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COMMENTS

ARMED REPRISALS DURING INTERMEDIACY — A NEW FRAMEWORK FOR ANALYSIS IN INTERNATIONAL LAW

I. INTRODUCTION

Traditionally, the subject matter of international law has been analyzed according to a war-peace dichotomy.¹ Whether the focus is on jurisdiction, commerce, treaties, recognition, sovereignty, boundaries, or the use of force, the approach has always been to set forth principles which describe the conduct of nations during either peacetime or wartime. But the conduct of states is not always amenable to this two-fold classification, and therefore, it is not surprising that enlightened thinkers²

1. W. FRIEDMANN, O. LISSITZYN & R. PUGH, *INTERNATIONAL LAW, CASES AND MATERIALS* 899 (1969) [hereinafter cited as W. FRIEDMANN & O. LISSITZYN]; 2 G. SCHWARZENBERGER, *THE LAW OF ARMED CONFLICT* 39 (1968). Professor Schwarzenberger states that:

The three states of international law — a state of peace, *status mixtus* and state of war — are abstractions on a level comparable to that of the fundamental principals of international law. . . . By reference to these, it is possible to divide the rules of international law into three categories: the rules of the law of peace, those pertaining to a *status mixtus*, and those governing states of war and neutrality.

Id.

2. Publicists are an important source of law in public international law. Historically, there have been few judicial determinations as compared with the common law system. Hence, there is a void of developed case law which is filled, in part, by the writings of experts. In a sense, international law treatises become a substitute for judicial opinions. G. FINCH, *THE SOURCES OF MODERN INTERNATIONAL LAW* 30 (1937); Oppenheim, *The Science of International Law*, 2 AM. J. INT'L L. 315 (1908). Article 38(4) of The Statute of the International Court of Justice also lists as one of the sources of law "judicial decisions and the teachings of the most highly qualified publicists." I.C.J. STAT. art. 38, para. 4 (emphasis added).

The statement of Justice Gray in the *Paquete Habana* case suggests further the importance of publicists as a source of law. Mr. Justice Gray suggests:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The *Paquete Habana*, 175 U.S. 677, 700 (1900); *accord*, *Hilton v. Guyot*, 159 U.S. 113, 163 (1895); 1 J. KENT, *COMMENTARIES* 18 (W. Lacy ed. 1889); H. WHEATON, *INTERNATIONAL LAW* § 15 (8th ed. R. Dana 1866). *Contra*, *The Queen v. Keyn*, 2 Ex. D. 63, 202-04 (1876), *cited in* W. FRIEDMANN & O. LISSITZYN, *supra* note 1, at 85.

The other sources of law recognized by Article 38 of The Statute of the International Court of Justice include: (1) international conventions; (2) international customs; (3) general principles of law recognized by civilized nations; and (4) *ex aequo et bono*. The latter is a method of deciding questions according to a standard of fairness, justice, good conscience and equity. It is distinguished from equity in that *ex aequo et bono* lacks a well defined regime of legal principles; *i.e.*, laches, "clean hands," and irreparable injury. *Ex aequo et bono* is even more flexible than equity in fashioning a remedy to a particular issue.

have suggested the recognition of a status between war and peace.³ This in-between status, known as intermediacy, *status mixtus*, or quasi-belligerency,⁴ more accurately reflects the way states actually conduct their affairs while, at the same time, avoiding the legal consequences of labeling an international conflict a war.⁵ If such a framework were used and nations became accustomed to *status mixtus*, the psychology of settling disputes might be altered. States might not be disappointed with partial solutions; rather, they might view such a settlement as not only feasible, but desirable as an alternative to open conflict.⁶ Hence, a lessening of international tensions might ensue.⁷ Admittedly, these objectives are utopian. At worst, we will be left with the present framework within which we are now operating. At best, we will be able to develop a new framework, permitting a realistic appraisal of the conduct of nations; and better structuring international expectations.

Intermediacy, according to Professor Jessup, has three basic characteristics: (1) a continuing relationship of "hostility and strain" between the states involved; (2) a conflict over issues so "fundamental and deep-rooted" that a solution to any one of them would not ease the strain; and (3) a desire by both nations not to go to war.⁸ Once it is established that intermediacy should be used as the relevant framework for analysis, it is then necessary to set forth principles of law which historically were employed only in the context of war or peace. Within *status mixtus*, there is a void of applicable law. This void is particularly noticeable with respect to armed reprisals.⁹ The question whether such acts of

3. Jessup, *Should International Law Recognize an Intermediate Status Between War and Peace?*, 48 AM. J. INT'L L. 100-01 (1954).

4. Although it is submitted that the term "intermediacy" connotes a less violent relationship than "quasi-belligerency," all three of these terms will be used interchangeably throughout this Comment.

5. See Jessup, *supra* note 3, at 100-01. Labeling a conflict a war has significant legal implications. The effects of war are:

a. To break off diplomatic and other non-hostile relations of the belligerent states.

b. To modify treaty relations of the belligerent states.

c. To modify the status of persons within the belligerent states.

d. To modify the status of property within the belligerent states.

e. To change the relations of belligerents and allies in accord with treaties of alliance.

f. To change the relations of belligerents and states not parties to the war.

g. To modify the relations of persons subject to the jurisdiction of states not parties to the war and the belligerents.

G. WILSON, HANDBOOK OF INTERNATIONAL LAW 262 (3d ed. 1939). See also G. SCHWARZENBERGER, *supra* note 1, at 63-106.

6. See Jessup, *supra* note 3, at 100-01.

7. *Id.*

8. *Id.* See also note 5 *supra*.

9. For purposes of this Comment, reprisals are also referred to as retaliatory acts, acts of self-help and acts of reprisals. This terminology may not be consistent with other publicists' use of the word. Different authors have made distinctions that they feel are useful. For example, Hindmarsh states:

Public reprisals . . . may be defined as coercive measures taken by one state against another, without belligerent intent, in order to secure redress for, or

retaliation are permissible during such a period has not been addressed. Consequently, if international law permits reprisals during intermediacy, there are no guidelines as to how much and what kind of force may legally be employed. This Comment posits that armed reprisals are permissible during intermediacy and, in so doing, describes the quantity and quality of force which the international legal community should tolerate. A test is established by which the legality of reprisals can be judged. The test is applied to a particular example in a step-by-step fashion to better acquaint the reader with its intricacies; it is then reapplied to another situation to reaffirm its validity.

The initial phase of the analysis involves an examination of the origin of present-day reprisals, noting the permissible limits of private reprisals during ancient and medieval times. Having outlined the history of reprisals, the customary rule of armed reprisals is reviewed to test its adequacy as a framework for analysis in a *status mixtus* setting.¹⁰ The provisions of the United Nations Charter¹¹ concerning reprisals are also examined for the same purpose. The issue addressed in that section is whether retaliatory acts of any kind are permitted under the Charter. Lastly, several proposals are set forth as to what the international law should be with respect to armed reprisals during intermediacy.

Throughout this Comment, reference will be made to the Beirut Airport raid conducted by Israel on December 28, 1968, against the Lebanese Government in retaliation for the destruction of an El Al airplane and

prevent recurrence of acts or omissions which under international law constitute international delinquency.

A. HINDMARSH, *FORCE IN PEACE* 58 (1933). Professor Hyde gives the word "reprisal" a more restrictive meaning:

For sake of clearness, and for the purpose of preserving solid distinctions of both historical and etymological worth, it is deemed wise to confine the use of the term "reprisal" to the act of taking or withholding of any form of property of a foreign State or its nationals, for the purpose of obtaining, directly or indirectly, reparation on account of the consequences of internationally illegal conduct for which redress has been refused.

II C. HYDE, *INTERNATIONAL LAW* 1662 (1945). Grover Clark makes a distinction between reprisal and retaliation:

Speaking exactly, the only common characteristic of acts of *reprisal* and acts of *retaliation* is the use of force; the two kinds of acts differ fundamentally in their purposes. *Retaliation* involves the use of force to *inflict an injury* in return for an injury inflicted; *reprisal* involves the use of force to *secure compensation for a loss by the taking of property*.

Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 AM. J. INT'L L. 694, 702 (1933).

Other authors make other distinctions, *see, e.g.*, II J. WESTLAKE, *INTERNATIONAL LAW* 6-7 (2d ed. 1913). For the purposes of this Comment, such distinctions are not crucial to the analysis. What is important is that the commentator defines the way he will use the terms before he begins his analysis. *See generally*, Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 443 (1969); Jessup, *supra* note 3.

This Comment is addressing only the issue of whether and to what extent reprisals are permissible during intermediacy. The discussion of self-defense is necessary because the United Nations Charter does not mention armed reprisals; it speaks only in terms of self-defense.

10. *See* pp. 277-88 *infra*.

11. *See* pp. 288-98 *infra*.

the murder of an Israeli national by two Lebanese guerrillas two days earlier.¹² This incident has been chosen as the initial example because it was an armed reprisal which occurred during a classic *status mixtus* relationship.¹³ Although there are other international relationships which can be characterized as quasi-belligerent, this one appears most noteworthy in light of a twenty-three year history of hostility over issues that are "fundamental and deep-rooted" — the existence of Israel as a state.¹⁴ Therefore, it seems appropriate to use the Beirut incident as the primary test of the thesis submitted herein.

After this step-by-step analysis, the proposed test will be examined again with respect to the reprisals undertaken by the United States against North Vietnam for the alleged wrongs committed during the Gulf of Tonkin incident. In that section, the analysis is restricted to the reprisal issue. Any discussion of the legality of that conflict in terms of international law, or its constitutionality in terms of municipal law, falls outside the purview of this Comment. The purpose of employing a second example is: (1) to insure a thorough examination of the theory set forth, and (2) to demonstrate that the test proposed has not been offered merely as a justification for the acts of one nation, namely Israel. It is the task of international law to describe the manner in which states do, in fact, conduct their affairs. At the same time, international law seeks to prescribe a course of conduct for states which will produce a minimal world order in which the states of the world can survive. In short, the second example is employed to bolster the validity of the theory set forth.

II. HISTORY

Long before the birth of the nation-state system, reprisals were undertaken by individuals, usually in pursuance of some property right.¹⁵

12. U.N. Doc. S/7930/Add. at 107-08 (1968); Falk, *supra* note 9, at 416; Note, *The Beirut Retaliation — A Case Study of the Use of Force in Times of Peace*, 2 N.Y.U.J. INT'L L. & POL. 105-06 (1969); N.Y. Times, Dec. 27, 1968, at 1, col. 2; N.Y. Times, Dec. 30, 1968, at 2, col. 6; N.Y. Times, Dec. 30, 1968, at 1, col. 7; N.Y. Times, Dec. 31, 1968, at 1, col. 6.

The term "fedayeen," used to describe guerrillas operating in the Middle East, literally translated means "men of terror." The Al Fatah are the most prominent and largest group of Palestinian guerrillas. *The Guerrilla Threat in the Middle East*, TIME, Dec. 13, 1968, at 29. The Popular Front for the Liberation of Palestine (PFLP) is, on the other hand, the most extreme group of guerrillas. *A Voice of Extremism*, TIME, June 13, 1969, at 42. According to an interview between the PFLP leader, Dr. George Habash and TIME correspondent, Lee Griggs, the purpose of this guerrilla group is to regain Palestine. Dr. Habash said that his group is totally opposed to any peaceful solution even if liberation takes ten to twenty years. Their aim is "a democratic, non-Zionist Palestine." *Id.*

13. Falk, *supra* note 9, at 434. Professor Falk states:

The situation in the Middle East is one of the quasi-belligerency in which there is an agreed ceasefire and a *de facto* situation of hostility that frequently results in intergovernmental violence.

14. For a brief history of the legal issues involved in the Arab-Israeli conflict, see O'Brien, *International Law and the Outbreak of War in the Middle East*, 1967, 11 ORBIS 692 (1967).

