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The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?

Jeffrey Allen McCredie*

I. INTRODUCTION

On April 14, 1986, United States Air Force F-111's and Navy 15 A-6 and A-7 fighter planes launched a strategic bombardment of five targets in Libya.¹ The strikes centered at designated areas in Tripoli,² and Benghazi.³ An estimated thirty-seven Libyans, including civilians, were killed; ninety-three sustained injuries.⁴ The strikes were preceded by numerous conflict-oriented events allegedly linked to Libya which occurred in the past four months. On December 27, 1985, terrorists attacked passengers at Rome and Vienna airports killing twenty, including four terrorists.⁵ President Reagan accused Libya of being involved.⁶ Subsequent to the airport attacks, the United States advocated economic sanctions against Libya and ordered United States citizens in Libya to return home.⁷ Conflict and tensions mounted between the United States and Libya when on March 24 and 25, 1986, Libyan missiles and ships attacked the U.S. Sixth Fleet while it was engaging in naval exercises in the Gulf of Sidra.⁸ Libyan leader Mohammad Qadhafi avowed that no nation may legitimately pass through the "Line of Death," an arbitrarily created line drawn from the northern most point of Libyan land across

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¹ Gorden, *Pentagon Details 2-Pronged Attack*, N.Y. Times, Apr. 15, 1986, at A1, col. 5.

² *Id.* at A1, col. 3. The attacks at Tripoli aimed at three areas; the El-Assiziya Barracks, a military airport, and Sidi Bilal.

³ In Benghazi, the Jamahiriya barracks and the Benina Air base were the principle targets.

⁴ Whitaker, *A New Kind of War*, Newsweek, Apr. 25, 1986, at 17.

⁵ Wall St. J., Apr. 16, 1986, at B18, col. 4.

⁶ *Id.* at B18, col. 3. The United States contended that Libya was a base for the Abu Nidal terrorist group, which allegedly orchestrated the Rome and Vienna massacres. Wash. Post, Jan. 16, 1986, at A1, col. 6.

⁷ Wall St. J., Apr. 16, 1986, at B18, col. 4.

⁸ *Id.* After Libya fired surface-to-air missiles at several United States war planes in the exercises, the United States sunk two Libyan patrol boats, including other exchanges of fire in "Operation Prairie Fire." See Newsweek, Apr. 7, 1986, at 24.

the Gulf of Sidra.⁹

Several days after the exchanges of fire in the Gulf of Sidra, on April 5, 1986 the "LaBelle" nightclub, a location in Berlin, West Germany frequented by American military personnel, was bombed.¹⁰ One American was killed and an estimated sixty-three Americans were injured.¹¹

Prior to the April 14, 1986, air strikes, the United States made known its intent to use military force against terroristic bases.¹² The United States also announced its finding of "incontrovertible evidence" linking Libya to the Berlin bombing.¹³ Intelligence sources also linked Libya to other recent incidents of international terrorism,¹⁴ including plans to attack American diplomats.¹⁵

After the strikes, President Reagan announced his decision to order the bombardment as retaliation for the direct Libyan role in the Berlin

⁹ Newsweek, Apr. 7, 1980, at 20.

¹⁰ Wall St. J., *supra*, note 6, at 18, col. 3.

¹¹ *Id.* Prior to the bombing of the nightclub in Berlin, on April 2, 1986, a bomb exploded in the passenger cabin of a TWA jet flying over Greece. Four Americans were killed. The United States Fleet in the Mediterranean remained on alert as Libyan officials ordered Westerners to move into Army camps, anticipating a possible raid. The Berlin bombing also took the life of another national, and the total dead were two, and injured over two hundred. Wash. Post, Apr. 5, 1986, at 1, col. 5.

¹² N.Y. Times, Apr. 10, 1986, at A1, col. 6. See, Wash. Post, Jan. 26, 1986, at A25, col. 1.

¹³ Weinraub, *Officials Say U.S. Warned of Bomb, Minutes Too Late*, N.Y. Times, Apr. 11, 1986, at A1, col. 6. U.S. Intelligence revealed a March 25, 1986 cable from Tripoli to the Libyan People's Bureau in East Berlin regarding the bombing. On April 4, 1986, a report from East Berlin came back to Tripoli that the bombing may take place the next day. Wash. Post, Apr. 15, 1986, at A23, col. 1. Walters, *Security Council Considers U.S. Self-Defense Exercise*, 86 DEP'T ST. BULL. 19 (1986).

¹⁴ Wall St. J., *supra* note 6, at 19, col. 3. Intelligence sources were quoted as linking Libya to the following incidents: April 13, 1985, bombing of the Bank Leumi in Paris, the June 19, 1985 Frankfurt West Germany airport bombing, the car bombing at the U.S. Rhein Main Air Force Base on August 8, 1985 and the October 1985 hostage-taking on the Achille Lauro cruise liner. The role of Libya, however, was undefined. See also Norland, *Inside Terror, Inc.*, Newsweek, Apr. 7, 1986, at 25.

Furthermore, other intelligence evidence linked Libya with the following incidents. In March 1986, Turkish police arrested two individuals for alleged plots in Turkey against Americans. On March 28, 1986, France expelled two members of the Libyan People's Bureau in Paris for suspected involvement in terrorism.

Six days later, France expelled two "Fatah Force 17" members recruited by Libya to attack United States citizens in Paris.

Finally, at the time that the air strikes were launched, the United States claimed that evidence existed that the Libyan People's Bureau was planning an attack in Vienna on April 17th. Walters, *supra* note 13, at 20.

¹⁵ Wash. Post, Apr. 5, 1986, at 1, col. 5. Intelligence sources indicated Libyan surveillance of United States diplomats in various European locations. Gwertzman, *Plots on Global Scale Charged*, N.Y. Times, Apr. 15, 1986, at A1, col. 3. (for intelligence indications of a "global plot" by Libya). N.Y. Times, Apr. 16, 1986, at A18, col. 1 (involving a failed plot in Paris of Libyans to kill Americans at the U.S. visa office).

bombing on April 5, 1986.¹⁶ The U.S. Ambassador to the United Nations, Vernon A. Walters, while addressing the U.N., called the attacks acts of self-defense.¹⁷ Prior to the strikes, in January 1986, Secretary of State George P. Shultz also claimed that the United States had a legal right to use military force to combat terrorism, under the theory of self-defense.¹⁸ This viewpoint has been criticized from within the United States¹⁹ and from without.²⁰

With the number of state-sponsored terrorist incidents on the rise, and the declarations by certain nation's leaders to employ state-sponsored terroristic tactics,²¹ the United States and her allies currently face the dilemma of employing forcible means to preempt future attacks. The decision to use military force against Libya, as well as other military responses such as in the October 1985 Achille Lauro incident,²² and the September 1986 deployment of U.S. special forces to Pakistan,²³ marks a new trend in United States' responses to international terrorism. This article discusses the actions of the United States against Libya under two theories of international law— self-defense and reprisal. Particular focus will be made on the action under The United Nation's Charter, as well as prior customary international law. The article will attempt to classify the actions and evaluate the viability of military responses to state-sponsored terrorism under international law. Finally, the article will offer potential methods of reviewing the use of force against terrorism by the international community as a whole.

¹⁶ N.Y. Times, *supra* note 1, at A1, cols. 3, 6.

¹⁷ Sciolino, *U.S. Defends Raid Before U.N. Body*, N.Y. Times, Apr. 16, 1986, at A17, col. 6. See Walters, *supra* note 13, at 1-20.

¹⁸ Wash. Post, Jan. 26, 1986, at A25, col. 6.

¹⁹ *Id.* at A25, col. 2. In response to Secretary Shultz's January comments, noted international legal scholars such as Professor Alfred P. Rubin claimed Shultz was in error. Professor John F. Murphy contended that preemptive strikes, if legal, must require a clear-cut case against the identity of the terrorists.

In direct response to the U.S. aerial strikes on Libya, former Chief Legal Counsel to the United Nations, Professor Oscar Schachter, asserted that the United States would have to establish that the actions were not a punitive reprisal, but were necessary and proportionate. Wash. Post, Apr. 15, 1986, at 20, col. 3.

²⁰ As usual, Europe, was full of mixed views, the majority opposed to the U.S. action. Europe generally feared a great backlash of retaliation from Libya. Wall St. J., Apr. 16, 1986, at 8, col. 1. France refused to give over flight rights to the F-111 bombers which took off from Britain. See Wall St. J., Apr. 15, 1986, at 1, col. 3. India and China condemned the attacks as well. See N.Y. Times, Apr. 16, 1986, at A16, col. 4. See also, Newsweek, Apr. 28, 1986, at 34.

²¹ Wash. Post, Jan. 16, 1986, at A1, col. 1 (where Colonel Qadhafi averred that he will train and equip Arab guerrillas for terrorist missions). Walters *supra* note 13, at 20.

²² N.Y. Times, Oct. 8, 1985, at A1, col. 6.

²³ N.Y. Times, Sept. 8, 1986, at A1, col. 6 (where reports indicated that the United States "Delta Force" embarked to assist Pakistani commandos, but never was actually employed).

