reprinted in, H.JAcK, DISARM—OR DIE 43 (1983).
The objection that such a pledge is unenforceable is meaningless, for enforcement, in the sense of "punishment," is relevant only after an obligation is broken. If the no first-use pledge were broken by a first-use against a nuclear-weapons state, enforcement would, with virtual certainty, come in the form of nuclear response. If the pledge (which is addressed to all states) was broken by a first-use against a non-nuclear-weapons state, any nuclear-weapons state would have the right of nuclear response under the principle of collective self-defense. A treaty could threaten no more compelling enforcement.

If, in contrast, the term "enforcement" is used to denote the intent to assure observance of an obligation before it is broken, by threatening "punishment" in case of non-observance, then again the pledge neither adds to nor detracts from the threat. The Soviet, as well as the Chinese, no first-use pledge neither promises nor expects any renunciation of the right to nuclear reprisal (second-use).

These considerations address the objection that the Soviet Union could benefit from breaking or withdrawing its no first-use pledge. There have been assertions that the pledge is a ruse to lull the West into a false sense of security, in order to improve the chances for a Soviet first strike. But, the pledge need not and certainly does not diminish the vigilance of the Soviet Union's potential adversaries, nor does the pledge in the present climate of deep mutual distrust influence the preparations of either side for nuclear war. In short, if the pledge were broken or rescinded, the legal and factual situation would be the same as if no pledge had been made.

This, however, does not mean that the pledge is useless. Whereas the deliberate unleashing of superpower nuclear war is altogether improbable, the possibility of accidental first-use has become even more threatening by the systematic preparations for instantaneous nuclear response. Consequently, the time for reasoned reflection and response is being extinguished, when the aim should be to expand that precious time. The significant benefit of a mutual no first-use pledge would be the psychological readiness to see the approach — and even the detonation — of a nuclear weapon as the result of human or machine failure, or as the work of terrorists or unauthorized subalterns. That readiness, and the resulting conclusion that a nuclear "counter" attack under such circumstances would be an irremediable mistake, might save the world from a nuclear holocaust.

The NATO refusal to reciprocate the Soviet's no first-use pledge does not imply the intention to start nuclear or conventional war. But as long as NATO insists on preserving the option of a first-use, the Soviet Union will have less reason to assume that a first nuclear strike against it was unintended, and might consider it necessary to act on the assumption that the strike was intended. A mutual no first-use pledge can, as much as humanly possible, guarantee the prevention of the ultimate blasphemy — an unintended end of civilization.
VII. CAN THE STRATEGIC DEFENSE INITIATIVE DIVERT THE NUCLEAR COLLISION COURSE?

The Strategic Defense Initiative (S.D.I.), emphasizing the unacceptable risks posed by offensive nuclear weapons, calls for a huge endeavor to eliminate this danger through an arms system that would destroy nuclear weapons in outer space, before they can hit the earth. Announcing the scheme in his television speech on March 23, 1983, President Reagan expressed the expectation that this would make nuclear weapons "impotent" and "obsolete" and free the American people of the fear of nuclear war. To accomplish this would, indeed, be a historic breakthrough.

The project raises fundamental questions. First, if S.D.I. is technologically feasible (which critics deny), would it really protect the American people against Soviet nuclear weapons? The S.D.I. does not make such a claim. It is directed solely against nuclear weapons coming from outer space; but those arriving from air, land or sea might still destroy the United States as a functioning society. Second, could the S.D.I. create an American monopoly of protection against space-delivered weapons? Hardly, since the Soviet Union would develop its own S.D.I., and both sides would develop weapons for the destruction of each other's "star wars" potential. Thirdly, would the scheme reduce the risk of unintended nuclear war? Since S.D.I. requires staggeringly complex new computer technology it would virtually exclude human decision-making and detection of computer errors. Moreover, S.D.I. could not guarantee against a deliberate first nuclear strike. In a major crisis, S.D.I. could conceivably induce either side to make a pre-emptive nuclear attack, in the knowledge that the attacked side's capacity to respond with space-delivered nuclear weapons would be destroyed.\footnote{ABM Treaty, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503.}