15. Maccoby, *Reprisals as a Measure of Redress Short of War*, 2 CAMBRIDGE L.J. 60, 61 (1924-26).

These *specific* or *private* reprisals can be traced to Biblical times when a man whose livestock was stolen or killed was permitted to recover up to five times his losses.¹⁶ A man whose wife was intentionally injured by another was permitted, in certain instances, to use physical force against the wrongdoer.¹⁷ In Athens, there was a law which allowed the relatives of an Athenian, slain in a foreign land or another city-state, which refused to punish or extradite the responsible party, to seize three citizens of that state and bring them before an Athenian court for retribution.¹⁸ However, it was not until the early Middle Ages, primarily in Europe, that the concept of private reprisals reached fruition.¹⁹ Beginning in the last quarter of the thirteenth century, private reprisals were considered legitimate only if perpetrated under *letters of marque* granted by the sovereign of the aggrieved party. *Letters of marque* authorized the individual to perform acts of self-help against the state directly or vicariously liable for the injury.²⁰ As a matter of custom, the issuance of the *letters* was preceded by an unsuccessful request for redress upon the state of the alleged wrongdoer.²¹ Typically, the provocation was a theft of personal property, and the retaliation a seizure of goods from the countrymen of the wrongdoer,²² not necessarily the wrongdoer himself. Rarely were goods destroyed in the name of reprisal.²³

In order to obtain *letters of marque* from the issuing authority,²⁴ the injured party had to show: (1) that an act violating one of his rights

16. *Exodus* 22:1 states:

If a man steals an ox or a sheep, and kills it or sells it, he shall pay five oxen for an ox, and four sheep for a sheep. He shall make restitution; if he has nothing, then he shall be sold for his theft. If the stolen beast is found alive in his possession, whether it is an ox or an ass or a sheep, he shall pay double."

This passage suggests that a disproportionate response was not only permitted but was commanded.

17. *Exodus* 21:22-25 states:

When men strive together and hurt a woman with child, so that there is a miscarriage, and yet no harm follows, the one who hurt her shall be fined, according as the woman's husband shall lay upon him; and he shall pay as the judges determine. If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.

In contrast to the preceding passage, this passage suggests that only a proportionate response is permitted with respect to the quantity of force employed. In light of this provision and the provision with respect to stolen livestock, there seems to be no answer to the question whether disproportionate responses were permitted, and, if so, under what circumstances.

18. II L. OPPENHEIM, *INTERNATIONAL LAW* 138 (7th ed. H. Lauterpacht 1952).

19. See Maccoby, *supra* note 15, at 60-67.

20. E. COLBERT, *RETALIATION IN INTERNATIONAL LAW* 15-50 (1948); A. HINDMARSH, *FORCE IN PEACE: FORCE SHORT OF WAR IN INTERNATIONAL RELATIONS* 43-56 (1933); II L. OPPENHEIM, *supra* note 18, at 138-39; Maccoby, *supra* note 15, at 61.

21. See E. COLBERT, *supra* note 20, at 15-50.

22. See Maccoby, *supra* note 15, at 60.

23. E. COLBERT, *supra* note 20, at 47; Maccoby, *supra* note 15, at 60.

24. In England, the issuing authority for the *letters of marque* was the Keeper of the Privy Seal and the Chancellor whose duty it was to examine the facts before issuing the *letters*. In France, petitions for reprisal orders were submitted by the aggrieved party to the Parlement, and then were examined judicially. In the Italian cities, the judiciary handled all requests for these reprisal orders. See Maccoby, *supra* note 15, at 64.

had been committed;²⁵ (2) that a named person or persons were responsible;²⁶ and (3) that a request for reparations had been unsuccessful in the courts of the delinquent's country.²⁷ If all these requisites were satisfied, the appropriate state authority would issue a written order permitting the injured party to seize property from the country of the bandit proportional in value to what had been stolen.²⁸ In addition, the medieval reprisal doctrine required a cessation of seizures once the objective of the reprisal was accomplished.²⁹ The goods that were seized were then brought before the sovereign or his representative for an accounting. Goods seized improperly or in excess of the claim would then be ordered returned by such authority.³⁰ This procedure, though widespread, did not insure that the person undertaking the reprisal would not provoke open hostilities with the target state.³¹ During the late fourteenth and early fifteenth centuries, concern over the dangers of private reprisals increased, and rulers began to realize that the granting of *letters of marque* did not sufficiently control the outbreak of violence.³² Hence, a series of bilateral treaties were entered into, under which nations limited their power to grant reprisal orders against one another.³³ Despite such efforts at control, hostilities did not cease because states, under the guise of private reprisals, began conducting reprisals to further their own interests. By the sixteenth and seventeenth centuries, violent incidents of self-help purporting to be private acts, but which in fact were state-directed reprisals, were occurring throughout the European continent.³⁴ Concurrently, states began to use armies instead of private citizens to further their interests.³⁵ No longer was force limited merely to the seizure of private property, but instead, involved the destruction of property and the loss of life.³⁶ It was not this increase in public (or state-directed) reprisals that caused the corresponding decrease in private reprisals. Rather, their unpopularity was due to more effective remedies for injured foreigners, and the desire by a growing community of mer-

25. E. COLBERT, *supra* note 20, at 15-50; Clark, *supra* note 9, at 695-98.

26. Clark, *supra* note 9, at 695-98.

27. In England this requirement was satisfied if *lettres of requete* were sent out under the Privy Seal and disregarded. Clark, *supra* note 9, at 695-98. See also E. COLBERT, *supra* note 20, at 18, 42; Note, *supra* note 12, at 108.

28. See E. COLBERT, *supra* note 20, at 36; Clark, *supra* note 9, at 697; Maccoby, *supra* note 15, at 63.

29. Clark, *supra* note 9, at 697-98.

30. *Id.* at 698.

31. See generally II L. OPPENHEIM, *supra* note 18, at 138-39; 7 J. MOORE'S DIGEST OF INTERNATIONAL LAW 137 (1906); Maccoby, *supra* note 15, at 63.

32. Maccoby, *supra* note 15, at 61, 63.

33. *Id.* at 63 n.5. Spain and Scotland entered such a treaty in 1550; and Spain and France in 1489. Clark, *supra* note 9, at 709-11.

34. E. COLBERT, *supra* note 20, at 47, 51.

35. Professor Oppenheim claims that this practice by which states had individuals undertake reprisals in their behalf occurred in the eighteenth century; Mr. Maccoby states that this practice occurred in the seventeenth century. Compare II L. OPPENHEIM, *supra* note 18, at 139, with Maccoby, *supra* note 15, at 64.

36. See pp. 276-77 *infra*.

chants to facilitate and expand trade. Hence, there were fewer incidents of piracy on European waters.³⁷ By the end of the eighteenth century, private reprisals were no longer recognized as a lawful sanction within the international arena.³⁸

Underlying medieval reprisals were several assumptions. The first such assumption was that the sovereign of an aggrieved national was obliged to make a remedy available,³⁹ often in the form of permission to commit a reprisal. Although the sovereign was expected to grant such permission, he carefully controlled the amount and kind of force that was employed. The second assumption underlying these private reprisals was that the entire population of a state was deemed responsible for the acts of any of its citizens. An injury inflicted by a national of a state was deemed to have been committed by that state.⁴⁰ The third assumption was that if the reprisal were preceded by the three requirements of customary international law — a prior illegal act, an identifiable guilty party, and a failure to obtain redress — then the reprisal was recognized as a legal act.⁴¹ Notwithstanding the importance of these assumptions, it is submitted that the critical aspect of these early reprisals was that the amount of force used in retaliation was commensurate with that used in the provocation.⁴² The reason for this proportionality was that sovereigns wanted to limit the outbreak of total war, and had the power to enforce this desire.⁴³

Throughout the centuries following the Middle Ages there were numerous instances of state-ordered armed reprisals. In 1740, Frederick II of Prussia, in retaliation for an alleged illegal arrest in Russia of a Prussian citizen, Baron de Stackelberg, seized two Russian subjects and detained them until Stackelberg was released.⁴⁴ In 1847, Great Britain blockaded the coast of Greece and captured several Greek vessels in retaliation for the destruction, by Greek citizens and soldiers, of the home of Don Pacifico, an Englishman living in Athens.⁴⁵ Perhaps the most famous reprisal was conducted by the colony of German Southwest Africa in 1914, when it inflicted severe property loss and personal injury during six different assaults upon the Portugese colony of Angola in retaliation for a border incident in which three German officials were shot and two others interned. The incident erupted at the frontier post of Naulilaa, and was prompted by language difficulties occurring between

37. Maccoby, *supra* note 15, at 64.

38. *Id.*

39. E. VATTEL, *THE LAW OF NATIONS* 284 (6th ed. 1844); Clark, *supra* note 9, at 698.

40. *See, e.g.*, Clark, *supra* note 9, at 723.

41. *Id.*

42. Note, *supra* note 12, at 114-16.

43. *See, e.g.*, Clark, *supra* note 9, at 696.

44. II L. OPPENHEIM, *supra*, note 18, at 140.

45. *Id.* at 137-38.

Portugese guards and German officials who were attempting to import food supplies into German Southwest Africa.⁴⁶

For purposes of this Comment, it is not necessary to further detail the history of public reprisals. International law is more concerned with broad principles which can be extracted from the customs of states.⁴⁷ It is the failure of international law to prescribe principles regarding armed reprisals during intermediacy on which this Comment focuses.⁴⁸ After the inadequacies of customary international law and the United Nations Charter provisions are highlighted, it will be easier to comprehend the need for a new framework for analysis — that of intermediacy.

III. THE CUSTOMARY RULE OF ARMED REPRISALS

Public reprisals are injurious acts of self-help undertaken by one state against another, the latter having committed an international tort.⁴⁹ For purposes of classification, positive reprisals — overt acts which would otherwise be illegal,⁵⁰ are distinguished from negative reprisals — refusals to perform acts which are ordinarily obligatory.⁵¹ Broadly stated, the purposes of these retaliatory acts are: (1) to enforce obedience to international law by discouraging further illegal conduct;⁵² (2) to compel a change in policy by the delinquent state;⁵³ and (3) to force a settlement to a dispute which resulted from a breach of international law by the delinquent state.⁵⁴ It must be emphasized that these reprisals would normally be illegal acts under international law but for the commission of a prior offense which temporarily suspends the operation of international law until the objective of the reprisal is accomplished.⁵⁵

46. W. BISHOP JR., *INTERNATIONAL LAW, CASES AND MATERIALS* 747-48 (2d ed. 1962); VI G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 154-55 (1943); L. ORFIELD & E. RE, *CASES AND MATERIALS ON INTERNATIONAL LAW* 902-03 (rev. ed. 1965); G. SCHWARZENBERGER, *supra* note 1, at 49-50; Lenoff, *Reciprocity: The Legal Aspects of a Perennial Idea*, 49 *Nw. U.L. Rev.* 630 (1954); McDougal & Feliciano, *Legal Regulation of the Right to Resort to International Coercion*, 68 *YALE L.J.* 1070 n.47 (1958-59).

47. For cases demonstrating the importance of custom as a source of international law where no other source of law exists, *see generally* North Sea Continental Shelf Cases, [1968] *I.C.J.* 30; Case Concerning Right of Passage Over Indian Territory (merits) [1960] *I.C.J.* 6; The Case of the S.S. "Lotus" [1927] *P.C.I.J.*, ser. A, No. 10.

48. It is submitted that there is little, if any, discussion to date addressing the issue set forth herein; *i.e.*, whether armed reprisals are permissible during intermediacy, and, if they are, the quantity and quality of force that can be employed by the retaliating state.

49. II L. OPPENHEIM, *supra* note 18, at 136.

50. *Id.*; Lenhoff, *supra* note 46, at 629.

51. II L. OPPENHEIM, *supra* note 18, at 140.

52. VI G. HACKWORTH, *supra* note 46, at 152. A reprisal is a legal act of redress to obtain satisfaction for an injury received after refusal to make redress has occurred.