II. STATE-SPONSORED TERRORISM PAST AND PRESENT, AND EFFORTS TO ACHIEVE A RESOLUTION

International terrorism appears in many forms, primarily in the categories of private terrorism, terrorism in civil war, and state-sponsored terrorism.²⁴ This article focuses only on state-sponsored terrorism. Terrorism, in the generic sense, is difficult to define.²⁵ For the purpose of this article, I define international terrorism as the "threat or use of violence by individuals or groups, including but not limited to bombings, hijacking, hostage takings, directed at indiscriminant international targets, intending to shock, stun, or create chaos among the international community."²⁶ State-sponsored terrorism includes acts by a government against its own population,²⁷ but for the purposes of this article, the focus will be made on a state which supports international terror by financing terrorist groups, or allowing their territory to be used for training, or aiding and abetting terrorism in general.²⁸

There is no dispute that incidents related to state-sponsored terrorism are steadily on the rise.²⁹ In this rise, Libya is one of the major contributors.³⁰ Libya not only openly admits the use of international terrorism,³¹ but avers to bring chaos to the Western Hemisphere.³²

Terrorism has burdened the world community for many years, but has been particularly prominent in the 1970s and 1980s as a form of violence. Despite enormous concern over the problem, the world community currently cannot agree on a mode or means of controlling international terrorism.³³ Even though a number of countries in the world community have previously balked at the question of the legality of ter-

²⁴ McCredie, *The Responsibility of States for Private Acts of International Terrorism*, 1 TEMP. INT'L & COMP. LAW J. 70 (1985).

²⁵ Gordon, *supra* note 1.

²⁶ Murphy, *Summary Report of the American Bar Association National Conference of Law in Relationship to Terrorism*, in 9 TERRORISM: AN INTERNATIONAL JOURNAL 8 (1987).

²⁷ Schestack, *Of Private and State Terror—Some Preliminary Observations*, 13 RUTGERS L.J. 460 (1982). See also Murphy, *The Soviet Union and International Terrorism*, 16 INT'L LAW 139 (1982).

²⁸ Schestack, *supra* note 27, at 460. The scope of state sponsored terror includes any effort by states to support international terror within or without their borders. It may include indirect involvement as well as the actual furnishing of men and weaponry, including ordering attacks.

²⁹ Murphy, *supra* note 26, at 4 (which particularly noted the rise in terrorist attacks against Americans). See also, Sayre, *Combating Terrorism: American Policy and Organization* in 4 TERRORISM, POLITICAL VIOLENCE AND WORLD ORDER, 481 (1984) [hereinafter T.P.V.W.O.].

³⁰ Murphy, *supra*, note 26.

³¹ *Id.* at 26. See Walters, *supra* note 13, at 20.

³² Murphy, *supra* note 26, at 27. Walters, *supra* note 13, at 20.

³³ Friedlander, *The Enforcement of International Criminal Law: Fact or Fiction*, 17 CASE W. RES. J. INT'L L. 88 (1984). See Murphy, *Legal Controls and Deterrence of Terrorism: Performance and Prospects*, 13 RUTGERS L.J. 465 (1982).

rorism,³⁴ there is a general world consensus that states involved with supporting terrorist activities engage in illegal activity and are internationally responsible for their acts.³⁵

Yet despite numerous international efforts to create a legal framework whereby terrorist acts can be adjudicated,³⁶ these efforts in many circumstances have proven ineffective to deal with states who flagrantly ignore the concept of international law.³⁷ Therefore, in recent months, the United States has promulgated a policy which includes the option to use military force to respond to international terrorism. The policy is primarily due to the lack of effective international legal enforcement machinery.³⁸ The use of military force against terrorists creates numerous problems under the United Nations Charter, and blurs the traditional distinction between war/peace and civilians/soldiers,³⁹ in that international terrorism has been previously termed a "form of warfare."⁴⁰

The lack of previous success in developing countermeasures against terrorism has always centered around problems in international jurisdictions, intelligence gathering, the definition of acceptable concessions, and most importantly, the concept of the use of force.⁴¹ The following sections outline briefly the previous international legislative efforts of the world community against terrorism, and why the use of force becomes an inescapable option.

³⁴ To this day, there are still countries, particularly in the third world, that believe terrorism is a valid method to effectuate national liberation or political goals. However, scholars such as Professor Whiteman contend that international terrorism is proscribed by *jus cogens*. Whiteman, *Jus Cogens In International Law, With a Projected List*, 7 GA. J.INT'L & COMP. L. 609 (1977). Despite the previous disputes over the legal status of terrorism, a most positive step was undertaken by the United Nations in December of 1985 when the General Assembly by declaration, condemned states who support terrorism as violating international law. G.A. Res. 61, 40 U.N. GAOR Supp. 1985.

³⁵ See McCredie, *supra* note 24. See also Lillich and Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U.L. REV. 217 (1977).

³⁶ See *supra* notes 42-82 and accompanying text.

³⁷ Rubin, *Current Legal Approaches to International Terrorism*, in 7 TERRORISM: AN INTERNATIONAL JOURNAL 147 (1984). See Friedlander, *Terrorism and International Law: Recent Developments* 13 RUTGERS L.J. 493 (1982).

³⁸ Almond, *Limits and Possibilities of International Regulation of Terrorism*, in T.P.V.W.O. *supra* note 29, at 493 (1984). See Evans, *American Policy Response to International Terror: Problems of Deterrence* in INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD — (Livingston ed. 1978) [hereinafter INTERNATIONAL TERRORISM.]

³⁹ Defense and Technology, June 1986, at 6.

⁴⁰ O'Ballance, *Terrorism: The New Growth Forum of Warfare*, in INTERNATIONAL TERRORISM, *supra* note 38, at 420.

⁴¹ *But see* Defense and Technology, *supra* note 39, at 6.

A. *Previous International Legislative and Diplomatic Efforts to Combat Terrorism*

1. United Nations' Efforts

The United Nations has technically been aware of the problems of terrorism since the League of Nations preceded the Charter.⁴² In the 1960s and early 1970s, the United Nations sponsored three multilateral aircraft hijacking conventions, limited only to aircraft situations.⁴³ In 1973, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents was promulgated.⁴⁴ This Convention applies primarily to protecting heads of states and diplomats.⁴⁵

In 1979, the United Nations responded to the 1976 Entebbe incident,⁴⁶ by creating a Hostage Convention.⁴⁷ This Convention delegitimizes hostage takings and calls for international cooperation in prevention and prosecution of international hostage incidents.⁴⁸

In addition to the enumerated conventions, the United Nations' General Assembly Resolution 38/130 attempted to broaden the scope of state responsibility for acts of terrorism.⁴⁹ And, in December 1985, the General Assembly finally agreed to condemn all acts of terrorism, especially those supported by states, as illegal under international law.⁵⁰

⁴² Zlataric, *History of International Terrorism and its Legal Control*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 482 (Bassiouni ed. 1975).

⁴³ Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 10 I.L.M. 133 (1970); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), Sept. 23, 1971, 23 U.S.T. 565, T.I.A.S. No. 7570, 10 I.L.M. 1115 (1971).

⁴⁴ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, G.A. Res. 3166, 28 U.N. GAOR Supp. (No. 30) at 146, U.N. Doc. A/9030 (1974).

⁴⁵ *Id.* at art. 2.

⁴⁶ On June 24, 1976, Air Force Flight 139 from Tel Aviv to Paris was hijacked by individuals of the Popular Front for the Liberation of Palestine. On July 3, Israel conducted a military rescue raid. N.Y. Times, July 11, 1976, at A1, col. 4.

⁴⁷ International Convention Against the Taking of Hostages, Dec. 7, 1979, G.A. Res 34/146, 34 U.N. GAOR Supp. (No. 46) at 245-47, U.N. Doc. A/34/36.

⁴⁸ Murphy, *The United Nations and International Terrorism*, in 7 TERRORISM; AN INTERNATIONAL JOURNAL 607 (1984-85).

⁴⁹ Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of These Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives Including Their Own in an Attempt to Effect Radical Changes, G.A. Res. 38/130, 38 U.N. GAOR Supp. (No. 47) at 266-67, U.N. Doc. A/38/47 (1984).

⁵⁰ Murphy, *supra* note 26, at 28; The U.N. "equivocally condemned as criminal all acts, methods and practices of terrorism whenever and by whoever committed." N.Y. Times, Dec. 7, 1986, at

Despite the overwhelming existence of legislation primarily designed to deal with specific types of terroristic incidents, the general impact of the work of the United Nations has gone unfulfilled.⁵¹ The Conventions tend to be limited in scope to specific incidents or diplomatic persons, and situations such as the bombing of the Berlin nightclub are not always covered. Another notable problem is that of enforcement. Today there is largely no effective way to enforce the legal norms created by the United Nations through the United Nations. Where nations as a matter of sovereignty ignore directives from the United Nations, every individual nation must seek domestic means to promote the laws which attempt to prevent terroristic actions. The next section outlines the efforts regional areas have undertaken to remedy international terrorism.

2. Other World Efforts to Peacefully Combat Terrorism

The Organization of American States "O.A.S." in 1971 promoted the Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extortion that are of International Significance.⁵² The Convention requires states to cooperate in preventing and punishing acts of terrorism, especially kidnapping, murder and assaults against "those persons to whom the state has the duty according to international law to give special protection."⁵³ The Convention only applies to diplomatic, consular, and civil servants.⁵⁴

In 1976 Europe promoted a Convention on the Suppression of Terrorism.⁵⁵ The scope of this Convention is broader than the O.A.S. Convention, including stricter provisions on the obligation to extradite and prosecute terrorists.⁵⁶ Subsequent to the European Convention, the Dublin Agreement of 1979 attempted to strengthen judicial cooperation among European states.⁵⁷

In addition to promulgating conventions and mutual agreements, regional areas such as Europe have consistently met and conferred at

3, col. 3. The U.N. also deplored the killing of innocent people due to terrorism. See N.Y. Times, Dec. 10, 1986, at A4, col. 3.