It is in the context of these considerations that the S.D.I.'s compatibility with existing treaty law, the ABM Treaty,\footnote{ABM Treaty, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503.} must be examined. The ABM Treaty of 1972 is the most important arms control agreement concluded since World War II.\footnote{For the texts and histories of negotiations of the agreements aiming at arms control and disarmament, concluded since 1945 and in force for the United States, see U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS, (1980). For an insider's analysis "of the initiatives and actions taken within the United Nations on the question of non-use of nuclear weapons and the prevention of nuclear war" from 1946 to the 1982 General Assembly 2nd Special Session on Disarmament (which also shows the obstacles the United Nations has been facing due to attitudes of Member States) see Cor-}
significance to be effectively limited in the arms-control negotiations."”

The U.S - U.S.S.R. Anti-Ballistic Missile Treaty, as the prefix "Anti" shows, is opposed to weapons designed to protect either nation's territory against attack. Its philosophy is based on the lessons of the 1960's, which indicate that such defense cannot be truly effective, but that their build-up nevertheless nourishes the suspicion of an intention to start a war. Instead, consonant with the deterrence doctrine, the Treaty expresses the philosophy that strategic stability requires an equal vulnerability; neither would attack the other, as the consequences would be unacceptable to both.

The key stipulation of the ABM Treaty reads: “Each party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land-based.” Thus the Treaty prohibits not only the deployment and, implicitly, the use of ABM weapons, but also their development and testing.

The Treaty proves the parties' earnest intent to prevent its demise. Thus, it shows a calm attitude toward potential infractions. For instance, the treaty states that “ABM systems or their components prohibited by this Treaty shall be destroyed or dismantled under agreed procedures within the shortest possible agreed period of time.” In other words, such matters are to be disposed of amicably. Also, in contrast to the time-restricted validity of other arms control agreements, such as SALT I and II, the ABM Treaty stipulates that it “shall be of unlimited duration.”

Nevertheless, the Treaty provides for emergency situations: “Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests.” The prerogative to withdraw from the Treaty, then, depends on three conditions: (a) events must have occurred which, in the withdrawing Party's judgment, were “extraordinary”; (b) the extraordinary events must, in the withdrawing Party's judgment, have been so grave to have "jeopardized its supreme interests," and (c) these events must be related to antiballistic missile matters. This third condition excludes the right to

82. The treaty permitted two carefully restricted types of non-mobile land-based ABM installations (hence its title as “limitation” instead of “prohibition” of ABM systems): the deployment of specified numbers of ABM launchers, ABM missiles and ABM radar complexes within a specified radius around Washington, D.C. and Moscow, and analogous by specified ABM installations in one additional area of each country (art. III). A 1974 Protocol to the Treaty reduced the number of those areas from two to one in each country. ABM Treaty, supra note 79.
83. Id. art. VIII.
84. Id. art XV, para. 1.
85. Id. art XV, para 2.
base the withdrawal on any other grounds. Linkage to extraordinary events unconnected with anti-ballistic weapons matters may not be invoked.

Furthermore, the withdrawal must not be abrupt. Notice of the decision to withdraw has to be given “six months prior to withdrawal from the Treaty.” The cooling-off period could permit bilateral negotiations, as well as third-party efforts (e.g., by the parties’ allies and/or the United Nations), to prevent the withdrawal and thus avoid a serious deterioration of the international climate and a new arms race.