53. *See Note, supra* note 12, at 116.

54. II L. OPPENHEIM, *supra* note 18, at 136.

55. Lenhoff, *supra* note 46, at 629.

Among the common illustrations⁵⁶ of such reprisals are embargo,⁵⁷ military occupation,⁵⁸ naval bombardment,⁵⁹ boycott,⁶⁰ pacific blockade,⁶¹ and intervention.⁶² To focus more clearly on the scope of reprisals, it is helpful to distinguish them from two other related courses of action — retorsions and acts of war.

Retorsions are unfriendly, retaliatory acts undertaken by one state against another for the purpose of obtaining redress or cessation of similar offensive, but not illegal acts.⁶³ Typical examples include tightening of passport restrictions, levying of high protective tariffs not guaranteed by treaty, and exclusion of foreigners from certain occupations.⁶⁴ Although retorsions and the acts which precipitate them do not violate international law, neither do they foster friendly intercourse between states. The amount of force employed in a retorsion is usually commensurate with that used by the provoking state, although in many cases it is less.⁶⁵ In addition, international law requires that retorsions cease when their objective has been accomplished.⁶⁶ In short, retorsions attempt to persuade rather than coerce. This, however, is not the case with acts of war which are clearly distinguishable from retorsions and reprisals.

56. See generally II L. OPPENHEIM, *supra* note 18, at 137-51.

57. VI G. HACKWORTH, *supra* note 46, at 152. An embargo is a special form of reprisal whereby the retaliating state seizes public or private property of the offending nation. G. WILSON, *supra* note 5, at 245. The term is sometimes used to refer to detention of ships in port for the purpose of compelling a delinquent to make reparation for the injury done. II L. OPPENHEIM, *supra* note 18, at 141.

58. VI G. HACKWORTH, *supra* note 46, at 152. Military occupation is more than merely invading another country, it is the temporary taking of another nation's territory for the purpose of holding it. II L. OPPENHEIM, *supra* note 18, at 434.

59. This is one way a nation may display force to insure observance of its rights. G. WILSON, *supra* note 5, at 249-50.

60. *Id.* at 246-47. Boycotts of trade were frequently undertaken to compel a foreign state to cease an objectionable policy. The United States in 1809 passed the Non Intercourse Act against British trade. 2 Stat. 528 (1815).

61. VI G. HACKWORTH, *supra* note 46, at 152. A pacific blockade is a method of isolating a country or ports without destroying peaceful relations. G. WILSON, *supra* note 5, at 247. It is a peaceful means of compelling a settlement of international disputes. II L. OPPENHEIM, *supra* note 18, at 144-45.

62. VI G. HACKWORTH, *supra* note 46, at 152; II L. OPPENHEIM, *supra* note 18, at 150-51.

[Intervention] consists in the dictatorial interference of a third State in a difference between two States, for the purpose of settling the difference in the way demanded by the intervening State.

Id. Intervention may take the form of a communicated dictatorial demand for the settlement of a dispute. *Id.* It may also take the form of interference by force. Brownlie, *The Use of Force in Self-Defence*, 1961 BRIT. Y.B. INT'L L. 187 (1962).

63. Lenhoff, *supra* note 46, at 629. The purpose of retorsions is to induce another state to change its actions or policies which, although not illegal under international law, are undesirable. *Id.* The acts in response to which the retorsions are made are unfriendly or discourteous but are not international delinquencies. W. FRIEDMANN & O. LISSITZYN, *supra* note 1, at 880; II L. OPPENHEIM, *supra* note 18, at 134, 136; L. ORFIELD & E. RE, *supra* note 46, at 909. Like reprisals, retorsions are not considered acts of war. II L. OPPENHEIM, *supra* note 18, at 132.

64. II L. OPPENHEIM, *supra* note 18, at 134; G. WILSON, *supra* note 5, at 244.

65. Nor does the retorsion have to be the same kind of act as that of the provoking act, although it usually is similar. See II L. OPPENHEIM, *supra* note 18, at 135; G. WILSON, *supra* note 5, at 243.

66. II L. OPPENHEIM, *supra* note 18, at 135.

The purpose of an act of war is to overpower the target state so that the victor may impose the conditions that it pleases.⁶⁷ From this, it follows that there is no requirement of proportionality in the amount of force which may be used;⁶⁸ nor is there a rule that the aggression must cease when the target state alters its conduct to conform to the wishes of the responding state.⁶⁹ The primary requisite for an act of war, further distinguishing it from other forceful measures, is the formation of an *animus belligerendi* by either the offending or responding state.⁷⁰ It is precisely this intent to go to war that reprisals seek to prevent.⁷¹ Thus, stated graphically, reprisals fall somewhere between retorsions and acts of war with respect to the intent to inflict injury, the intensity of the force actually employed, and the risk of initiating more violent hostilities.⁷²

This area between retorsions and acts of war cannot remain unexplored and undefined for the present-day potential to enter into full scale hostilities is too great. To better understand the nature of an armed reprisal, it is necessary to go beyond the above definition and understand the customary rule of international law with respect to such an act of force. Once again, the purpose of explaining the customary rule is to test its adequacy for analysis of contemporary international problems.

67. *Id.* at 202. The ultimate objective of a war could be viewed in two respects, politically or militarily:

(1) From the political point of view, the object is to obtain the end of a state.

(2) From the military point of view, the object is to secure the submission of the enemy.

G. WILSON, *supra* note 5, at 255.

68. See text accompanying notes 102-08 *infra*. Any amount and any kind of force can be implemented in order to compel another state to settle the differences. II L. OPPENHEIM, *supra* note 18, at 133.

69. *Id.* Unlike retorsions and reprisals, the warring state is not required to cease the belligerent activity when a state has been compelled to conform to the desires of the victorious state. It may impose any conditions upon the vanquished state. *Id.*

70. M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 98 (1961).

Professor Kelsen disagrees, feeling that to fulfill the requirement for a "legal status of war" the intent to go to war is not enough; the actual use of armed force is also required:

A state of war in the true and full sense of the term is brought about only by acts of war, that is to say, by the use of armed force; and only such a state may be, but need not necessarily be, terminated by a peace treaty. Consequently war is a specific action, not a status. From the point of view of international law, the most important fact is the resort to war, and that means resort to an action, not resort to a status. Some writers consider the intention to make war, the *animus belligerendi*, of the state or states involved in war as essential. *Animus belligerendi* means the intention to wage war. But this can only be the intention to perform acts of war, that is to say, to use armed force, with all the consequences international law attaches to the use of armed force.

H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 27 (1952).

71. See H. KELSEN, *supra* note 70, at 27.

72. II L. OPPENHEIM, *supra* note 18, at 202.

Unilateral acts of force performed by one State against another without a previous declaration of war may be a cause of the outbreak of war, but are not war in themselves, so long as they are not answered by similar hostile acts by the other side. . . . Thus it comes about . . . acts of force performed by one State against another by way of reprisal . . . are not necessarily acts initiating war.

Id. at 202-03.

*A. Armed Reprisals During Peacetime Under
the Customary Rule*

Customary international law prescribes two prerequisites that must be satisfied before an armed reprisal can be perpetrated during peacetime. The first prerequisite is a prior violation of international law⁷³ which by nature involves an interference with more than trivial rights or interests of the aggrieved state.⁷⁴ An international delinquency⁷⁵ occurs when any one or more of the following has been violated: (1) an international convention recognized by the opposing states;⁷⁶ (2) a customary rule of international law applicable to the states involved;⁷⁷ (3) a principle recognized by civilized nations;⁷⁸ (4) a decision of an international tribunal to which both states were consenting parties;⁷⁹ or (5) a bilateral treaty binding on both states.⁸⁰ The only issue raised by this first requirement is whether there has in fact been a breach of international law. The analysis would simply involve an examination of the five criteria to decide if any one or more of them were satisfied. In short, there must be a prior illegal act to justify an armed reprisal.

Given that such an act occurs, the second prerequisite for legitimization of an armed reprisal is the absence of redress; that is, an unsuccessful demand by the injured state upon the offending state for cessation of the illegality or for redress or both.⁸¹ The purpose of this requirement is to delay the use of force until all avenues of achieving a peaceful solution are exhausted.⁸² Examples might include negotiation,⁸³ arbitra-

73. II L. OPPENHEIM, *supra* note 18, at 137; Falk, *supra* note 9, at 430; Note, *supra* note 12, at 109. Whether or not an act is illegal may depend upon the existence of war or peace since reprisals are acceptable and allowable under customary international law only if the requirements of peace time or war time reprisals are fulfilled. See II L. OPPENHEIM, *supra* note 18, at 143.

74. Note, *supra* note 12, at 114-15. Not every injurious act gives rise to a provocation. An act of a state injurious to another state is nevertheless not an international delinquency if committed neither wilfully and maliciously nor with culpable negligence. Therefore, an act of a state committed by right, or prompted by self-preservation in necessary self-defense, does not constitute an international delinquency, however injurious it may be to another state. I L. OPPENHEIM, *INTERNATIONAL LAW* 311 (7th ed. H. Lauterpacht 1948).

75. A delinquency involves the violation by a state of an internationally recognized duty. I L. OPPENHEIM, *supra* note 74, at 307. It should be distinguished from discourteous or unfriendly acts since they "are not illegal and therefore not delinquent acts." *Id.*

76. *Id.* at 311-12. For example, the Hague Convention of 1907 prohibits the use of armed force to recover contract debts or loans from other states. *Id.*

77. *Id.* at 313-14. Some rights that a state enjoys are derived from international law. For example, generally a state has a duty to refrain from restricting the flow of a river to other states. While a state has the right to use the river and is technically acting within its legal rights it may incur liability because its use was arbitrary. *Id.*

78. *Id.*

79. *Id.* at 320.

80. *Id.* at 307.

81. See E. COLBERT, *supra* note 20, at 72; II L. OPPENHEIM, *supra* note 18, at 142; Falk, *supra* note 9, at 430; Note, *supra* note 12, at 113.

82. See Note, *supra* note 12, at 113.

83. II L. OPPENHEIM, *supra* note 18, at 136.

tion,⁸⁴ good offices,⁸⁵ conciliation,⁸⁶ inquiry,⁸⁷ or any other amicable means.⁸⁸ Ideally, one or more of these are used prior to any retaliatory action so that a peaceful settlement may be reached. Even if the reprisal does occur, the time delay may render it milder than it would have been were it spontaneous. Specifically, the demand for redress involves three steps. The first entails informing the offending state of the wrong that it has perpetrated against the one aggrieved.⁸⁹ Such a communication will probably include a demand for redress.⁹⁰ The second step is the passage of a reasonable time during which the alleged wrongdoer is expected to answer.⁹¹ While there is no binding rule as to what is a reasonable time, it should depend upon the severity of the injury, prior relations between the states involved, their geographic location with respect to each other, and the practice of other states in like situations.⁹² In all likelihood, the decision as to what is a reasonable time will be made by the state seeking redress. The third step in satisfying the "no redress" requirement involves refusal or neglect by the offending state to make the requested reparations.⁹³ Thus, if there is a proper communication to the provoking state, and the passage of a reasonable time within which no redress is made, the second requirement is satisfied. Combined with the first prerequisite of a prior illegal act, justifiable grounds for reprisal exist at this juncture.

Having established that an armed reprisal may legally be undertaken, customary international law then sets forth the manner in which the reprisal must be conducted. This involves two facets: (1) the target of the reprisal must be appropriate; and (2) the quantity and quality of force used must be within certain limits.

84. Westlake, *Reprisals and War*, 25 L.Q.R. 127, 135-37 (1909). It has been proposed that no reprisal should be undertaken against any state unless it refuses or neglects to reply to an offer of arbitration, or, after accepting arbitration, refuses to abide by the award. *Id.* at 136-37.