⁵¹ Murphy, *supra* note 29, at 603; See McWhinney, *International Terrorism: United Nations Projects for Legal Controls*, in 7 TERRORISM: AN INTERNATIONAL JOURNAL 175 (1984-85).

⁵² Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413, O.A.S.T.S. No. 37, at 6, Org. of Amer. States Off. doc. OEA/Ser. A/17.

⁵³ *Id.* at art. 1.

⁵⁴ 1 THE INTER-AMERICAN SYSTEM 323 (F. Garcia-Amador 1983).

⁵⁵ European Convention on the Suppression of Terrorism, Oct. 25, 1978, 1978 Gr. Brit. T.S. No. 93 (Cmd. 7390) Europ. T.S. No. 90, reprinted in 15 I.L.M. 1272 (1976).

⁵⁶ *Id.* at arts. 7, 8, and 13(1).

⁵⁷ Agreement Concerning Application of the European Convention to the Suppression of Terrorism, European Community, 12 Bull. Eur. Comm. 90 (1979) reprinted in 19 I.L.M. 325 (1980).

economic summits, and issued nonbinding declarations.⁵⁸ On May 5, 1986, in Tokyo, seven countries issued a summit statement, particularly focusing on Libya's renowned sponsorship of terrorism.⁵⁹ The statement called for refusal to export arms to states who sponsor terrorism, limits on diplomatic missions, stricter entry/exit requirements for foreigners, improved extradition procedures, and general cooperation in the apprehension and prosecution of terrorists.⁶⁰ This statement was subsequently adhered to in practice by several European and non-European nations. In August, 1986, West Germany recently arrested a suspect in the October, 1985, Achille Lauro incident,⁶¹ an Italian jury convicted 11 of 15 suspects in the Achille Lauro incident,⁶² and in September, 1986 Pakistan President Zia vowed to seek the death penalty in prosecuting any individuals found to have assisted in the September, 1986, hijacking incident.⁶³ Finally, in late September, the European Economic Community agreed to increase sharing of police intelligence information and consolidate policies on negotiation.⁶⁴

3. United States Efforts

In addition to being active in supporting the aforementioned United Nations and world regional efforts, the United States has moved to suppress terrorism through economic summits,⁶⁵ domestic extradition treaties,⁶⁶ and new bilateral mutual judicial assistance treaties.⁶⁷ More specific efforts to create a codified domestic policy on terrorism prevention include the Act for the Prevention and Punishment of the Crime of

⁵⁸ *E.g.* 86 DEP'T ST. BULL. 5 (1986) (Tokyo Summit of 1986). The nations attending were: The United States, Japan, United Kingdom, France, The Federal Republic of Germany, Belgium, Italy, Canada and Luxemburg.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Philadelphia Inquirer, Aug. 1, 1986, at A7, cols. 1-2.

⁶² N.Y. Times, July 11, 1986, at A1, col. 1.

⁶³ N.Y. Times, Sept. 8, 1986, at A4, col. 4. President Zia was not a party to the Tokyo summit.

⁶⁴ Philadelphia Inquirer, Sept. 26, 1986, at A1, cols. 5-6.

⁶⁵ Examples include the doctrines affirmed at the Bonn Declaration in 1978, 78 DEP'T ST. BULL. 5 (1978); the Canadian Summit in 1981, 81 DEP'T ST. BULL. 16 (1981); the London Economic Summit June 1984, 44 FACTS ON FILE 419 (1984); and the most recent Tokyo Summit in 1986, 86 DEP'T ST. BULL. 5 (1986).

⁶⁶ See Extradition Treaty, July 9, 1974, United States-Canada, 27 U.S.T. 983, T.I.A.S. No. 8237 (which includes extradition for hijacking, piracy, kidnappings, and bombings), Extradition Treaty, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656 (which also includes as extraditable offenses kidnapping, piracy, offenses on transportation vehicles, offenses with explosives).

⁶⁷ Examples include but are not limited to:

Hostage Taking,⁶⁸ and the 1984 Anti-terrorism Assistance Program.⁶⁹ The Hostage Taking Act would make a federal crime any activities of individuals who seize Americans abroad.⁷⁰ The Anti-terrorism Assistance Program permits the President to furnish information to foreign countries to enhance the ability of their law enforcement personnel to deter terroristic actions.⁷¹

The Terrorist Prosecution Act of 1985⁷² is another Congressional effort to extend United States' jurisdiction to prosecute terrorists who commit violent acts against United States citizens' abroad or in the United States.⁷³ In 1984, President Reagan introduced several bills to specifically deal with the problems of state-sponsored terrorism.⁷⁴ These include the Aircraft Sabotage Act,⁷⁵ Act for Rewards for Information Concerning Terroristic Acts,⁷⁶ and the Prohibition Against the Training or Support of Terrorist Organizations Act of 1984.⁷⁷ Of particular relevance is the *Prohibition Act* which authorizes the Secretary of State to suspend technology to groups supporting terrorists.⁷⁸

In September of 1986, the Omnibus Diplomatic Security and Anti-terrorism Act of 1986, was introduced to provide more protection for embassies abroad.⁷⁹ Although not yet fully effective, this Act would pro-

1. Supplementary Convention to the Extradition Convention of Oct. 24, 1961, Mar. 14, 1983, United States-Sweden;

2. Convention on the Transfer of Sentenced Persons, July 17, 1984, United States-France, T.I.A.S. No. 10823;

3. Extradition Treaty, July 18, 1984, United States-Thailand, T.S. No. 681;

4. Extradition Treaty, Aug. 17, 1984, United States-Costa Rica, T.S. No. 668;

5. Extradition Treaty, Aug. 17, 1984, United States-Jamaica, T.S. No. 849;

6. Extradition Treaty, Aug. 10, 1984, United States-Ireland, T.S. No. 391;

7. Extradition Treaty, Sept. 24, 1984, United States-Italy, T.I.A.S. No. 10837;

8. Treaty on Mutual Legal Assistance in Criminal Matters with Memorandum of Understanding, Aug. 16, 1984, United States-Italy, 26 U.S.T. 493, T.I.A.S. No. 8052.

⁶⁸ Act for the Prevention and Punishment of the Crime of Hostage Taking, 18 U.S.C. § 1203 (Supp. II 1984) [hereinafter *The Hostage Act*].

⁶⁹ Act of Nov. 14, 1983, 22 U.S.C. § 2349aa (Supp. II 1984).

⁷⁰ Hostage Act *Supra* note 68.

⁷¹ Act of Nov. 14, 1983 *Supra* note 69 (under "General Authority").

⁷² Terrorist Prosecution Act of 1985, § 1429, 99th Cong., 2d Sess., 132 CONG. REC. §§ 1382-88 (1986).

⁷³ See note, *U.S. Legislation to Prosecute Terrorists: Anti-Terrorists or Legalized Kidnapping*, 18 VAND. J. TRANS. L. 915 (1985).

⁷⁴ Current Developments, Leich *Four Bills Proposed by President Reagan to Counter Terrorism*, 78 AM. J. INT'L L. 915 (1985).

⁷⁵ S. Res. 2623/H.R. 5690, 98th Cong., 2d Sess. (1984). See also *The Hostage Act*, *supra* note 68.

⁷⁶ S. Res. 2625/H.R. 5612, 98th Cong., 2d Sess. (1984).

⁷⁷ S. Res. 2626/H.R. 5613, 98th Cong., 2d Sess. (1984).

⁷⁸ Current Developments *supra* note 74, at 923.

⁷⁹ Philadelphia Inquirer, Sept. 7, 1986, at A25, col. 1.

vide an estimated \$2.1 billion for security operations.⁸⁰

The efforts of the United States domestically indicate a willingness by Congress to create stricter legislation to combat terrorism. However, domestic legislation and international legislation have little meaning if such measures cannot be enforced. Furthermore, international legislation as well as United States domestic legislation have been traditionally directed at individuals and groups, not states who as a matter of foreign policy ascribe to terrorism. Therefore, when evidence exists that another state is preparing to take terrorist actions, must nations sit idly and take no action even in the absence of specific authorizing legislation? In domestic criminal situations, a standard of probable cause must exist for law enforcement to intercept criminal activity. What standard can be used in the international community, especially where no preventive action can be taken by a recognized international body to intercept such activity? Given the limited scope of previous international legislation and the lack of legal enforcement mechanisms, nations such as Israel, and the United States, promote the idea of preemptive strikes against terrorist bases. As stated by Harry H. Almond, Jr.:

“States that engage in terrorism, including attacking impermissible targets, must be countered through reprisals because enforcement machinery for correcting such conduct is limiting.”⁸¹

Undoubtedly, with the United States' response to the Achille Lauro incident, Libya and Pakistan, a new precedent is developing to utilize military force against terrorists. The immediate questions raised by the promulgation of such a policy are whether such a policy conforms to international law; in what situations is the policy applicable; and whether such a policy adds to stabilizing world order, or the deterioration of normative restraint in international affairs.⁸² The remaining sections evaluate the United States' response to Libyan involvement with terrorism under traditional theories of self-defense and related doctrines, as well as the doctrine of reprisal.