Finally, “[s]uch notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.” The notice of withdrawal must make a convincing case that can stand outside scrutiny. Withdrawal from a bilateral treaty by either Party terminates the treaty, which is the reason why the ABM Treaty surrounds the right of withdrawal with strict conditions. The pursuit of the S.D.I. without a formal withdrawal from the ABM Treaty may indicate the wish of the United States not to be considered as causing the Treaty’s dissolution. But, since it conflicts with the essence of the Treaty, the S.D.I. entitles the Soviets to terminate the Treaty themselves. In any case, the ABM Treaty, as it stands, cannot survive the S.D.I., nor does any prospect exist for a U.S.-Soviet agreement to amend the Treaty.

Indeed, the fact that the S.D.I. does not expect to make nuclear weapons obsolete, but that it is to be combined with preparations for their offensive use, came to public knowledge in May of 1985. Reporting on Washington’s “most extensive review of the nuclear policy in ten years”, a New York Times dispatch stated:

The Defense Department is devising a nuclear war plan and command structure that would integrate offensive nuclear weapons with the projected anti-missile shield. . . . Until now, the United States has relied solely on offensive weapons such as missiles, as a nuclear deterrence. It is the prospect of the shield and the preconceived need to coordinate these two elements that has prompted the current review. . . .

In addition, the United States has begun to field an array of new nuclear weapons, including the B-1 bomber, Trident submarines armed with ballistic missiles, the Pershing-2 medium range ballistic missile, and cruise missiles based on land, sea and air. . . . [T]he new plan is intended to coordinate the potential use of these weapons, plus others

86. Id.
87. Id.
88. The 1969 Vienna Convention on the Law of Treaties states: “A material breach of a bilateral treaty by one of the Parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operations in whole or in part.” (art. 60, para. 1) A material breach of a treaty, for the purposes of this article, consists in . . . (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.” (art. 60, para. 3) Convention on the Law of Treaties, U.N. Doc. A/CONF. 3 9/27 (1969).
THE NUCLEAR COLLISION COURSE

still being developed, with the shield. . . .

Three months later, "[t]he White House announced that, despite So-
viet objections, the U.S. would proceed with the first American test of an
anti-satellite weapon against an object in space."90

The large numbers of orbiting satellites are the superpowers’ indis-
ispensable eyes and ears for their command and control of communication
and intelligence networks. The side deprived of its satellites would be in a
disastrously inferior situation. Were both sides deprived of them, com-
plete chaos would result.

Since “satellite-killers” are not anti-ballistic missiles, neither their
development nor their testing or deployment is prohibited by the ABM
Treaty. However, the technology of anti-satellite (ASAT) weapons is so
much identical with that of anti-ballistic missiles that tests of ASAT
weapons would simultaneously test anti-ballistic missiles, and must there-
fore also be considered forbidden. All in all, the pursuit of the S.D.I.
scheme not only violates the ABM Treaty, but erects no barrier against
nuclear war.

VIII. CONCLUSION

The collision course toward nuclear war can only be diverted by re-
membering and following the reasonable and rational rules of conduct set
by international law. If the evil threatened by nuclear war is laid side by
side with these legal norms it is hard to see how they could permit nu-
clear war.

Respect for law is more important for human survival and well-being
than is the perfection of technology. If the human mind was able to split
the atom, it must be able to concentrate efforts to split the fascination
with the pernicious offspring of that feat - the path toward nuclear cata-
strophe. Practicable, carefully designed proposals for reversing the trend
exist. Based on years of study and thorough discussion, the most com-
prehensive list of the measures available and in principle agreeable to all
Members of the United Nations is contained in the “Program of Action”
enunciated by consensus in the Final Document of the 1978 General As-
sembly Special Session on Disarmament.91 Various additional construc-
tive proposals are to be found in other General Assembly resolutions, in
formal statements by groups of World leaders, and in the conclusions
reached by highly respected personalities such as those of the Pugwash

90. N.Y. Times, Aug 21, 1985, at 1, 8. Concerning some planned future tests of S.D.I.
Weapons, see, J. Smith, ‘Star Wars’ Tests and the ABM Treaty, 229 SCIENCE, July 5, 1985,
at 29.
91. The Consensus Declaration of the Special Session states: “Mankind is confronted
with a choice: we must halt the arms race and proceed to disarmament or face annihilation.”
U.N. Department of Public Information, Final Document of the Special Session of the
General Assembly on Disarmament (May-July 1978) at 10-19.
group. Yet, who will be left to be blamed, and by whom, if the counsel of reason is disregarded?
STUDENT COMMENT

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

BY

GREGORY F. INTOCCIA*

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 Beruit was virtually destroyed by a terrorist truck bomb.1 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.2

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.3

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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.
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. 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.