85. A state is said to offer "good offices" to another state when it tries to induce the disputing parties to negotiate between themselves, and to "mediate" when it enters the negotiations itself, but clearly each process merges with the other. J. BRIERLY, *THE LAW OF NATIONS* 373-76 (6th ed. 1963), cited in W. FRIEDMANN & O. LISSITZYN, *supra* note 1, at 246; II L. OPPENHEIM, *supra* note 18, at 9-10.

86. Conciliation is the process of settling a dispute by referring it to a commission of persons whose task it is to uncover the facts and make proposals for a settlement without having the binding character of an award or judgment. J. BRIERLY, *supra* note 85, at 373-76, cited in W. FRIEDMANN & O. LISSITZYN, *supra* note 1, at 248; II L. OPPENHEIM, *supra* note 18, at 12-13.

87. Inquiry as a peaceful means of settling disputes is usually achieved by agreements which give to a commission the power to find facts and clarify issues in dispute. The famous Bryan Treaties are an example. II L. OPPENHEIM, *supra* note 18, at 7.

88. II L. OPPENHEIM, *supra* note 18, at 136.

89. E. COLBERT, *supra* note 20, at 72, 75; II L. OPPENHEIM, *supra* note 18, at 142; Note, *supra* note 12, at 109.

90. Note, *supra* note 12, at 113.

91. II L. OPPENHEIM, *supra* note 18, at 142-43; Note, *supra* note 12, at 113.

92. See generally Blum, *The Beirut Raid and the International Double Standard*, 64 AM. J. INT'L L. 73, 87-89 (1970); Clark, *supra* note 9, at 695-96; Falk, *supra* note 9, at 431-35; Note, *supra* note 12, at 113-14.

93. Cf. II L. OPPENHEIM, *supra* note 18, at 142-43.

With respect to the first facet, the reprisal must be undertaken only against the entity responsible for the provocation.⁹⁴ If the delinquency does not officially originate from the government, but rather from the territory which the government controls, the question arises whether responsibility can be imputed to the government. Phrased differently, there is a question of whether or not the person or persons who commit the original breach of international law can be considered agents of the government so that their acts are deemed to be the acts of the government.⁹⁵ It is well settled that a state is liable for the activities of its nationals if it is capable of exercising control over them. This vicarious liability of the state flows from a well recognized duty upon the state to exercise reasonable care to prevent illegal acts emanating from its territory. If such acts do occur, the state has a further responsibility to either punish the wrongdoers or compel them to make retribution.⁹⁶ Whether those individuals comply with their government's demand has no significance for purposes of international law since they are not legal "persons" in international law.⁹⁷ The conclusion to be drawn then is that states are responsible for the acts of their nationals if they (the states) knew or should have known of these activities and did not act to suppress them.⁹⁸ If the state is responsible, anyone or anything belonging to it may, with two exceptions, be the target of a reprisal.⁹⁹ Individuals of the delinquent state living abroad¹⁰⁰ and public debts owed by the state are not considered permissible targets for reprisal.¹⁰¹

The second question with respect to the conduct of the actual reprisal involves the amount of force employed by the retaliating state. Generally, international law requires that the amount of force used during the reprisal must be proportional to that used during the provocation.¹⁰² However, this rule presents a major problem since proportionality is subject to at least four interpretations.¹⁰³ The traditional view, an outgrowth of the law of private reprisals, is that the amount of damage inflicted

94. Falk, *supra* note 9, at 431; Note, *supra* note 12, at 109.

95. See I L. OPPENHEIM, *supra* note 74, at 330-31; Note, *supra* note 12, at 110-11.

96. I L. OPPENHEIM, *supra* note 74, at 238-39; Note, *supra* note 12, at 111.

97. For a discussion of what entities are considered "legal persons" in international law, see W. FRIEDMANN & O. LISSITZYN, *supra* note 1, at 201-25.

98. See Note, *supra* note 12, at 110-11.

99. II L. OPPENHEIM, *supra* note 18, at 139-40.

Ships sailing under its flag may be seized, treaties concluded *with it* may be suspended, part of its territory may be militarily occupied, goods belonging to it, or to its citizens, may be seized, and the like.

Id. at 139.

100. *Id.* at 140. This exception appears to apply strictly to "individuals enjoying privilege of extraterritoriality while abroad such as heads of states and diplomatic envoys." *Id.*

101. *Id.* It is generally felt that public debts of a country are not appropriate objects of reprisal.

102. II L. OPPENHEIM, *supra* note 18, at 141; Note, *supra* note 12, at 114. Proportionality, as it is used in this Comment, is a term of art; it means a one-for-one relationship. This is contrary to its usual dictionary meaning which connotes any ratio, percentage or comparison.

103. Note, *supra* note 12, at 114-16.

during the response may not exceed the amount of damage inflicted during the initial injury.¹⁰⁴ This view probably represents the most widely accepted international law rule. The second interpretation of proportionality suggests that the reprisal should not offend the norms of civilized society and should evidence a high regard for human existence.¹⁰⁵ This interpretation seems to allow a disproportionate response with respect to the destruction of property so long as the reprisal is undertaken with regard for the lives of the citizens of the victim state. A third view of proportionality posits that the amount of force used in a reprisal should be less than that which would risk a full scale conflict.¹⁰⁶ This view, like the preceding one, does not require strict proportionality. The only consideration is whether the reprisal would precipitate a war. While this permits a more flexible response by an aggrieved state, it also must be deemed unsatisfactory since it imposes no guidelines as to what amount of force international law should tolerate.¹⁰⁷ The fourth interpretation of proportionality requires that the responding state employ only that amount of force that is necessary to accomplish its objective.¹⁰⁸ Again, like the second and third views, this may or may not call for a strictly proportional response. If, in implementing a reprisal, a state uses more force than necessary to accomplish its objective, then the reprisal fails this particular test and is illegal. Whether the reprisal is legal, therefore, depends upon which of the four interpretations is used.

Two additional requirements pertaining to the amount of force employed during a reprisal must be noted. One is that the reprisal must cease immediately upon reparation by the delinquent state.¹⁰⁹ The second is that a state, in conducting a reprisal, must not unreasonably interfere with the rights of third-party states.¹¹⁰ The effect of these two limitations is to place armed reprisals within certain boundaries beyond which they would be illegal and unjustifiable.

104. Falk, *supra* note 9, at 431. One authority cited for this "dollar-for-dollar, death-for-death" approach is the holding of the Special Arbitration Panel (Portugal-Germany) in the *Nautilaa* case. Although there is contrary authority which contends that *Nautilaa* does not stand for a strict proportionality rule, it at least stands for the proposition that reprisals must be in approximate proportion to the offense, and certainly cannot, in any case, be totally out of proportion to the acts which precipitate them. 8 Trib. Arb. Mixtes 409 (1928). The tribunal stated, *inter alia*, that the German aggression of October, November, and December, 1920, namely, attacking and destroying forts in Angola, lacked proportionality when compared to the killing of two German officials and internment of two others during a border incident. *Id.* at 422. See also VI G. HACKWORTH, *supra* note 46, at 154-55.

105. Note, *supra* note 12, at 114. See also Venezia, *La Notion de Reprises* en Droit International Public, 44 REV. GEN. DROIT INT'L PUB. 465, 487 (1960).

106. Note, *supra* note 12, at 114; Venezia, *supra* note 105, at 487.

107. This view would seem to permit an excessive amount of force to be used in response to a relatively minor infraction as long as war does not result. This results in placing little if any practicable limitation on the amount of force allowed in an armed reprisal.

108. Brownlie, *supra* note 62, at 231-32; Note, *supra* note 12, at 114.

109. II L. OPPENHEIM, *supra* note 18, at 143.

110. See generally, II L. OPPENHEIM, *supra* note 18, at 673-766.

*B. Armed Reprisals During Wartime Under
the Customary Rule*

The purpose of armed reprisals during wartime is to compel obedience to the laws of war.¹¹¹ Concomitantly, the duty of a warring nation to obey the laws of war depends upon whether the enemy adheres to similar conduct. If a nation violates the laws of war, the injured nation is justified in conducting a reprisal to compel the offending nation to refrain from such illegal acts. While proportionality is usually set forth as a requirement of a wartime reprisal,¹¹² international law does permit the response to be different in kind from the provocation.¹¹³ Whereas in medieval times a seizure of goods was answered by a seizure of goods, such a requirement does not inure to the rules for armed reprisals during wartime. In reality, neither proportionality nor the similarity of the acts is the problem of wartime reprisals. The crux of the difficulty with respect to these reprisals is that their purpose will rarely, if ever, be accomplished, since no belligerent state is likely to accede to a request to cease illegal activities. Nor is it likely that a belligerent would compensate the injured state with which it is at war.¹¹⁴ One last, unrelated aspect of wartime reprisals, further distinguishing them from those committed during peacetime, is the lack of concern that such reprisals may substantially interfere with the rights of neutrals.¹¹⁵ In the final analysis, while international law addresses the problem of wartime reprisals, it is not as significant a concept as that of peacetime reprisals since states at war will be more concerned with their own national interests than with adherence to law.

IV. THE FAILURE OF THE CUSTOMARY RULE

It is submitted that the customary rule, pertaining to both war and peace, is inadequate to analyze armed reprisals during intermediacy.¹¹⁶ The wartime reprisal rule is not applicable to intermediacy situations in general, and to the Beirut incident in particular, because neither Israel nor Lebanon had the requisite *animus belligerendi*¹¹⁷ to properly label their relationship one of war.¹¹⁸ Since the customary rule of peacetime

111. The purpose of wartime retaliation is to force the other belligerent state to cease its illegal action and to equalize the position of the opposing nations by releasing one from adherence to the law which the other has violated. E. COLBERT, *supra* note 20, at 2; II L. OPPENHEIM, *supra* note 18, at 143; J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 354 (2d ed. 1959).

112. During the Second World War one example of a truly proportionate reprisal occurred. In response to the alleged binding and chaining of German prisoners taken in the Dieppe raid, Germany treated four thousand British prisoners in like manner. J. STONE, *supra* note 111, at 354 n.32.

113. *Id.* at 354-55.

114. *Id.* at 356.

115. *Id.* at 366.

116. See note 3 *supra*.

117. See note 71 *supra*.

118. See note 183 *infra*.

reprisals is used to analyze retaliations short of war, focus should be directed to those aspects of the peacetime rule which break down when applied to *status mixtus*. Those aspects concern: (1) the culpability of a government for a non-governmentally implemented provocation; (2) the necessity of requesting redress, and waiting a reasonable time before responding; and (3) the proportionality of the response. Examination of these three criteria demonstrates that the customary rule is too rigid to resolve the question whether international law should permit reprisals during intermediacy¹¹⁹ and, if permitted, what the limits of such a response should be.

A. Culpability

Addressing the question of a state's responsibility for a non-governmentally directed provocation, it must first be recognized that guerrilla warfare has become a means adopted by many national liberation groups to overthrow governments which they believe to be illegal or oppressive.¹²⁰ Any inquiry, then, to be relevant to present day conditions, must focus upon whether responsibility for guerrilla attacks upon a neighboring state can be ascribed to the government which purports to be the international representative of those who committed the alleged international tort. Briefly stated, responsibility is a function of support. If support short of overt military or financial assistance does not render a state responsible, then Lebanon escapes liability in the present example even though (1) it permitted the Popular Front for the Liberation of Palestine (the "Popular Front") to recruit and train commandos from refugee camps located within Lebanon;¹²¹ (2) it made available mass media through which propaganda was disseminated; and (3) it publicly applauded the Athens raid¹²² executed by those same guerrilla forces.

One recent discussion of the customary rule concluded that Lebanon was not responsible for the Athens raid since the link between the Lebanese Government and the Popular Front operating within its territory was too weak to impute liability to the former.¹²³ Thus, according

119. In recent years there have been other international relationships that might conceivably be labeled *status mixtus*: North and South Korea, East and West Germany, China and Formosa, India and Pakistan, Nigeria and Biafra, the Soviet Union and China.