III. CLAIMS OF SELF-DEFENSE

A. *The Obligation of Pacific Settlement of Disputes*

One fundamental tenet in the world legal order system is expressed by Articles 2(3) and 33 of the United Nations Charter. The pacific settle-

⁸⁰ *Id.*

⁸¹ Sayre, *supra* note 29, at 493.

⁸² Falk, *The Decline of Normative Restraint in International Relations* in SPECIAL FEATURE RESTRAINTS ON THE UNILATERAL USE OF FORCE: A COLLOQUY, 10 YALE J. INT'L L. 261, 265 (1985).

ment of disputes.⁸³ Article 2(3) requires nations to "settle their international disputes by peaceful means in such a manner that international peace and justice, are not endangered." Article 33 requires nations involved in international disputes to first seek a solution by acceptable peaceful means such as negotiation.⁸⁴ When read in conjunction with one another, these articles contemplate a situation whereby nations would attempt to resolve matters among themselves,⁸⁵ and if this failed, the matter would be referred to the Security Council, which bears the primary responsibility of maintaining international peace and security.⁸⁶

Evidence indicating that the United States attempted to utilize the Security Council before the bombing is scarce. If the United States invoked the authority of the Security Council on an emergency basis, and no remedy came forth, the rule of reason would dictate that the United States would have no choice but to strike preemptively. An attempt to invoke the powers of the Security Council as a matter of policy would also boost the credibility of subsequent actions.

Despite the requirements of all nations to attempt peaceful settlement of disputes, neither Article 2(3) or Article 33 impairs the right of self-defense under Article 51.⁸⁷ Peaceful settlement of disputes does not require nations to allow attacks against them to continue, if that nation need exercise the right of self-defense, rather Articles 2(3) and 33 set forth a general overriding obligation.⁸⁸ The problematical area in exercising the right of self-defense is defining how much effort a nation must take in the area of peaceful remedies.

⁸³ See 1 BASSIOUNI AND NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 273-76 (1973).

⁸⁴ U.N. CHARTER art. 33 provides in full:

"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

⁸⁵ G. GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS (2d ed. (1949). The methods by which nations may attempt to resolve international disputes are: *Negotiation* (involving diplomatic discussions); *Enquiry* (efforts to find a basis for settlement); *Mediation* (using an outside agency to informally assist in resolution); *Conciliation* (a commission or other international body attempts to intervene and settle); *Arbitration* (an international arbitration panel will hear the dispute and decide it); *Judicial Settlement* (such as the International Court of Justice) resort to regional agencies. *Id.* at 237-41. See H. Kelsen, Law of the United Nations 366, 924 (1951).

⁸⁶ U.N. CHARTER art. 24 provides in full:

"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility, the Security Council acts on their behalf."

⁸⁷ Arend, *The Obligation to Pursue Peaceful Settlement of International Disputes During Hostilities*, 24 VA. J.INT'L L. 97, 122 (1983). See also Murphy, *The Obligation of States to Settle Disputes by Peaceful Means*, 14 VA. J.INT'L L. 57 (1974).

⁸⁸ See U.N. CHARTER arts. 2(3), 33.

If nations claim a use of force as self-defense, they technically need not have attempted to resolve the matter previously by peaceful means, especially where the attack against them is unexpected. However, the United States has overwhelmingly attempted to peacefully resolve the problems of international state-sponsored terrorism, and has done so for a significant time prior to the April 14, 1986 bombings.⁸⁹

In addition to being a consistent participant in treaty making, and diplomatic arrangements between world powers,⁹⁰ the United States has attempted numerous peaceful methods of calling to Libya's attention the unacceptability of their policy on terrorism. However, evidence available to the public about United States efforts to negotiate with Qadhafi directly is nonexistent. Although, in the larger scope of the whole affair such efforts may have proven fruitless, such a public "vain" attempt would have only bolstered the credibility of the United States subsequent actions.

Prior to the air strikes, the United States undertook diplomatic efforts to avoid the situation.⁹¹ According to newspaper accounts, the National Security Council was initially interested in a peaceful resolution.⁹² In addition to the quiet diplomacy, public condemnation, and demon-

⁸⁹ It should be noted that one other legal question arises with the bombings on April 14, 1986—that of Libya's rights to claim the Gulf of Sidra as their territorial waters, thereby excluding nations from engaging in naval exercises such as the United States. Although the principal grounds for the bombing of April 14, 1986, were to preempt terrorist bases, under Article 51 of the Charter the prior exchanges of fire in late March were also argued as acts of self-defense under the Charter. The scope of this paper is only whether the United States may assert claims of self-defense against terrorism as a result of the April 14, 1986 bombings. It should be noted that the United States and Libya have argued previously over the right to the Gulf of Sidra. See Note, *The Gulf of Sidra Incident of 1981*, 10 YALE J. INT'L LAW 59 (1984). Other nations have as well. See also *Libya v. Malta Case*, 44 CAMBRIDGE L.J. 341-5 (1983). Irrespective of the scope of this paper, a few words must be said in passing. Customarily, nations have always had the right to operate vessels on the high seas. The high seas are today regarded as areas beyond the territorial sea—which extends outward three miles from the coast. *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980). See also *United States v. Romero-Galve*, 757 F.2d 1147 (11th Cir. 1985). Although various nations have contended that 12 mile limits or 200 mile limits are territorial seas, no clear norm exists today to confirm this. Furthermore, according to Professor Yehuda Blum, Libya's claim to the Gulf of Sidra cannot be accommodated within the general international law of the sea. Blum, *Current Developments*, 80 AM. J. INT'L LAW 668, 671 (1986).

⁹⁰ See sources listed, *supra* notes 43-82 and accompanying text.

⁹¹ Wash. Post, Apr. 15, 1986, at A1, col. 2. See also Walters, *supra* note 13. It is suggested that the most effective and useful method of dealing with international disputes is the method of diplomacy. The likelihood of a quick decision and response is great, and both parties may be able to compromise and effect a resolution. However, where one or both parties refuse to discuss the matter among themselves, the matter must be referred to other parties by means of modification, arbitration, etc. The process takes great time to effectively resolve. It is suggested, however, that where nations such as Libya who promulgate a policy of terrorism for years, refuse to negotiate diplomatically, the likelihood of success at any other level is a nullity.

⁹² N.Y. Times, Apr. 15, 1986, at A11, col. 1.

strations of military force in the Gulf of Sidra,⁹³ the United States urged on January 7 and 8, 1986, an economic boycott and sanctions.⁹⁴

The United States, according to the Honorable Abraham D. Sofaer, also approached other Arab states to negotiate with Colonel Qadhafi; and requested East Germany to stop the attack on the Berlin nightclub just minutes before it occurred.⁹⁵

Therefore, despite numerous attempts to resolve the matter under peaceful terms, no success was achieved. Accordingly, the decision to utilize force under Article 51 of the Charter was carried out. The next sections discuss this decision.

B. Prohibitions on the Use of Force Under the Charter

In the contemporary era, as reflected by the United Nations Charter, nations are under a general obligation to refrain from using force against other nations. Article 2(4) of the Charter is frequently cited by international scholars as being the primary restriction on the use of force.⁹⁶ It provides:

“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”

Article 2(4) was designed by the framers of the Charter for several reasons. It was intended to ensure that international peace and security would be maintained by nations, and to restrict war as a means of foreign policy.⁹⁷ Article 2(4) must not, however, be construed by itself to limit all uses of force. The key language “or in any manner inconsistent with the purposes of the United Nations” seems to imply the right of nations to use force in limited circumstances so long as they conform to accepted purposes of the Charter.⁹⁸ One central purpose of the United Nations is clearly to maintain international peace and security, and to “take effective collective measures for the prevention and removal of threats to the

⁹³ Walters, *supra* note 13.

⁹⁴ Wall St. J., Apr. 15, 1986, at 22, col. 2. Wall St. J., Apr. 16, 1986, at 18, col. 1.

⁹⁵ Murphy, *supra* note 26, at 31.

⁹⁶ See Nanda, *The U.S. Armed Intervention in Grenada, Impact on World Order*, 14 CAL. W. INT'L L.J. 395, 417 (1984); Schwenninger, *The 1980's: New Doctrines of Intervention or New Norms of Non-Intervention*, 33 RUTGERS L. REV. 423, 427 (1981).

⁹⁷ G. GOODRICH, E. HAMBRO, & A. SIMONS, *CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS* 44 (3d ed. 1969); HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 136 (1979).

⁹⁸ G. GOODRICH, E. HAMBRO, & A. SIMONS, *Id.*

peace.”⁹⁹ Although nations are forbidden to arbitrarily intervene militarily in other nations’ affairs,¹⁰⁰ certain situations arise where nations have no alternative but to use force. Unquestionably, the United States violated Libya’s territorial integrity or political independence in the April bombings, yet the question remains whether international law provides exceptions to Article 2(4), and whether the United States’ actions were consistent with other provisions and purposes of the Charter.