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-help6 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

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. The "essence of our response," Shultz stated, "is simple to state: violence and aggression must be met with firm resistance." The best deterrent to terrorism, he stated, is the "certainty that swift and sure measures will be taken against those who engage in it."9

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," and that "Israel has won major battles in the war against terrorism," Shultz asserted that "nations of the world would do well to follow Israel's example [of how to deal with terrorism]." (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." (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]." (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." 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." The speech advocates flexibility in response at the "times and places of our own choosing." (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."18

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 Nations19 and other bodies20 which clearly outlaw international terrorism,

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.


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.”

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

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. 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.

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 policymakers 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 and the militant takeover of the American embassy in Tehran, 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.

24. Id.
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.29

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.30 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.

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.


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. 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.

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. 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. The court underscored the principle that a state is liable if it knowingly permits its territory "to be used for acts


contrary to the rights of other States. 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. 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. 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. 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-

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.\textsuperscript{39} 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.\textsuperscript{40} 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.\textsuperscript{41} 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,"\textsuperscript{42} 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,\textsuperscript{43} 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.\textsuperscript{44} Recognizing this fact, international rules permit economic reprisals against states found to be violating international law.\textsuperscript{45} Hence, economic sanctions would be legally permissible

\textsuperscript{40} Id.
\textsuperscript{41} Id. at 304.
\textsuperscript{42} See supra text accompanying note 18.
\textsuperscript{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.
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.46

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.47 Generally, those principles view a state's use of force as permissible in two cases: first, when acting in self-defense;48 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-

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.\textsuperscript{49}

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.\textsuperscript{50} Under customary principles, a state need not wait for any armed attack to occur, whether conventional or unconventional.\textsuperscript{51} 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.\textsuperscript{52} 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;\textsuperscript{53} second, there must exist compelling necessity to act in response to coercion;\textsuperscript{54} 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.\textsuperscript{55}

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

\textsuperscript{49} Reference to the word “retaliation” in this article is intended to be synonymous with “armed reprisal.”

\textsuperscript{50} See infra text accompanying note 58.

\textsuperscript{51} 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). Cisero, Gentilli, and Grotus 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.

\textsuperscript{52} Id. at 483.

\textsuperscript{53} See infra text accompanying note 58.

\textsuperscript{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.

\textsuperscript{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.\(^6\) *Caroline* is generally recognized by commentators as authoritative precedent that self-defense, including the concept anticipatory self-defense, is legal doctrine.\(^7\) 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."\(^8\) 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."\(^9\)

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."\(^60\)

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,"\(^81\) 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, and whether the United Nations Article 51 is a principle of limitation or illustration.

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. 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. However, for the most part, this machinery does not exist. War between nations did

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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 in 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.\textsuperscript{66} 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.\textsuperscript{67} 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.\textsuperscript{68}

(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.\textsuperscript{69} Consequently, the endangered state is not obligated to first seek peaceful resolution if it reasonably believes that self-defense action is a pressing necessity.\textsuperscript{70} The rationale for this view was perhaps best stated by Sir Humphrey Waldoch 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."\textsuperscript{71}

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."\textsuperscript{72} 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.

\textsuperscript{66} Id.
\textsuperscript{67} Levenfeld, supra note 25, at 20.
\textsuperscript{68} Id.
\textsuperscript{69} Gross, supra note 32, at 485.
\textsuperscript{70} Id.
\textsuperscript{72} Id. at 420.
The "legislative history" of the United Nations Charter appears to be consistent with this "broad" view. The travaux préparatoires, 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. 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 armée." The French version is generally considered to be the most accurate version of the Article's negotiating history, 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.