120. See generally R. DEBRAY, *REVOLUTION IN THE REVOLUTION?* 19 (B. Ortiz transl. 1967); HO CHI MINH ON REVOLUTION 224 (B. Fall ed. 1967).

121. There is indication that all of these activities were permitted by the Lebanese Government. See note 209 *infra*.

122. See Falk, *supra* note 9, at 420-21; note 210 *infra*.

123. Professor Falk concluded that the necessary link between the delinquency which precipitates the reprisal and the state from which it emanates was not present in the Athens provocation, and, therefore, Lebanon was not culpable. Falk, *supra* note 9, at 439. That conclusion is accepted here for the purpose of demonstrating that the customary rule is inadequate. If Professor Falk is correct then the analysis set forth follows logically. If professor Falk is mistaken and the necessary link was present fulfilling this element of the customary rule, the other elements attacked as inadequate are still present. Admittedly, the conclusion of Professor Falk is the

to that commentary, the customary peacetime rule imposes no legal obligation on a state to prevent guerrillas from committing extraterritorial acts of aggression, notwithstanding the failure of the government to intervene once it learned that an international delinquency was initiated from within its borders. Furthermore, it was found that the customary rule does not require the state to take steps necessary to prevent future delinquencies; only where the government overtly and directly supports the guerrillas, so as to make them agents of the government, will culpability inure to the state under the customary rule. However, during intermediacy, when states differ fundamentally over deep-rooted issues,¹²⁴ a greater, not lesser, responsibility to control subversive elements should be imposed. Only then is there a chance of preventing more open and violent hostility. It should be noted that in the months *following* the Beirut raid, Lebanon took measures which, in fact, effectively controlled guerrilla activity. This indicates that the Lebanese Government probably had the capacity to so limit this subversive activity *before* the Athens raid. The conclusion that Lebanon had no duty to restrain the activities of the Popular Front, and was therefore not responsible for these activities, does not help structure expectations or reduce tensions between the states involved.

B. Request for Redress

The second aspect of the customary rule which poses serious obstacles to analyzing armed reprisals during *status mixtus* is the prohibition against an immediate response. As already noted, the customary rule requires the retaliating state to request redress and to wait a reasonable time during which the offending state may, and hopefully will, satisfy the request. It is submitted that such a request in the Middle East *status mixtus* would be futile, since there the provocations consisted of repeated acts; *i.e.*, the continuous interference with Israeli air traffic. Such prior conduct would make it impracticable to require Israel to stand idly by and await further acts of provocation while presumably making diplomatic overtures. It was clear that there would be nothing gained by requesting redress. Evaluated realistically, even minor frictions between quasi-belligerent states may not be amenable to settlement by diplomatic gestures since requests for redress are not likely to be granted by a state which is in a *status mixtus* with the requesting state.¹²⁵ Therefore, during intermediacy a state should be allowed to respond to an international tort immediately, without perfunctorily awaiting redress which no one

same drawn herein — that a nexus did not exist between the breach of international law by the Popular Front and the government of Lebanon. Even if that conclusion is rejected, the inadequacy of the customary rule is proved.

124. See Jessup, *supra* note 3.

125. In an intermediacy situation, the fundamental issues that divide the nations pervade most of the ancillary issues. *Id.*

seriously considers will be forthcoming. In the context of the Beirut raid, Israel did not comply with the customary rule, but to hold it to such a standard does not comport with the realities of the situation.

C. Proportionality

The third aspect of the customary rule of reprisal which fails in a *status mixtus* situation is proportionality. Assuming, *arguendo*, that the traditional view of proportionality is that the injury inflicted during both the provocation and the retaliation must be equal or nearly equal,¹²⁶ then the Beirut reprisal would be inconsistent with international law since the destruction of \$43.8 million worth of property was certainly not equal to the destruction of one El Al airplane and the killing of one Israeli national.¹²⁷ Yet, the use of a lesser amount of force would not have effectively deterred future acts of aggression — one object of a reprisal during *status mixtus*. The paradox is that a state acts illegally under the customary rule of armed reprisals, and yet, is forced to do so in order to accomplish its objective — the cessation of provoking acts in the future. Those provoking acts in the instant example were the work of not only Lebanese commandos but of other forces operating in the Arab sphere. It is submitted that due to the exigencies of the situation, international law should permit a greater quantum of force to be used during intermediacy than during peacetime. During intermediacy, hostility is more commonplace and becomes part of a state's expectations. Therefore, to induce a quasi-belligerent state to alter its course of conduct, it is necessary to use an amount of force which will exceed the target state's expectation of normal hostility, and impress upon it the determination of the responding state not to tolerate similar acts in the future. Hence, the traditional view of proportionality is too restrictive, and a broader, more pragmatic standard is needed.

If any of the other three views of proportionality are used, although probably not representative of the customary proportionality formulation, then a more forceful retaliation would be rendered legitimate, and this element of the traditional rule would be satisfied, although measured by another yardstick.¹²⁸ In the final analysis, the three critical requirements

126. This test apparently was applied by one commentator in viewing the Beirut raid as disproportionate. Falk, *supra* note 9, at 433, 439-40. *But see* Note, *supra* note 12, at 114-16 (All four meanings of proportionality as outlined in the text, pp. 282-83 *supra*, must be considered in the test for proportionality. Note, *supra* note 12, at 115).

127. Falk, *supra* note 9, at 416, 439. According to Professor Falk, "[The Beirut attack] involved the destruction of what appeared to involve an excessive amount of property in an unusually spectacular and inflammatory fashion . . ." This statement is unpersuasive because there has not yet been suggested a satisfactory method of putting a value on one man's life. It is not logical to compare the loss of one life with the destruction of one inanimate airplane, or even thirteen.

The objects of the Beirut raid were to alter the policies of all the Arab states and to induce them to deprive the guerrilla groups of their sanctuaries. *See* Falk, *supra* note 9, at 437-38 n.61.

128. A discussion of these other views is set forth in section III of this Comment. *See* pp. 277-84 *infra*.

of the customary rule of armed reprisals — a culpable state, an unsuccessful demand for redress and a proportional reprisal — would not be satisfied in a factual setting which, as demonstrated, would resist that conclusion. However, as set forth above, the customary rule is totally inadequate when used to gauge states' actions during *status mixtus*.

V. ARMED REPRISALS UNDER THE UNITED NATIONS CHARTER

Having examined the right of armed reprisal under the customary rule of international law, the next phase of analysis is to ascertain whether and to what extent the United Nations Charter has limited or abolished that right. It must be understood initially that the Charter attempted to create a structure for the peaceful settlement of international disputes. Toward this end, Article 2 of the Charter states in pertinent part:

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

. . . .

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

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.¹²⁹

The purposes of the United Nations to which the above provision makes reference include: the maintenance of international peace and security; the development of friendly relations between states; the achievement of international cooperation in solving economic, cultural, social and humanitarian problems; and, the creation of a center for harmonizing the actions of states to attain these ends.¹³⁰ While these objectives are relevant to the interpretation of the applicable Charter provisions, they should not be read as limiting the conduct of a state to the extent that the state's existence is threatened. Certainly, no discussion of armed reprisals can bypass the United Nations Charter; while the Charter is essential to our understanding of the right to implement such actions, it should not function as a straight-jacket to analysis.

The Charter makes no mention of armed reprisals. Therefore, to decide whether such acts are legal it is necessary to examine its provisions concerning self-defense, since that is the only use of force expressly allowed. In addition to Article 2, cited above, Article 51 sets forth the right of a state to use force in its own defense:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs

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

130. U.N. CHARTER art. 1.

against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by the Members in the exercise of the 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 to maintain or restore peace and security.¹³¹

The combined effect of Articles 2(3), 2(4) and 51, according to most commentators,¹³² is to render all use of force, except collective or individual self-defense, illegal.¹³³ Under such an interpretation, the viability of the customary right of armed reprisals is highly questionable. Even the right of self-defense is circumscribed by requiring that an actual armed attack occur before such a right inures to the injured state. It further follows from this restrictive reading that the use of force in anticipation of an imminent attack is precluded, since an armed attack would not have preceded the prophylactic reaction of the threatened state. Opponents of this literal interpretation have advanced several cogent arguments,¹³⁴ after their exposition, they will be applied to the context

131. U.N. CHARTER art. 51.

132. H. BRIGGS, *THE LAW OF NATIONS* 964 (2d ed. 1952); L. GOODRICH & E. HAMBRO, *CHARTER OF THE UNITED NATIONS* 104 (2d ed. 1949); P. JESSUP, *A MODERN LAW OF NATIONS* 172 (1956); H. Kelsen, *THE LAW OF THE UNITED NATIONS* 269 (1951); II L. OPPENHEIM, *supra* note 49, at 153-54; Wright, *The Outlawry of War and the Law of War*, 47 *AM. J. INT'L L.* 365, 370 (1953).

133. Brownlie, *supra* note 62, at 232-33. See also II L. OPPENHEIM, *supra* note 18, at 156.

[T]he Charter confines the right of armed self defense to the case of an armed attack as distinguished from various forms of unfriendly conduct falling short of an armed attack.

Id.

134. See, e.g., Brownlie, *supra* note 62, at 236. One commentator postulates that Article 2(4) leaves the traditional right of self-defense unimpaired; it extends to protect the existence of a state, its citizens and their property. It does not depend upon the occurrence of an armed attack upon the sovereign state. D. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 185-86 (1958).

Concerning other means of self-help Bowett writes:

The prohibition of the individual state's right to use or threaten force, coupled with the delegation to the Security Council of primary responsibility for the maintenance of international peace and security, and the agreement of individual members to accept the Council's decision brings about a situation in which self help may be prohibited whilst self-defense remains under Article 51.

Id. at 11.

The traditional international law rule concerning self-defense was expressed in the *Caroline* case. That case arose from the Canadian insurrection of 1837. The insurgents in Canada were receiving supplies from sympathizers on the American side of the border. The *Caroline* was a small steamship used by Americans at Buffalo and Black Rock, both on the American side. On December 29, 1837, while moored at Schlosser, also on the American side, with thirty-three Americans on board, the *Caroline* was attacked, destroyed by fire and set adrift over Niagara Falls. One American was killed, several were wounded, and only 23 of the 33 on board were accounted for. In 1841, an alleged participant in the raid, Alexander McLeod, was arrested and detained in New York. Lord Palmerston, as spokesman for the Canadian government, claimed responsibility for the incident, and justified it as a public act of force in self-defense by persons in the British service. In 1842, the two governments agreed on the principle that the requirements of self-defense might necessitate the use of force, but Secretary of State Webster stated that the necessity did not exist in this case. In a letter from Secretary Webster dated April 24, 1841,

of the Beirut raid to determine the ability of the United Nations Charter to deal effectively with reprisals during intermediacy.

It may be argued initially that each nation possesses an inherent right of self-defense which arises from natural law.¹³⁵ That this right is inherent is expressly stated in Article 51. In essence, a state, simply because it is a state, has the right to take those measures it deems essential to its own preservation. Self-defense as a natural right is justified when certain national interests are threatened,¹³⁶ peaceful settlement of a dispute is impossible,¹³⁷ and the immediate use of force is absolutely necessary to maintain the status quo.¹³⁸ Examples of vital national interests which warrant the use of force in self-defense include an interference with the territorial integrity of a state¹³⁹ or a threat to the lives of its nationals at home or abroad.¹⁴⁰ Additionally, a nation possesses the inherent right to protect its existence from threats that do not violate its territorial integrity.¹⁴¹ The assistance of subversive elements within

to Mr. Fox, the British Minister at Washington, which was later incorporated into a note to Lord Ashburton of Great Britain, he said that Great Britain must show: [N]ecessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

This suggests that an actual undertaking must be in the offing in order to make the act of self-defense immediately necessary. See generally W. FRIEDMANN & O. LISSITZYN, *supra* note 1, at 882; Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938); Note, *supra* note 12, at 119.