C. *Exceptions to the Prohibitions of the Use of Force in the International Community*

Where nations perceive threats to their peace and security, and peaceful solutions are not imminently possible, nations may undertake what are termed self-help measures to protect their formal legal rights.¹⁰¹ The right of nationals to exercise self-help measures includes the right of self-defense under Article 51 of the Charter, and limited intervention in affairs to enforce legal norms.¹⁰² Professor Brownlie has categorized the exceptions to the restrictions on the use of force as follows:

1. acts of self-defense;
2. acts of collective self-defense;
3. actions authorized by a competent international organ;
4. where treaties confer rights to intervene by an ad hoc invitation, or where consent is given by the territorial sovereign;
5. actions to terminate trespass;
6. necessity arising from natural catastrophe;
7. measures to protect the lives and or property of nationals in a foreign territory.¹⁰³

Under any circumstances, an analysis of self-help measures must center around several factors: whether the action takes on a remedial or repressive character to enforce legal rights,¹⁰⁴ whether the force applied

⁹⁹ U.N. CHARTER art. I(1) provides:

The purpose of the United Nations are:

1. “To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the supervision of acts of aggression or other breaches of peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace.”

¹⁰⁰ Schroder, *Non-Intervention, Principle of*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 358 (1983); U.N. CHARTER art. 7.

¹⁰¹ Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967).

¹⁰² Bryde, *Self-Help*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 215 (1983).

¹⁰³ I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 432, 433 (1963).

¹⁰⁴ D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 11 (1956).

supports the notions of basic community order,¹⁰⁵ and whether the force has been applied in ways whose consequences conform to community goals and minimal world order.¹⁰⁶ Relevant to an evaluation of the United States' actions are the concepts of self-defense under Article 51 of the Charter, and the protection of nationals abroad.

1. Self-defense under Article 51

Article 51 of the Charter provides:

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

Undoubtedly Article 51 claims are evaluated by the world community, especially through the United Nations,¹⁰⁷ and all acts under Article 51 must be exercised exclusively for self-defense purposes.¹⁰⁸ In the past, international scholars have debated the question of "preemptive strikes," or "anticipatory self-defense," as being a concept consistent with Article 51.¹⁰⁹ Anticipatory self-defense would permit a nation to use force to eliminate a threatening attack before the attack actually occurred.¹¹⁰ Many international scholars, such as Professors Henkin,¹¹¹ Jessup,¹¹² Brownlie,¹¹³ and Kunz,¹¹⁴ have contended that such a concept is contrary to the scope of Article 51, because an actual "armed attack" need not occur for a nation to employ force. The concern over restricting the concept of anticipatory self-defense is that nations may abuse the doc-

¹⁰⁵ Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985).

¹⁰⁶ I. BROWNLIE, *supra* note 103, at 432, 433.

¹⁰⁷ P. JESSUP, A MODERN LAW OF NATIONS 168 (1949).

¹⁰⁸ D. BOWETT, *supra* note 104, at 269.

¹⁰⁹ M. MCDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 231, 232 (1961).

¹¹⁰ *Id.*

¹¹¹ Schroder, *supra* note 100, at 232-33.

¹¹² M. MCDUGAL & F. FELICIANO, *supra* note 109, at 165-66.

¹¹³ I. BROWNLIE, *supra* note 103, at 225-226, 434.

¹¹⁴ Kunz, *Individual and Collective Self-Defense under Article 51 of the U.N. Charter*, 41 AM. J. INT'L L. 872, 876 (1947).

trine and disguise acts of aggression as self-defense.¹¹⁵

Other noted scholars such as Professor Bowett,¹¹⁶ McDougal¹¹⁷ and Waldcock¹¹⁸ have acknowledged the validity of the concept of anticipatory self-defense pending certain requirements. Recently, nations such as the United States and Israel have advocated the desirability of the doctrine, especially in the area of responding to terrorists.¹¹⁹

a. Anticipatory self-defense

Although the accepted interpretation of "armed attack" under Article 51 remains in dispute, nations such as the United States and Israel have over the past few years begun to evolve a state practice of preemptive force.¹²⁰

Tribunals in the past have acknowledged the rights of nations to respond preemptively to threats of impending attacks.¹²¹ Professor Schachter has contended that based on previous customary international law advanced by tribunals, and state practice, that terrorist activities against a state's nationals, especially hostage situations, should be an area where this doctrine may apply.¹²² In any circumstances, though, the elements of necessity and proportionality need to be present to allow a state to legitimately claim a preemptive strike as being self-defense.¹²³ Necessity has been described as a temporal requirement, involving responding close in time to the impending threat.¹²⁴ Proportionality is the measurement of the threatening attack or attack against the force used to repel or

¹¹⁵ Schwarzenberger, *Fundamental Principle of International Law*, 87 HAGUE RECUEIL DES COURS 195, 334 (1955).

¹¹⁶ P. JESSUP, *supra* note 107, at 187-88.

¹¹⁷ M. MCDUGAL & F. FELICIANO, *supra* note 109, at 233-36; McDougal, *The Soviet Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 599 (1963).

¹¹⁸ Waldcock, *The Regulation of the Use of Force by Individual States in International Law*, 81 HAGUE RECUEIL DES COURS 455, 495-97 (Vol. II, 1952).

¹¹⁹ Randelzhofer, *Use of Force*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 265, 267 (1983).

¹²⁰ For example, the United States' actions in bombing Libya, responding to the Achille Lauro hijacking are arguably acts of anticipatory self-defense. When Israel bombarded Tunis in October, 1985, they claimed the right of self-defense to preempt P.L.O. headquarters, and bases. N.Y. Times, Oct. 2, 1985, at A1, col. 6. The United States stated that the attack by Israel was justified due to a recent terrorist incident. *Id.* at A1, col. 5. Other incidents of Israel preemptively striking bases included: November 17, 1986—Israel gunships bombarded Palestinian bases in Sidon, Wall St. J., Nov. 18, 1986, at A1, col. 3; October 28, 1985—Israel Air Force jets attacked P.L.O. bases in Bekaa region of Lebanon. N.Y. Times, Oct. 28, 1985, at A1, col. 1.

¹²¹ II, G. SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURT AND TRIBUNALS* 29 (1968) (citing the Tokyo Military Tribunal).

¹²² Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 133 (1986).

¹²³ Wallace, *International Law and the Use of Force*, 19 INT'L LAW 259, 262 (1985).

¹²⁴ Schachter, *supra* note 122, at 132; *see generally* B. RODICK, *THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW* (1928).

deter future action by the threatening state.¹²⁵

The case often cited as the *locus classicus* of the doctrine of anticipatory self-defense is *The Caroline*.¹²⁶ In 1837, a rebellion in colonial Canada was supported by American volunteers operating in the United States.¹²⁷ The *Caroline* was a steamship supplying men and provisions to Canadian rebels.¹²⁸ Because the rebels attacked British vessels, and British protests about the activities remained unredressed, a British military force stormed the vessel, and two men were killed.¹²⁹ American Secretary of State Daniel Webster, responding to the incidents, stated that the doctrine applies where dangers are "instant, overwhelming, leaving no choice of means, and no moment for deliberation."¹³⁰ Since the *Caroline* incident, nations have argued the doctrine in situations such as the United States' response to the Cuban Missile Crisis in 1962,¹³¹ the invasion of Manchuria by Japan in 1933,¹³² and the invasion of Norway by the Nazis in 1940.¹³³

In June of 1981, Israeli planes destroyed the Osirak reactor just outside of Baghdad, Iraq.¹³⁴ The principle reason that Israel advanced for preemptively striking was the Iraqi purpose in building the reactor: to produce nuclear arms to be potentially used against Israel.¹³⁵ Another reason for the strike was Iraq's support for Palestinian terrorism in the Middle East.¹³⁶ Israel invoked the inherent right of self-defense under the Charter as permitting the strike to prevent the potential threat.¹³⁷ Although Israel's actions were criticized by nations including the United

¹²⁵ Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1637 (1984).

¹²⁶ Jennings, *The Caroline and McLeod Cases*, 32 AM.J.INT'L L. 82 (1938).

¹²⁷ Meng, *The Caroline*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 81 (1983).

¹²⁸ *Id.*

¹²⁹ 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 409-14 (1906).

¹³⁰ Letter from D. Webster to Fox, reprinted in 29 BRIT. AND FOREIGN STATE PAPERS 1129, 1138 (1840-41).

¹³¹ Mallison, *Limited Naval Blockade on Quarantine—Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335 (1963). Here the United States claimed that the Navy blockade was necessary because of the imminent threat of installation of missile sites in Cuba.

¹³² II L. OPPENHEIM INTERNATIONAL LAW 302 (Lauterpacht, 7th ed. 1955), where the claim by Japan that they had to invade Manchuria due to Chinese attacks was rejected because no imminent threat existed.

¹³³ *Nazi Conspiracy and Aggression* (Nuremberg) Opinion and Judgment, 36 (1947). Similar to Japan, Germany argued the necessity of the invasion and this claim was also rejected by the Military Tribunal.

¹³⁴ N.Y. Times, June 9, 1981, at A1, col. 6.

¹³⁵ GOV'T OF ISRAEL, THE IRAQI THREAT—WHY ISRAEL HAD TO ACT 9 (Jerusalem 1981).

¹³⁶ *Id.* at 6. See Mallison and Mallison, *The Israeli Aerial Attack of June 7, 1981, Upon Iraq's Nuclear Reactor: Aggression or Self-Defense*, 15 VAND. J. INT'L LAW 417 (1984).

¹³⁷ GOV'T OF ISRAEL, *supra* note 136, at 37-42.