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. It found that a defensive use of force intended to affirm rights illegally denied is not consistent with 2(4). 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, and the 1967 Israeli airstrike against Egypt when Israeli intelligence evidence gave clear indication that an Egyptian attack was impending.

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-

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.
78. Id.
rants the self-defensive action.\textsuperscript{81} Despite this standard, disagreement exists over whether measurement of the danger is limited to immediately preceeding 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.\textsuperscript{82} 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."\textsuperscript{83} 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,\textsuperscript{84} 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.\textsuperscript{85} 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\textsuperscript{86} would be illegal since a reprisal is not a means of sovereign self-protection; reprisals merely intend

\textsuperscript{81} Gross, \textit{supra} note 32, at 487.
\textsuperscript{83} \textit{Id.} at 6-7.
\textsuperscript{84} \textit{Id.} at 10.
\textsuperscript{85} \textit{Id.}
\textsuperscript{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.\textsuperscript{87} However, new evidence suggests increased approval by the international community of selective types of reprisals.

\textit{a. Customary International Law}

Customary international law permitted armed reprisal as a matter of self-help within the limits set forth by the \textit{Naulilaa} case.\textsuperscript{88} The \textit{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.\textsuperscript{89} Second, the injured state must also have attempted to obtain redress from the offending state for the alleged violation.\textsuperscript{90} Lastly, implementation of the reprisals must not be patently offensive, that is, disproportionate to the wrong done.

\textit{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.\textsuperscript{91} This view places great reliance on Article 2 of the Charter which states in pertinent part:

\begin{quote}
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-
\end{quote}

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\textsuperscript{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, \textit{supra} note 39, at 277-78.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{90} Examples of attempted redress would include good faith arbitration or negotiation.

\textsuperscript{91} See \textit{Oppenheim}, \textit{supra} note 30, at 156.
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.” 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. 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. 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 defacto form, of the continued vitality of the concept reprisal. This Security Council practice, however, must be viewed with caution since the Security Council’s stated position is condemnation of armed reprisal. 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. 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-

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.99 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.100 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.101 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.”102

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

100. Salpeter, supra note 39, at 288.
101. Levenfeld, supra note 25, at 35.
102. Id.
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. Balancing these concerns, the United States should not regard a state’s toleration nor negligent oversight of terrorist activity, as “substantial complicity.” 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.

Where a nation fails to control terrorist activity because of the inability of its government to function, 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-

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.\textsuperscript{108} 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.\textsuperscript{109} 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.\textsuperscript{110} 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.\textsuperscript{111}

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.\textsuperscript{112}

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

\textsuperscript{108} J. Murphy & A. Evans, Legal Aspects of International Terrorism 569 (1978).


\textsuperscript{110} Id. at 312.

\textsuperscript{111} Id.

\textsuperscript{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. 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. 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, 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. Security Council sanctioning and weak enforcement by member states has in practice rendered the use of United Nations economic sanctions useless. 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.

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 affect 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.119

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.120 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.121

Arguably, legal precedent exists for the notion that the doctrine of armed reprisal is available to all nations.122 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

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\(^2\) 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.\(^2\) 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.\(^2\)

Given the great confusion that exists over whether the concept of self-defense includes the customary form of anticipatory self-defense,\(^1\) 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.\(^3\) In an era of sophisticated terrorist methods\(^1\) 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,\(^1\) 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\(^1\) and policy\(^1\) viewpoints to have participated to a substantial degree\(^1\) in a terrorist act, conditions meet the requirements for customary anticipatory self-defense\(^1\) and conditions are such that the prospective benefits of engaging in the self-defensive action outweigh the prospective costs wrought by escalation in

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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.
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. 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 disadvantages 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,” 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.

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