The action taken here is really that of anticipatory self-defense. There are other examples where the right of anticipatory self-defense was exercised against armed bands operating from a neighboring territory. See Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L.Q. 712 (1958).

135. D. BOWETT, *supra* note 134, at 4.

136. The question which follows is which interests must be threatened so as to allow self-defense.

The classical writers, however, failed to offer any guidance on the degree of injury necessary to justify resort to force as a matter of self-defense. The Spanish theorists, generally speaking, limited the right to protection of territory, nationals, and property, but Vattel extended it to the violation of any rights. . . .

J. STONE, *supra* note 111, at 339.

137. I L. OPPENHEIM, *supra* note 74, at 266.

138. *Id.*; Note, *supra* note 12, at 119.

139. D. BOWETT, *supra* note 134, at 29-41.

140. I L. OPPENHEIM, *supra* note 74, at 309; Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 REC. DES COURS 466-67, 503 (1952); Note, *supra* note 12, at 118.

141. See D. BOWETT, *supra* note 134, at 43, 189. It should be recognized that the members of the United Nations have not in practice abandoned the right of anticipatory self-defense. Pakistan justified its invasion and occupation of Kashmir on the ground that it possessed the inherent right to exercise anticipatory self-defense. There had been in fact no actual attack on Pakistan by India. 5 U.N. SCOR, 464th meeting 7 (1951); U.N. Doc. S/PV464 (1951).

The British Government's position on articles 2 and 51 following its involvement in the Arab-Israeli War of 1956, was that Article 51 did not restrict the customary right of self-defense and that its involvement was justified as a measure to protect British nationals. Brownlie, *supra* note 62, at 236.

Finally, a number of the East European Treaties of Friendship and Mutual Assistance provide for the immediate aid in case of a renewal of aggression by Germany — it has been suggested that they indicate a readiness to resort to anticipatory self-defense. Treaty of Friendship and Mutual Aid, Poland and Czechoslovakia, March 10, 1947, art. 3, 25 U.N.T.S. 365.

the threatened state or the use of bacteriological warfare serve as two examples where the territorial integrity of a state need not necessarily be violated in order that the existence of the state or its political independence be threatened.¹⁴² Yet, a strict reading of Article 51 would not allow the victim of such aggression to forcefully respond.

To posit that the only right of self-defense is that defined by Article 51 is to hold that the United Nations *conferred*, rather than limited a natural right. However, it is undisputed that states possessed the inherent right of self-defense prior to their entrance into the United Nations. They possessed all of the natural rights that inure to an entity known as a state.¹⁴³ Thus, according to some commentators, the Charter should be viewed as a *limitation*,¹⁴⁴ not a *grant* of this natural right of self-defense.¹⁴⁵ If Article 51 is viewed as such a limitation, then it does not follow that a state cannot act to protect vital national interests given certain exigent circumstances. Indeed, it would be a strange conclusion to say that a state, acting to protect its territorial integrity, political independence, or the lives of its nationals, is, by so doing, acting contrary to the purposes of the United Nations. If those purposes include the maintenance of international peace and security, as is expressly stated in the Charter, how can a state by protecting those interests mentioned act inconsistently with the Charter?¹⁴⁶

Another impracticality of a literal reading of the Charter is that it requires that an actual armed attack occur *before* a state can claim the right to defend itself.¹⁴⁷ It is submitted that given the capability of

142. See D. BOWETT, *supra* note 134, at 192; Brownlie, *supra* note 62, at 244-45; Kelsen, *Collective Security and Collective Self Defense Under the Charter of the United Nations*, 42 AM. J. INT'L L. 783, 791-92 (1948).

143. See Note, *supra* note 12, at 117.

144. D. BOWETT, *supra* note 134, at 185, quoting Goodhart, *The North Atlantic Treaty of 1949*, 78 REC. DES COURS 187, 192 (1951).

[T]he members of the United Nations when exercising their inherent powers do so not by grant but by already existing right. The Charter limits the sovereign rights of the states; it is not a source of those rights.

Id. See also J. STONE, *supra* note 111, at 234.

It is evident that Article 51 was intended to "safeguard the right of self-defense not restrict it." D. BOWETT, *supra* note 134, at 188.

145. Kelsen states that Article 51 applies only in the event of an armed attack therefore no other claim to self-defense may be presented even if the troops are poised on the borders. H. KELSEN, *supra* note 132, at 269; J. STONE, *supra*, note 111, at 244; Wehberg, *L'Interdiction der Recours a la Force*, 78 REC. DES. COURS 7, 70, 81 (1951).

146. D. BOWETT, *supra* note 134, at 183. This commentator would permit the use of self-defense as an anticipatory measure against troops concentrated along the frontier. *Id.* at 244 n.8. See also Brownlie, *supra* note 63, at 239.

147. II L. OPPENHEIM, *supra* note 18, at 136.

The Charter confines the right of armed self-defense to the case of an armed attack as distinguished from . . . various forms of unfriendly conduct falling short of armed attack.

Id.

Another commentator states:

But this article applies only in case of an armed attack. The right of self-defense must not be exercised in case of any other violation of the legally protected interests of a member.

H. KELSEN, *supra* note 132, at 269.

modern weaponry,¹⁴⁸ it is unrealistic to expect a state to await an armed attack before responding with force.¹⁴⁹ Such an attack could terminate the existence of a state.¹⁵⁰ An examination of the Beirut raid within the framework of the law of the United Nations highlights the unreasonableness of a restrictive reading of the Charter.

VI. THE FAILURE OF THE UNITED NATIONS RULE

An analysis of the Beirut raid under the Charter reveals two possible conclusions — either armed reprisals are prohibited under the Charter and the Beirut raid is illegal, or an inherent right of armed reprisal exists irrespective of the Charter when no peaceful alternative is available. Focusing on the first possible conclusion, most publicists have suggested that Article 2 abrogates the right to implement an armed reprisal¹⁵¹ since the only way to achieve a semblance of world order is to outlaw all use of force¹⁵² except the narrowly defined exceptions of Article 51.¹⁵³ That all wars, defacto wars, and forceful measures short of war are illegal under the Charter¹⁵⁴ seems to have been the official position of the United Nations when it censored Great Britain for its reprisal against Harib Yemen on March 28, 1964, in response to Yemeni support of the anti-colonial struggle in Aden.¹⁵⁵ The rationale of that decision was that the members of the United Nations contracted with each other not to use

148. See D. BOWETT, *supra* note 134, at 192.

149. I D. O'CONNELL, *INTERNATIONAL LAW* 342 (1965).

150. D. BOWETT, *supra* note 134 at 43.

151. Note, *supra* note 12, at 127.

152. See McDougal & Feliciano, *supra* note 46, at 1060. See also D. BOWETT, *supra* note 134, at 13, 148; I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 265, 281 (1963); C. COLOMBOS, *INTERNATIONAL LAW OF THE SEA* 409 (6th rev. ed. 1967); P. JESSUP, *supra* note 132, at 172-75; H. KELSEN, *supra* note 132, at 269; L. KOTZSCH, *THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW* 270 (1956); II L. OPPENHEIM, *supra* note 18, at 153; C. DE VIGSCHER, *THEORY AND REALITY OF PUBLIC INTERNATIONAL LAW* 289 (P. Corbett transl. 1957); Falk, *supra* note 9, at 428; Hsu Mo, *The Sanctions of International Law*, 35 *Grot. Soc'y* 4, 8 (1949); Waldock, *supra* note 140, at 492; Wright, *Intervention, 1956*, 51 *AM. J. INT'L L.* 257, 272 (1957); Wright, *supra* note 132 at 365, 370.

The only judicial decision under Article 51 is the *Corfu Channel* case which did not read the provisions of that Article so narrowly as to preclude the justification of anticipatory self-defense. *Corfu Channel Case*, [1949] *I.C.J.* 42 (individual opinion of Judge Alvarez); *Id.* at 76-77 (dissenting opinion of Judge Krylov); *Id.* at 108-112 (dissenting opinion of Judge Azevedo).

153. It should be noted that the United Nations Charter prohibits the use of force in international relations but not in internal affairs. Therefore, the use for force to quell a civil war would not be prohibited. II L. OPPENHEIM, *supra* note 18, at 153.

154. 2 G. SCHWARZENBERGER, *supra* note 1, at 51; J. STONE, *supra* note 111, at 19.

155. Falk, *supra* note 9, at 428. U.N. Doc. S/Res/188 (1964). By a 9-0 vote with two abstentions the Security Council censored Great Britain stating that the Security Council "condemns reprisals as incompatible with the purposes and principles of the United Nations." U.N. Doc. S/Res/5650 (1964). This statement seems to have been the principle that the United Nations has followed concerning armed reprisals. See Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States U.N. Doc. A/6799 (XXII) (Sept. 26, 1967).

force to achieve solutions to international controversies; the members, in relinquishing to the world organization their right to use force,¹⁵⁶ sought to better achieve world order.¹⁵⁷

If the Beirut raid is classified as an armed reprisal, it would be illegal under this rationale irrespective of Lebanon's culpability.¹⁵⁸ This would be so notwithstanding the possible conclusion that under customary international law it may have been a lawful response to the Athens provocation.¹⁵⁹ Under the Charter requirements, Israel failed to follow the prescribed steps in settling international disputes: (1) peaceful diplomatic negotiation with Lebanon seeking redress for the injury inflicted by the guerrilla attack on its property; and (2) that route failing, the forwarding of a complaint to the Security Council whose decision would have been final.¹⁶⁰ Since Israel failed to take these steps, the Security Council, following precedent,¹⁶¹ was compelled to unanimously condemn Israel for its attack on the Beirut airport.¹⁶²

156. See p. 288 *supra*. Certain methods of coercion were preserved, namely, individual and collective self-defense. Economic reprisals may also be preserved as a permissible form of coercion; cf. McDougal & Feliciano, *supra* note 46, at 1061.

157. *Id.* at 1063-64.

158. Note, *supra* note 12, at 127.

159. Falk, *supra* note 9, at 430 n.39.

As a technical matter, Charter Law is properly accorded priority over inconsistent rules of customary international law. Therefore, the clear rejection of the right of reprisal in U.N. practice seems to establish the general authority of this conclusion in positive international law.

Id.

160. Note, *supra* note 12, at 127. Article 25 of the United Nations Charter provides:

The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

U.N. CHARTER art. 25.

Article 39 provides the Security Council with the authority to make decisions.

The Security Council shall determine the existence of any threat to the peace, the breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

U.N. CHARTER art. 39.

161. See notes 155 *supra* & 213 *infra*, which indicate that the Security Council condemned Israel for its role in the El Samu reprisal and Britain for engaging in an armed reprisal in Yemen.

162. On December 31, 1968, the Security Council adopted the following resolution stating that the United Nations:

1. Condemns Israel for its premeditated military action in violation of its obligations under the Charter and the cease-fire resolutions;
2. Considers that such premeditated acts of violence endanger the maintenance of peace;
3. Issues a solemn warning to Israel that if such acts were to be repeated, the Council would have to consider further steps to give effect to its decisions;
4. Considers that Lebanon is entitled to appropriate redress for the destruction it suffered, responsibility for which has been acknowledged by Israel.

U.N. Doc. S/Res/262 (1968).

The statements of the various representatives in the Security Council demonstrate the unanimous condemnation directed at Israel. See generally U.N. Doc. S/PV1460 at 7-11 (1968) (statement of Mr. Ghorra of Lebanon), quoted in U.N. MONTHLY CHRONICLE, Jan. 1969, at 5; U.N. Doc. S/PV1460 at 12 (1968) (statement

Even assuming that the Beirut reprisal was an act of self-defense, preserved under Article 51, a strict reading of that section would nevertheless lead to the conclusion that Israel acted illegally since one prerequisite for a valid exercise of self-defense is the occurrence of an armed attack.¹⁶³ While such an exercise of self-defense may on rare occasions be anticipatory, for example, where an armed attack is imminent, it may not be prophylactic.¹⁶⁴ A state may prevent an aggressor from launching an attack, but it cannot expand the anticipatory attack beyond this limited purpose. Anticipatory self-defense will not justify attacking another state now for the purpose of deterring the target state from all future aggression. It justifies only preventing the implementation of an imminent aggressive act. For this reason, any attempt to justify an armed reprisal as a resort to anticipatory self-defense may be as fruitless as asserting the right to perpetrate an armed reprisal.