States¹³⁸ and scholars,¹³⁹ general support existed for the action.¹⁴⁰

Israel has also advanced claims under theories of anticipatory self-defense for the occupation of Lebanon.¹⁴¹ And, in October of 1985, Israel claimed the right of self-defense when it bombed the Palestinian Liberation Organization's General Compound Headquarters in Tunis, in which over sixty were killed.¹⁴² Israel claimed the attack was a warning to terrorists.¹⁴³ The United States supported the attack.¹⁴⁴

In evaluating such claims, under the standards advanced by the *Caroline* scholars have contended that the test should be "whether a nation acted with 'reasonableness under the circumstances.'" ¹⁴⁵ According to Professor Schachter, the test of the *Caroline* is still applicable to modern day situations.¹⁴⁶ In terms of the United States' response to Libyan terrorism, an imminence of threat did exist. It is uncontroverted that Libya is heavily involved in sponsoring international terrorism.¹⁴⁷ Colonel Qadhafi has vowed publicly to utilize terrorist tactics against the United States.¹⁴⁸ U.S. intelligence sources have linked Libya to numerous incidents in 1986, before the bombing of the Berlin nightclub.¹⁴⁹ Then, after the April bombing in Berlin, clear and convincing evidence linked Libya to the incident.¹⁵⁰ Following the Berlin bombing, other evidence indicated future plans to link Libya with potential future attacks in Vienna.¹⁵¹ Therefore, intelligence information available on or about April 14, 1986, which had proven consistently reliable in the past indicated further attacks.

The dilemma which international law faces in such a situation concerns the definition of "imminence." Should imminence mean immediate, as in the next few minutes, or several days later? With modern

¹³⁸ N.Y. Times, June 18, 1981, at A1, col. 1, where the United States and Iraq agreed to condemn the attack by Israel.

¹³⁹ Mallison & Mallison, *supra* note 136; see D'Amato, *Israel's Air Strike Upon the Iraq Nuclear Reactor*, 77 AM. J. INT'L LAW 584 (1983).

¹⁴⁰ See Note, *Tensions Between International Law and Strategic Security: Implication of Israel's Preemptive Raid on Iraq's Nuclear Reactor*, 24 VA. J. INT'L LAW 459 (1984); see also Note, *Attack on Osirak: Delimitation or Self-Defense Under International Law*, 4 N.Y.L. SCH. J. INT'L AND COMP. L. 131 (1982).

¹⁴¹ See Levenfeld, *Israel's Counter-Feedayeen Tactics in Lebanon, Self-Defense and Reprisal Under Modern International Law*, 23 COLUM. J. TRANSNAT'L L. (1982).

¹⁴² N.Y. Times, Oct. 2, 1985, at A1, col. 6.

¹⁴³ *Id.* at A8, col. 1.

¹⁴⁴ *Id.* at A1, col. 5.

¹⁴⁵ G. SCHWARZENBERGER, *supra* note 121, at 34.

¹⁴⁶ Schachter, *supra*, note 122 at 136.

¹⁴⁷ See sources listed, *supra* notes 5, 6, 13 and 14.

¹⁴⁸ See sources listed, *supra* note 21.

¹⁴⁹ See sources listed, *supra* notes 13, 14 and 15.

¹⁵⁰ See sources listed, *supra* note 13.

¹⁵¹ See sources listed, *supra* note 14.

technology and communications systems, and the capabilities of modern diplomatic correspondences, if a matter of several hours or days lies between a suspected threat or action, perhaps the threat is not so imminent as to require a response of force. Again, the tool of a direct public appeal to Qadhafi to cease the illegal terrorist activity would only create mass opinion against him should he ignore such a request. Therefore, all nations who invoke the imminence standard should be careful to explicate the actual time frames involved.

With respect to the proportionality requirement, another difficulty arises under international law to create a workable and measurable standard. Does the Biblical standard an "eye for an eye" apply, or should the standard be an approximation to the threat? If the reason given for the U.S. bombings was the Berlin incident in April, where one building was destroyed, 2 persons killed, and several hundred wounded, do the thirty dead, one hundred injured, and destruction of several buildings reflect a proportionate standard?¹⁵² Even though the Security Council criticized the number of civilian casualties,¹⁵³ it would appear that the United States made every effort to minimize the civilian casualties, and only strike at suspected terrorist strongholds. Also, the relative number of casualties, and weaponry including conventional bombs, was not in great excess of the provocation or threat.¹⁵⁴ Furthermore, Ambassador Walters reported the action to the Security Council in no uncertain terms as being one of self-defense.¹⁵⁵ President Reagan and the National Security Council were also reported to have deliberately considered the concept of proportionality, and a military plan was organized accordingly.¹⁵⁶ Given the actual result of the aerial strikes, and all available evidence, it cannot be said that the United States acted inconsistently with the requirements of preemptive force in that the relative casualties and weaponry were proportionate to the threat. According to Ambassador Robert B. Oakley, a sharp decline in Libyan-sponsored terrorism occurred and other nations focused on the problems of Libyan terrorism and moved swiftly to take steps in prevention of future attacks.¹⁵⁷

However, the international community still needs a standard to adequately define proportionality. The best standard should require that in all circumstances only the individuals and technology involved in illegal activity be targeted.

Under all circumstances, nations who decide that a strategic deployment of force is necessary must be cognizant that such uses of force are

¹⁵² Whitaker, *supra* note 4.

¹⁵³ 1986 DEP'T ST. BULL. 21-23 (Apr. 24).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 21.

¹⁵⁶ Newsweek, Apr. 21, 1986, at 21-22.

¹⁵⁷ Murphy, *supra* note 26, at 45.

not repressive, nor acts of aggression disguised as self-defense. The claims of self-defense under modern international law can best be made when time elements of threats are clearly set forth, and all direct attempts to negotiate with the source of the threat are exhausted.

b. Protection of nationals abroad

United Nations Ambassador Vernon Walters averred that the U.S.'s action was also undertaken to protect American citizens living abroad.¹⁵⁸ Obvious concern by the United States included the safety of U.S. diplomats abroad, private citizens and military personnel as were in the Berlin nightclub, and other Americans in foreign countries, especially Europe. The doctrine of protection of nationals abroad existed before the Charter, and is essentially a specific type of self-help falling under the general claim of self-defense.¹⁵⁹ Under one view, an injury to a national in a foreign state, such as the injuries sustained by U.S. citizens during the Berlin bombing, are imputed injuries to the nationals home state.¹⁶⁰ Professor Bowett has previously noted that:

"There may be occasions when the threat of danger is great enough, in its application to a sizable community abroad, for it to be legitimately construed as an attack on the state itself."¹⁶¹

Therefore, under the social contract theory, a nation is obligated to take all measures possible to protect its citizens abroad.¹⁶² In the pre-charter era, the United States has frequently exercised the right to protect nationals,¹⁶³ and Israel has claimed this right by its military maneuvers and occupation of Lebanon.¹⁶⁴ Since the Entebbe incident in July of 1976,¹⁶⁵ approximately ten military rescue efforts have been undertaken by various governments to free hostages abroad.¹⁶⁶ However, the bombing of Libya was the first effort by the United States to launch a "non-rescue raid" military response where targets were destroyed in an attempt to deter attacks against U.S. citizens in foreign countries. Although international jurists have recognized the right of nations to intervene in other

¹⁵⁸ DEP'T ST. BULL., *supra* note 153, at 21.

¹⁵⁹ I. BROWNLIE, *supra* note 103, at 225, 292.

¹⁶⁰ Bowett, *The Use of Force in the Protection of Nationals*, 43 TRANS. CROT. SOC'Y 111, 117 (1952).

¹⁶¹ D. BOWETT, *supra* note 104, at 93.

¹⁶² *Id.* at 91.

¹⁶³ *Id.* at 97.

¹⁶⁴ See sources listed, *supra* note 141.

¹⁶⁵ See Boyle, *The Entebbe Hostage Crisis reprinted in T.P.V.W.O.*, *supra* note 29, at 559. After Air France Flight 139 from Tel Aviv to Paris was hijacked by individuals claiming to be members of the Popular Front for the Liberation of Palestine, on July 3, 1976, Israeli military forces undertook a military raid.

¹⁶⁶ The most recent raid was undertaken by Pakistan commandos in early September, 1986. See N.Y. Times, Nov. 26, 1985, at A10, col. 3.

nations' affairs on behalf of their nationals,¹⁶⁷ certain conditions must exist. Professors Waldcock and Bowett contend:

1. an imminent threat of injury to nationals must exist;
2. a failure or inability on the part of the territorial sovereign to protect them; and
3. the measure of protection should be strictly confined to the object of protecting them against injury.¹⁶⁸

States employing such a force to protect nationals must always respond on a limited and temporary basis, and proportionally.¹⁶⁹ In the past, nations have at times disguised an act of aggression as the right to protect nationals abroad, when no real danger to nationals existed.¹⁷⁰ However, no clear prohibition against this use of force presently exists in the international community.¹⁷¹

It is the author's view that this doctrine is most applicable where a nation exercises force to rescue hostages or to remove nationals from foreign countries, such as the United States' Operation Bluelight effort in Iran.¹⁷² However, a general claim may be made as a result of the bombing of Libya under the theory that no nation can totally protect persons from terrorist attacks. It is undisputed United States citizens abroad are constant victims of terrorist attacks and are relatively easy prey.¹⁷³ Intelligence sources revealed that U.S. diplomats were being monitored by Libyans.¹⁷⁴ Libya has been linked to international terrorism on numerous occasions.¹⁷⁵ The international community to this day has not been able to thwart terrorist attacks, although great success has been achieved in foiling terrorist plans. Just prior to the Berlin bombing, the United States tried to persuade other Arab nations and East Germany to prevent the bombing.¹⁷⁶ After the bombing, intelligence sources noted the reaffir-

¹⁶⁷ P. JESSUP, *supra* note 107, at 169; 1 L. OPPENHEIM INTERNATIONAL LAW, § 135 at 309 (8th ed. 1955); Waldcock, *supra* note 118, at 445.

¹⁶⁸ I. BROWNLIE, *supra* note 103, at 299. See 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, § 5 at 187, 189 (1971).

¹⁶⁹ Abramansky & Green, *Unilateral Intervention on Behalf of Hijacked Americans Abroad*, 1979 UTAH L. REV. 231.

¹⁷⁰ D. BOWETT, *supra* note 160, at 104.

¹⁷¹ United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 17 (May 12, 1981). See also Jeffrey, *The American Hostages in Tehran: The I.C.J. and the Legality of Rescue Missions*, 30 INT'L & COMP. L.Q. 717 (1980) and Note, *Resort to Force by States to Protect Nationals: The United States Rescue Mission to Iran and its Legality Under International Law*, 21 VA. J. INT'L L. 485 (1981).

¹⁷² *Id.*

¹⁷³ N.Y. Times, Nov. 26, 1985, at A1, col. 5, (indicating that American citizens and property comprise 30-35% of international targets). See also *Terror in 1985: Brutal Attacks, Tough Response*, N.Y. Times, Dec. 30, 1985, at A1, col. 5.

¹⁷⁴ See sources listed, *supra* notes 14, 15.

¹⁷⁵ See sources listed, *supra* notes 10, 11, 13-15, 21 and 30.

¹⁷⁶ See sources listed, *supra* notes 91-95.

mation by Libya to continue its attacks.¹⁷⁷ Therefore, based on the imminent threat of continued attacks, the inability of other nations to assist and prevent the attacks, and the stated sole objective of destroying areas considered terrorist strongholds, the United States can also validly claim the right to exercise force on behalf of nationals in response to terrorist activities, but such force must not serve as a reprisal.¹⁷⁸ The following section discusses the United States' actions under the doctrine of reprisal.

IV. CLAIMS OF REPRISAL

Although the principle claim by the United States to exercise force was self-defense, the United States prior to the bombing had indicated acceptance to the idea of retaliation against terrorists.¹⁷⁹ Immediately prior to the bombing of Libya, the idea of "retaliatory strikes" was discussed by the National Security Council,¹⁸⁰ and President Reagan stated on one occasion that he ordered the strikes in "retaliation" for the bombing of the Berlin nightclub.¹⁸¹ The use of the language "retaliation" and the actual attack itself raises several questions: Whether the United States actions operated primarily as a reprisal, and if it did, whether such action is consistent with international law?

A. Pre-Charter Reprisals

Reprisals have been defined as injurious and otherwise internationally illegal acts of one state against another, and are exceptionally permitted for the purpose of compelling the latter state to consent to a satisfactory settlement created by its own international delinquency.¹⁸² In the Middle Ages, the word reprisal stemmed from the French *reprendre* (to take) and were permitted by any member of a group offended by an act of another sovereign, against any subject of that sovereign who committed a wrong or failed to pay a debt.¹⁸³ Naturally, a fine line may exist between acts of reprisal and acts of self-defense. Traditionally, acts of self-defense attempt to eliminate an immediate threat or to prevent instantly a threat from occurring,¹⁸⁴ while reprisals attempt to meet un-

¹⁷⁷ See sources listed, *supra* note 14.

¹⁷⁸ Schachter, *supra* note 122, at 139.

¹⁷⁹ *E.g.*, when Israel attacked Tunis in early October of 1985, in "retaliation for the slaying of three Israeli's in Larnaca, Cyprus," the United States stated the attacks were justified against terrorists. N.Y. Times, Oct. 2, 1985, at A1, cols. 5, 6. On December 30, 1985, the United States also indicated agreements with Israel as a matter of policy on utilizing reprisals against terrorists. N.Y. Times, Dec. 30, 1985, at A7, col. 1.

¹⁸⁰ N.Y. Times, Apr. 11, 1986, at A1, col. 6.

¹⁸¹ N.Y. Times, Apr. 15, 1986, at A1, cols. 3-6.

¹⁸² II L. OPPENHEIM, *supra* note 133, at 136.

¹⁸³ I B. FERENCZ, ENFORCING INTERNATIONAL LAW: A WAY TO WORLD PEACE, 4 (1983).

¹⁸⁴ 10 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 338 (1971).

lawful acts already performed, by way of punitive sanction.¹⁸⁵ While both acts of self-defense and reprisal attempt to deter future actions by another sovereign, reprisals tend to occur much later in time as a response to an act, and have no relationship to pending threats. Reprisals occur in situations whereby states believe the laws regulating conduct among states are so inadequate, that the only method of resolution of a conflict is by means which may be considered illegal.¹⁸⁶ Situations in which reprisals occur include state actions against foreigners which are illegal; a state's refusal to compensate foreigners for damages during civil strife, and a state's failure to fulfill treaty obligations.¹⁸⁷ Reprisals can occur between nations in peacetime,¹⁸⁸ or can originate between nations at war when one nation violates the laws of warfare.¹⁸⁹ Reprisals are classified as "positive," involving overt action by one nation against another, or "negative," involving a refusal by one nation to do what is required.¹⁹⁰

Currently the prevailing view is that *reprisals are illegal* under the United Nations Charter.¹⁹¹ Yet the minority view in the past, coupled with ambiguous United Nations declarations, creates a situation whereby nations may believe they have a right to resort to reprisals.

The United States in the past has employed acts of reprisal.¹⁹² The *Naulilaa* case is often cited as the leading case in evaluating reprisals.¹⁹³ When two members of a German armed party were killed by Portuguese soldiers on Portuguese territory, German troops subsequently attacked and destroyed several Portuguese forts and posts.¹⁹⁴ In declaring reprisals "acts of self-help by the injured state in retaliation for unredressed acts contrary to international law,"¹⁹⁵ the Tribunal formulated conditions for legitimate reprisals to be exercised:

1. a prior illegal act by a nation;
2. an unsuccessful attempt to obtain redress for the alleged international wrong; and

¹⁸⁵ *Id.*

¹⁸⁶ T. COLBERT, RETALIATION IN INTERNATIONAL LAW 60 (1948).

¹⁸⁷ *Id.* at 64.

¹⁸⁸ Lohr, *Legal Analysis of United States Military Response to State Sponsored International Terrorism*, 34 NAVAL L. REV. 1, 27 (1985).

¹⁸⁹ KALSHOVEN, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 321 (1983).

¹⁹⁰ Lohr, *supra* note 188, at 30.

¹⁹¹ Schachter, *supra* note 122, at 132. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 33-36 (1972).

¹⁹² Lohr, *supra* note 188, at 29, where that author cites the bombing in 1853 by U.S. Naval vessels of Greytown, Nicaragua in retaliation for wrongs against U.S. citizens in that town.

¹⁹³ *Naulilaa Case (Ger. v. Pol.)* 2 R. Int'l Arb. Awards 1011 (1928).

¹⁹⁴ Schwazenberg, *The Law of Armed Conflict*, in II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 49 (1968).

¹⁹⁵ *Id.*

3. a proportionate response by the injured nation.¹⁹⁶

B. *Post Charter Reprisals*

Since the Naulilaa incident, reprisals in general have been condemned.¹⁹⁷ On December 28, 1968, when Israel staged a helicopter assault on the Beirut airport, in retaliation for an Arab attack on the El-Al airline on December 26th, the Security Council vigorously condemned the act.¹⁹⁸ The action by Israel was a direct response to terrorist attacks against Israel, which Lebanon refused to prevent.¹⁹⁹ In commenting on the Israeli actions, Professor Falk believed the action to be illegal, although he provided a twelve point framework to evaluate reprisal claims, implying that if nations adhered to the requirement of the Naulilaa case, acts of reprisal become more legitimate.²⁰⁰

In 1970, the United Nations Declaration of Friendly Relations specifically required states to refrain from the use of reprisals.²⁰¹ Yet evidence exists that a limited number of states accept the validity of reasonable reprisals.²⁰²

The actions by the United States in the broadest sense operated as a reprisal, in addition to possible self-defense claims. Libya's prior illegal acts were principally its role in the Berlin bombing, as well as other terrorist incidents. It cannot be said that the United States did not try to peacefully resolve the situation, due to numerous efforts in international convention, appeals to Arab neighbors, and other diplomatic means. But for the evidence linking Libya to future attacks in Vienna, the strikes would appear to operate as a reprisal. They were specifically designed to deter future terrorist activity by Libya, but may have operated as retribution as well.

Nations such as the United States must attempt to avoid a situation whereby a use of force in peacetime even appears as a reprisal. Given the consistent condemnation of reprisals in the international community, the only valid use of preemptory force falls under the claim of self-defense. "Retaliation" and "reprisal" tend to be tainted with notions of fostering

¹⁹⁶ *Id.* at 50. 12 WHITEMAN, DIGEST OF INTERNATIONAL LAW 177 (1968).