If resort to the United Nations is rendered ineffective by reason of a Security Council veto,¹⁶⁵ or because that international organization has refused to redress similar wrongs in the past, then the state must have a paramount right to take those steps necessary to protect its existence.¹⁶⁶

of Mr. Rosenne of Israel), *quoted in* U.N. MONTHLY CHRONICLE, Jan. 1969, at 5; U.N. Doc. S/PV1460 at 13-15 (1968) (statement of Mr. Malik of the Soviet Union), *quoted in* U.N. MONTHLY CHRONICLE, Jan. 1969, at 5; U.N. Doc. S/PV1460 at 28-30 (1968) (statement of Mr. Wiggins of the United States), *quoted in* U.N. MONTHLY CHRONICLE, Jan. 1969, at 6-7; U.N. Doc. S/PV1460 at 32-33 (1968) (statement of Sir Leslie Glass of Great Britain), *quoted in* U.N. MONTHLY CHRONICLE, Jan. 1969, at 7-8; U.N. Doc. S/PV1460 at 33-36 (1968) (statement of Mr. Chayet of France), *quoted in* U.N. MONTHLY CHRONICLE, Jan. 1969, at 8; U.N. Doc. S/PV1460 at 42-46 (1968) (statement of Mr. Parthasarathi of India), *quoted in* U.N. MONTHLY CHRONICLE, Jan. 1969, at 9; U.N. Doc. S/PV1460 at 46-51 (1968) (statement of Mr. Csatorday of Hungary), *quoted in* U.N. MONTHLY CHRONICLE, Jan. 1969, at 9; U.N. Doc. S/PV1460 at 52-56 (1968) (statement of Mr. Benkaoui of Algeria), *quoted in* U.N. MONTHLY CHRONICLE, Jan. 1969, at 9-10; U.N. Doc. S/PV1460 at 56-57 (1968) (statement of Mr. M'Bengue of Senegal), *quoted in* U.N. MONTHLY CHRONICLE, Jan. 1969, at 10; U.N. Doc. S/PV1460 at 61-62 (1968) (statement of Mr. Ghorra of Lebanon in reply to the preceding discussion), *quoted in* U.N. MONTHLY CHRONICLE, Jan. 1969, at 10; U.N. Doc. S/PV1460 at 62-63 (1968) (statement of Mr. Rosenne of Israel in reply to the preceding discussion), *quoted in* U.N. MONTHLY CHRONICLE, Jan. 1969, at 10-11.

163. Comment, *The Arab Israeli War and International Law*, 9 HARV. INT'L L.J. 232, 252 (1968).

164. *Id.*

165. E. COLBERT, *supra* note 20, at 203-04; J. STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 92-101 (1958); Note, *supra* note 12, at 128.

166. Note, *supra* note 12, at 130.

When just and adequate redress is unavailable within the United Nations forum, then a Member State must have recourse to the traditional principles of self-help enunciated prior to the United Nations.

Id.

In the Security Council meetings held to discuss the Lebanese charge of aggression against Israel, Mr. Rosenne of Israel stated:

The feeble excuses which came from Lebanon, from Beirut, will deceive no objective person. By its tolerance and connivance, Lebanon has once again ranged itself on the side of defiance of international law. It has thus continued both by omission and by commission, the policy enunciated by its Prime Minister

Such a right to self-preservation must be superior to the principles enunciated in the United Nations Charter. Professor Bowett suggests this same idea in stating:

on 16 February 1968. The official position of the Lebanese Government was then expressed by Mr. Abdalla el-Yaffi in the Lebanese Parliament as follows — and I am quoting from Radio Beirut: "We remain at war with Israel. Lebanon will remain faithful to the Khartoum decisions." There is no need for me to repeat before this Security Council the trinity of negatives that constitutes the Khartoum decisions.

On 30 April 1968, Abdalla el-Yaffi publicly pledged support to warfare by terror against Israel. He publicly encouraged Lebanese nationals to join terrorist organizations and promised them arms to fight Israel. That is the declared policy of the Government of Lebanon.

The Beirut daily *Al-Yaum* vividly described the official ceremony held on 30 April last when the Prime Minister took leave of fifty Lebanese citizens who had joined the El-Fatah terror organization, a representative of which thanked the Lebanese Government for its assistance.

The newspaper *Al-Anwar* of Beirut, of the same day added that the Prime Minister spoke enthusiastically in favour of the continuation of warfare by terror against Israel, and had instructed the Lebanese border guards to facilitate the movements of El-Fatah units.

To attack Israel is indeed an easy way to gain popularity, and the Arab leaders do not shun it. On 2 May 1968, the newspaper *Al-Sayad* reported extensively on the presence of the Prime Minister of Lebanon at the funeral of an El-Fatah man who had been killed in action, where armed El-Fatah men, dressed in camouflage uniforms and shooting into the air, were seen surrounding the Prime Minister.

On 8 May 1968, the Lebanese daily *Al-Safa* reported that "training centres for Lebanese young men who joined the fedayeen movement have been established in the town of Sidon." In a statement made on 6 May, the Lebanese Prime Minister reiterated his Government's support for terrorist warfare. The following night the first of a series of armed attacks was launched from Lebanese soil against an Israeli village, Manara.

Since then, the Government of Lebanon has not restrained itself either in its actions or in its threats against Israel. My delegation reported these and other incidents to the Security Council in its communications of 14 May 1968 and 15 June 1968. Those notes stressed the grave dangers to the cease-fire created by these Lebanese provocations.

Those and other warnings were not needed. On 2 November 1968, the Prime Minister of Lebanon declared to the Kuwait newspaper *Ar-Rai Al-Am* that he did not believe in political solutions and that his Government would support the fedayeen since he considered their activities to be lawful. Later in the day he received a delegation and, according to Radio Beirut, repeated that statement. On 2 November 1968, Radio Baghdad quoted the Prime Minister as saying that what was taken by force would be recovered by force. On 6 November 1968, the Permanent Representative of Israel forwarded again a complaint to the Security Council. He wrote:

"I am instructed to stress once more the responsibility of the Lebanese authorities to ensure scrupulous observance of the cease-fire and to prevent all armed action against or incursions into Israel from its territory, whether by regular or irregular forces. When the cease-fire is violated from the Lebanese side, Israel must reserve the right to take appropriate defensive measures." (S/8891).

In this very month of December, Lebanon acted as host to an Arab regional conference, which vowed to continue terror warfare against Israel.

On 24 December 1968, a bare five days ago, the El-Fatah headquarters in Beirut published a warning to Christian pilgrims that they would be risking their lives by going to Bethlehem for Christmas. *The New York Times* of 25 December reported that the Arab terrorists had planned a dramatic act of violence to disrupt the holiday. According to the newspaper, only the vigilance of the Israeli defence forces prevented an infamous act of desecration.

The dastardly and murderous outrage of 26 December is thus the culmination of a long sustained and officially encouraged campaign. All through 1968

The right of self-defence is common to all systems of law. . . . As a legal concept its function and its scope may well vary with the degree of maturity attained by the system of the law in which it finds a place. In any immature system of law, where there is absent any centralized machinery for the enforcement of the law and the protection of the rights of individuals, or where such machinery is inefficacious or dilatory in securing those ends, the need to allow to the individuals whose rights are endangered by a breach of the law to protect their rights by their own action is obvious.¹⁶⁷

Until the nations of the world obtain meaningful solutions to their international problems, the United Nations will continue to be little more than a hope in which few states will place their trust. A state continually threatened and attacked by terrorist groups supported by belligerent neighboring states has no alternative¹⁶⁸ but to use force to protect its territorial

Lebanon, turning a deaf ear to Israeli's appeals, has been playing an ever increasing role in the overall Arab belligerency against Israel. It was in Beirut that the major Arab terrorist organizations established their headquarters and set up their international networks. From this safe haven, and taking advantage of its activities, they mobilized their resources, built up their propaganda machine, planned and directed their murderous attacks launched against Israel villages and cities, the acts of sabotage, the planting of mines and boobytraps, and the hi-jacking of an Israeli airplane last July. They made no secret of their far-reaching and devilish plots and plans. All this is taking place on Lebanese soil, in Beirut, the very capital of that country, under the complacent eyes and ears of the Lebanese authorities. The Government's responsibilities are clearly established. They are direct responsibilities, not vicarious ones.

The latest tragic and barbaric act in Athens has again brought to the Lebanese Government the cheap rewards of applause by a public opinion continuously whipped into senseless and blind hatred. The influential Lebanese newspaper *El-Nahar*, gloating over the murder, wrote on 28 December:

"The homeland of the Palestinian is the entire world — in Jerusalem, in Tel Aviv, in Los Angeles, in Rome and Athens. One day it will be in New York, Washington and London. For as long as the Palestinian is without a homeland, the entire world is his. His home is where the enemy is. . . . And New York, Washington and London or any other places might be the scene of the next Palestinian protest operation. The world will support or condemn, be happy or be afraid."

On 28 December 1968 a commando unit of the Israel defence forces landed at Beirut airport and struck at a number of aircraft belonging to Arab airlines parked in the airport. There was no loss of life. Strict precautions were taken, as far as possible, to avoid damage to non-Arab aircraft. The action was directed solely against the base from which the terrorists had departed on the previous occasion.

This action was taken to uphold Israel's basic right to free navigation in international skies. Its purpose was to show once again that Israel's rights on land and sea and in the air cannot be jeopardized [*sic*] and trampled on with impunity. It is a reminder to friend and foe of the firm and unconditional commitment of the people and of the Government of Israel to protect its very existence, its territory and its lifelines, resolutely and unswervingly.

Without in any belittling the gravity of this terrorist warfare being conducted against Israel's civil aircraft, wherever they might be, the complaint that we are discussing must also be seen in the broader context of the continuation by the Arab States, including Lebanon, of active belligerency and warfare against Israel through the instrumentality of irregular forces and organizations armed, trained, encouraged and financed by the Arab Governments, including the Government of Lebanon.

U.N. Doc. S/PV1460 at 17-25 (1968).

167. D. BOWETT, *supra* note 134, at 3.

168. Falk, *supra* note 9, at 427.

integrity and nationals.¹⁶⁹ This was the position taken by Israel when one of its planes was destroyed and nationals killed during the Athens provocation.¹⁷⁰ The purpose of such terrorist attacks — this was only one of many — is to continue the war lost in 1967¹⁷¹ and regain the territory surrendered during that short lived conflict.¹⁷² Israel felt that drastic measures were necessary to prevent recurrence of aggressive acts aimed at Israeli air traffic, since resort to the United Nations would not achieve their cessation.¹⁷³ Israel's attempts to introduce evidence before the Security Council concerning Lebanon's culpability for the Athens raid were rebuffed,¹⁷⁴ and the Council unanimously condemned the Beirut raid.¹⁷⁵ However, the fact that the United Nations condemned Israel does not help answer the vital question raised in this Comment, namely, whether international law as altered by the United Nations Charter permits a

169. If a state is constantly victimized by aggressive actions, it must utilize a limited amount of force to protect its existence where it has no other alternative because:

1. Diplomatic channels are closed because of a tradition of hostility;
2. The United Nations has been ineffective to solve the Arab-Israeli situation; and
3. The terrorists have avowedly expressed their purpose to be the total obliteration of Zionists.

Cf. Falk, *supra* note 9, at 427.