¹⁹⁷ P. JESSUP, *supra* note 107, at 178; D. BOWETT, *supra* note 104, at 13; I. BROWNLIE, *supra* note 103, at 222, 223.

¹⁹⁸ Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 417 (1969).

¹⁹⁹ *Id.* at 422.

²⁰⁰ *Id.* at 439. See Bowett, *supra* note 191, at 27.

²⁰¹ United Nations Declaration on Principles of International Law Concerning Friendly Relations Among States, G.A. Res. 2625 (XXV) (1970).

²⁰² Comment, *International Legal and Policy Implications of an American Counter Terrorist Strategy*, 14 DEN. J. INT'L L. & POL. 219 (1984).

aggression, and as such, do not seem consistent with maintaining international peace and security.

C. *Proportionality and Civilian Casualties Due to Reprisals*

The question of the proportionality of the response is raised by virtue of the number of civilian casualties. The strike was technically executed during peacetime. One school of thought calls terrorism a form of warfare. If the United States responded militarily, would the legal situation as to civilian casualties be treated differently because the laws of war apply?

Several scholars contend the law of warfare has no applicability to terrorism.²⁰³ However, the United States, exercising a claim of reprisal in peace or wartime, is bound by the Geneva Conventions,²⁰⁴ as reprisal attacks against civilians in any form are clearly illegal.²⁰⁵ The 1949 Geneva Convention on the Protection of Civilians specifically would apply to all cases of armed conflict irrespective of whether a state of war was not recognized by the parties.²⁰⁶ It forbids reprisals against civilians.²⁰⁷

Protocol I, additional to the Geneva Convention, formulated in 1977, requires states to distinguish between civilians and combatants, and civilians and military objectives.²⁰⁸ Protocol I applies to any land, air or sea warfare which may affect civilian populations.²⁰⁹ Indiscriminate attacks are expressly prohibited, and are defined as:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol.²¹⁰

²⁰³ Green & Lador-Lederer, *International Terrorism: Fourth Interim Report of the Committee I.L.A.* in 7 *TERRORISM: AN INTERNATIONAL JOURNAL* 127 (1984). See Rubin, *Terrorism and the Laws of War*, 12 *DEN. J. INT'L LAW & POL.* 219 (1984).

²⁰⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363. Geneva Convention Relative to Treatment of P.O.W.'s, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3265.

²⁰⁵ Draper, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 324 (1983). Dinstein, *id.* at 338, 341.

²⁰⁶ See *Protection of War Victims*, Aug. 12, 1949, Part I, art. 2, 6 U.S.T. 3516, 3518, T.I.A.S. No. 3365.

²⁰⁷ *Id.*

²⁰⁸ Protocol I, Additional to the Geneva Convention 1977, reprinted in D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICT* 580, art. 48 (1981).

²⁰⁹ *Id.* at art. 49(3).

²¹⁰ *Id.* at art 51(4).

Nations are further forbidden from treating as a single military objective clearly separated and distinct military objectives located where civilians are concentrated.²¹¹ Attacks which may be expected to cause incidental loss of civilian life, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited as well.²¹² Furthermore, nations are directed to take precautionary measures, before an attack, including verification of military objectives and minimizing incidental loss of civilian life.²¹³ Overall, Protocol I requires nations to take the utmost precautions when civilian casualties may result from a strategic bombing.²¹⁴

Given the evidence available to the public, the United States did adhere in procedure and form to the concept of proportionality and minimal loss of civilian life. The attacks were against specific military locations and bases where terrorists were believed to operate. Careful deliberation as to the scope of the attacks was made.²¹⁵ The attacks were on target with minor deviations. No other targets other than the bases were military objectives. The fact that civilians were affected incidentally to the bombing does not render a violation of the Geneva Conventions. Where approximately thirty-seven dead have been reported, and over ninety injured, such a result is not inconsistent with the rule of proportionality and the reasonable protection of civilians. Furthermore, the primary motivation behind the attacks, in addition to protecting U.S. citizens abroad, was to force Libya to withdraw from promoting and sponsoring terrorist activities.²¹⁶ The bombings were executed solely as a response to the illegal actions of Libya, and not out of a policy of aggression.²¹⁷ Irrespective of the motivation behind utilizing military force to respond to terrorists, the question of the desirability of reprisals in light of long term world and short term world community goals remains unanswered. If nations are permitted to engage in terrorist activities without any means to enforce international prohibition thereof, state conduct may be unregulated and a continued rise in incidents may occur. On the other side, if nations consistently employ reprisal type actions, long term stability may be jeopardized, and greater conflict may emerge. And with the increasing ease by which nations may acquire nuclear weapon technology, should terrorists seize upon this avenue, grave world chaos could occur. Nations should avoid the necessity of resorting to reprisals, and

²¹¹ *Id.* at art. 51(5)(a).

²¹² *Id.* at art. 51(5)(b).

²¹³ *Id.* at art. 57.

²¹⁴ See Gasser, *A Brief Analysis of the 1977 General Protocols*, 19 AKRON L. REV. 521, 526 (1986) (Symposium on the 1977 Geneva Protocols).

²¹⁵ See sources listed, *supra* notes 1-23, 90-95.

²¹⁶ T. COLBERT, *supra* note 186, at 160.

²¹⁷ *Id.*

adhere to uses of force under claims of self-defense. The remaining section discusses the options available in the modern era.

V. CONCLUSIONS AND PROSPECT

The solution to the question of terrorism does not lie in one avenue or approach, but is manyfold. As to the desirability of military responses to terrorist activities, clear procedures and policy goals must be established by nations desiring to exercise this avenue. The idea of a reprisal, given the instability of certain regions of the world, is antithetical to minimum world order. Despite the short term gains of such an act, the long term gain appears not to be deterrence, but further instigation. However, if nations choose to claim the right of retaliation, it must only be undertaken where no other avenue of redress can be attained. All diplomatic efforts must be exhausted, as well as appeals to international bodies. Where nations such as Libya choose to exercise such lawlessness as to attack innocent civilians, nations such as the United States may have no other feasible option with which to respond. When and if all peaceful means are exhausted, if a nation chooses to act in retaliation, with the goal of enforcing international law and deterring future illegal acts, the chosen targets must be verifiably connected with the illegal activity, they must be virtually free of a civilian presence, and the response must be proportionate to the alleged injury. Although the United States' actions in Libya operated in self-defense, a general claim of reprisal could be made. Such a claim, though, is at the least questionable as a valid doctrine of international law. The real international dilemma which currently exists is that nations such as the United States have no choice but to resort to such actions. Only when the world community as a whole seeks to condemn and limit acts of terrorism will the situation be remedied.

Nations which exercise military force in self-defense must also possess valid evidence that an impending attack is present, that peaceful remedies are not possible, and that the impending attack will cause much destruction if it is carried out. Nations must always respond proportionately to the impending threat, and seek to minimize all damage while maximizing protection. Should other nations be unable to protect foreign nationals within their bodies, pre-planning crisis management teams should be on the ready alert. This contemplates foreign nations agreeing to work jointly with the rescuing nation, the sharing and pooling of resources, and much time and training.

The effective and well balanced military response will always depend on reliable and extensive intelligence networks. Representatives from governments must regularly meet and share intelligence information on an increased and continual basis. Given the current state of international

law and the fact that many nations tend to ignore it, the intelligence area becomes the vital link between stability and instability. Nations must refine and increase intelligence sources from a wide variety of areas to effectively deal with terrorists who tend to be extremely sophisticated in intelligence gathering themselves.

Nations should contemplate the desirability of making terrorism both a domestic and international crime, permitting law enforcement universal jurisdiction in terrorist activities. Examples of nations taking positive steps in cooperating jurisdictionally occurred when Britain seized a woman carrying a bomb on board an El-Al airplane in London,²¹⁸ and when West German police recently apprehended suspected persons in the Achille Lauro affair.²¹⁹

The previous ineffectiveness of international legal machinery does not mean that the legal frameworks cannot be strengthened. Recent examples of positive legal steps in combating terrorism are the convictions of terrorists in Italy²²⁰ and Britain.²²¹ Due to the sensitive issues raised by terrorism, a special tribunal should be founded to adjudicate terrorist actions. Such a tribunal should operate under a mandate which permits special investigation and access to classified information if necessary. However, it is unlikely that countries could ever agree to such a panel, given the previous disagreements with the international court of justice and its jurisdiction.

Finally, nations should move to create a convention deploring all bombings, and extend protections under such law to all persons affected, not just diplomats.

The current status of international law creates a situation whereby nations must resort to military force to deal with terrorists. Until states who illegally sponsor terrorists relinquish their support of terrorism and abandon it as a means of foreign policy, the world community will see an increase in strategic attacks and disorder.

²¹⁸ Dickey, *Linking Syria to Terrorism*, Newsweek, Nov. 3, 1986, at 40. The seizure of the woman uncovered a Syrian plot to bomb the plane. A Jordanian was eventually convicted of being involved.

²¹⁹ Philadelphia Inquirer, Aug. 1, 1986, at A7, cols. 1-2.

²²⁰ N.Y. Times, July 11, 1986, at A1, col. 4.

²²¹ Newsweek, *supra* note 218.