170. See note 12 *supra*.

171. N.Y. Times, Dec. 31, 1968, at 2, col. 3. The Arabs are trying to do what they failed to do in 1967 in the Arab-Israeli war, but this time by committing acts of aggression against civilians. *Id.*

172. N.Y. Times, Feb. 9, 1969, § 6 (Magazine), at 26, col. 2.

173. Blum, *supra* note 92, at 102-03. Israel's position on why it failed to go before the United Nations was stated by Foreign Minister Eban:

I am sometimes asked . . . why did we not go to the Security Council after the Athens attack. Well, I would like to tell you what our decision-making process is. We did the exercise, we present our complaint. It is considered. It would have been rejected because they have Algeria and Pakistan and the Soviet Union and Hungary and even if you did not, you have the [Soviet] veto. What would be the effect of Israel complaining about her attack on her airlines, complaining to the highest international organ and being rebuffed? Would this not be interpreted as the legitimisation of the attack on the Israeli aircraft in the name of what is called the Palestine struggle? This is why we didn't go to the Security Council after the Algerian affair [of the hijacking of an El Al airliner in July 1968]. Because of the power structure we would have failed and then it would have been said that the international community approves the kidnapping of aircraft provided that the reason is the Palestinian reason.

Quoted from Mr. Eban's press conference of Jan. 2, 1969, released by the Israeli Government Press Office, reproduced in Blum, *supra* note 92, at 102-03.

174. The Soviet Union refused to consider the Israeli allegations against Lebanon while at the same time it was condemning Israel for aggression. U.N. Doc. S/PV 1460, at 13-15 (1968); U.N. Doc. S/PV1462 at 76 (1968) (remarks of Mr. Malik of the Soviet Union). Russia took this position despite its own definition of aggression in article 1(f) of the 1954 Russian Draft Definition of Aggression which stated that an aggressor is any state which offers "[s]upport [to] armed bands organized in its own territory which invade the territory of another [s]tate" or any state which refuses "on being requested by the invaded [s]tate, to take in its own territory any action within its power to deny such bands any aid or protection." Soviet Draft Resolution of October 18, 1954, A/C.6/L.332/Rev.1 reproduced in Note, *supra* note 12, at 123 n.88. Hungary and Pakistan also objected to the inclusion of the Athens incident on the Council agenda. U.N. Doc. S/PV1460 at 47 (1968) (remarks of Mr. Csatorday of Hungary); U.N. Doc. S/PV1461 at 37 (1968) (remarks of Mr. Shahi of Pakistan).

175. See note 162 *supra*.

state to undertake an armed reprisal during intermediacy. While the United Nations has itself stated that armed reprisals are prohibited, and this view is held by many commentators, it is posited that in a *status mixtus*, where a nation's vital interests are at stake, the right to conduct armed reprisals exists.¹⁷⁶ Such a right, however, must be limited; an unrestricted right would lead to the total collapse of the United Nations.¹⁷⁷ The purpose of the next section is to delineate the scope of this limited right.

VII. ARMED REPRISALS DURING INTERMEDIACY

The failure of both customary international law and the United Nations to provide an adequate framework for evaluating armed reprisals during *status mixtus* reveals the need for a new standard by which such retaliatory acts can be judged. It is important to formulate such a standard by describing how states should act in a *status mixtus* relationship if international law is to structure expectations. The standard proposed is an attempt to confront a problem which international law has not as yet addressed.¹⁷⁸ The standard is cognizant of the limitations placed upon the use of force by the United Nations Charter¹⁷⁹ since that is the only existing world organization which could function to enforce international law and bring a semblance of world order to the international arena. By enunciating a standard for armed reprisals, it is hoped that states will be able to determine whether a contemplated armed reprisal would be

176. See D. O'CONNELL, *supra* note 149, at 338-39.

In considering the extent to which the United Nations Charter today has limited the scope of self-defence one cannot ignore the effectiveness or otherwise of international machinery as a substitute for individual action; if the law is ineffective the primordial right of self-defence must reassert itself.

Id.

Israel's position on the Beirut raid was also expressed by Foreign Minister Abda Eban when he responded to the question whether Israel would alter its policy of retaliation because of the international outcry against the inflammatory use of force:

We have no policy of retaliation. We have a policy of *survival*. If retaliation helps survival, we are for it. If someone could prove we could *survive* by giving

Arab violence a free rein, then we would do so. But nobody has proved this. *TIME*, Jan. 10, 1969, at 28 (emphasis added).

It is submitted that when the machinery of the United Nations does not operate effectively to keep the peace under certain restricted instances the customary right of armed reprisal reasserts itself.

177. The problem with justifying one reprisal is that it raises the same justification issue for similar action by other states. International peace is certainly not fostered if resort to armed reprisals is unfettered by international restrictions. Thus we will attempt to confine the scope of permissible armed reprisals to an area of absolute necessity. This Comment also recognizes that armed reprisals should not be the rule but the exception to the peaceful settlement of international disputes and should be condemned when and if the United Nations becomes an effective organization.

178. Many contemporary writers have examined the broader question of whether armed reprisals are permitted under the United Nations Charter or whether the Charter has effectively precluded them. However, these studies are premised upon a relationship of peace between nations. Few writers have addressed themselves to a situation where the reprisal occurs during a state of intermediacy. See generally Falk, *supra* note 9.

179. See discussion of the limitations placed upon the use of force by the United Nations Charter at pp. 288-92 *supra*.

consistent with international law. The fundamental premise which pervades this analysis is that armed reprisals are an exception to the rule that force should not be used by a state to settle its disputes. Ineffective as the United Nations might be,¹⁸⁰ its goal of peaceful solutions to international disputes should be the goal of all nations. Therefore, the standard used to judge the legality of armed reprisals during intermediacy should preclude the indiscriminate use of force. Yet, to be effective and realistic, it should be more flexible than the customary rule of peacetime reprisals. The Beirut raid will again be used as an example in order to realistically appraise the standard proposed.

By the proposed standard, an armed reprisal during intermediacy is justified only if all of the following requirements are fulfilled:

A. A *status mixtus* relationship truly exists between the state which perpetrates the armed reprisal and the state against which it is directed; and,

B. The armed reprisal is in response to a provocation which endangers the territorial integrity or the lives of the nationals of the retaliating state, or in any other way seriously jeopardizes its existence; and,

C. There is evidence indicating to a substantial certainty that a nexus exists between the provoking act and a government to which responsibility can be imputed; and,

D. Recourse to the United Nations has either been exhausted or would to a high degree of certainty prove ineffective to remedy the injury that has been inflicted; and,

E. The amount of force employed does not exceed that amount necessary to accomplish the objective of deterrence, and at the same time demonstrates a high regard for human life; and,

F. The reprisal is limited to appropriate targets having a reasonable relation to the deterrent objective.¹⁸¹

A. Intermediacy

Intermediacy is an absolute prerequisite to a justifiable armed reprisal under this analysis. As previously noted, intermediacy has three basic characteristics: (1) a continuing relationship of "hostility and strain;" (2) a conflict over issues so "fundamental and deep-rooted" that a solution to any one of them would not ease the strain; and (3) a desire by both nations not to go to war.¹⁸² With respect to the Arab-Israeli situa-

180. See pp. 292-98 *supra* for an analysis of the failure of the U.N. rule.

181. The basis for this intermediacy test can be found in a proposed rule for peace time reprisals submitted by Professor Falk. Falk, *supra* note 9, at 441-42.

182. Jessup, *supra* note 3, at 100-06. One political observer has commented: [Israel] is a small state surrounded by much larger Arab states, which have openly vowed to destroy it. They cannot do so by classical warfare. They have

tion, the initial question is whether there exists a state of intermediacy. Apparently, there is no official declaration of war¹⁸³ between the Arab states and Israel because this would involve recognizing Israel as a state.¹⁸⁴ Such recognition is irreconcilable with the official Arab position that Israel does not legally exist as a state. Although no war exists, an objective analysis of Arab-Israeli relations compels the conclusion that those nations are not at peace. The Arab states have announced on numerous occasions that they view relations with Israel as continuously hostile. However, for purposes of analyzing the Beirut raid it is necessary to focus on Israel's relationship vis-à-vis Lebanon since that relationship has been less hostile than Israel's relations with the other Arab nations. If the requisite hostility does not exist between Israel and Lebanon, an armed reprisal committed by either of these states would necessarily be unjustifiable and hence illegal under this test. Arguably, Lebanon is part of the Arab world which has taken a position favoring guerrilla warfare as a means of regaining Palestine.¹⁸⁵ The Beirut raid was directed against Arab-owned planes, not merely those owned by Lebanon, to *deter the entire Arab bloc*, of which Lebanon is an inextricable part, from supporting fedayeen activity. Thus, there is a continuing relationship of "hostility and strain"¹⁸⁶ between Israel and Lebanon as well as between Israel and the other Arab states.¹⁸⁷ Hence the first element is met. Secondly, there are "fundamental and deep-rooted" issues at the core of the Mideast controversy, the most important of which being the right of Israel to exist as a state. The Arabs contend that Israel was created contrary

tried open aggression and have been defeated and humiliated, so they have resorted to anarchy and guerrilla warfare.

The Arabs are exploding in their impotence. They have established their subversive headquarters in Amman. They avoid a major clash with the more modern, organized Israeli forces, but supply guerrillas with money, arms and technical aid. . . . The Arabs think they can hijack airplanes, defy the rules of international commerce, and get away with it. . . . Nasser thinks he can use the techniques of the Vietcong in Vietnam to restore the military balance he lost in the six-day war against the Israelis. . . . [A]nd when one side resorts to the techniques of anarchy, as the Arabs have done against the Israelis, the whole community of nations has to think about the consequences.

Reston, *The Rise of Anarchy in International Relations*, N.Y. Times, Sept. 10, 1969, at 46, cols. 5-8 (emphasis added).

183. D. BOWETT, *supra* note 134, at 191. What Bowett wrote concerning the Arab-Israeli situation as it existed twenty years ago is applicable today:

[N]either party can reasonably assert that it is actively a belligerent or required to exercise the right of visit, search, and seizure for any legitimate purpose of self-defense.

Id.

184. Rosenne, *Directions for a Middle East Settlement — Some Underlying Legal Problems*, 33 LAW & CONTEMP. PROB. 44, 50 (1968).

185. A statement attributed to the Lebanese Prime Minister indicates that the armed effort of the Arab guerrillas was politically supported and approved by the Lebanese Government. Falk, *supra* note 9, at 421 n.18:

Fedayeen action is legitimate, and no one can condemn the fedayeen for what they are doing. Their aim is to retrieve their homeland and their plundered rights. . . . Thus, I say, fedayeen action is legal.

Id.

186. See Rosenne, *supra* note 184, at 50-51.

187. Falk, *supra* note 9, at 431 n.42.

to the terms set by the United Nations for a Jewish state.¹⁸⁸ Israel, on the other hand, claims that the land they now occupy is a re-embodiment of the Kingdoms of 933 to 722 and 168 to 83 B.C. "The two millennia of dispersion are dismissed as a parenthesis in history."¹⁸⁹ Even if these two elements of intermediacy are satisfied, the real problem is with the third — that neither state desires to go to war. Although that is the official position of the states involved, both sides do seem willing to resort to force when necessary.¹⁹⁰ The Arabs have been content since the 1967 conflict to achieve their goals through terroristic tactics. The Israeli Government resorted to violent use of force in the Six Day War, and since that time has adopted the use of armed reprisals to respond to guerrilla attacks.¹⁹¹

B. Provocation

In order to be upheld, an armed reprisal during *status mixtus* must be in response to a prior international tort which endangers vital national interests. Those vital interests include the territorial integrity of the state,¹⁹² the lives of its nationals at home and abroad,¹⁹³ and any other imminent threat to the existence of the state.¹⁹⁴ A threat to any one of these interests supplies the requisite injury justifying the use of an armed reprisal. This requirement is an expansion of the customary international law rule since it permits an armed reprisal for any substantial threat to the existence of the state — a justification not present under the customary rule. Specifically, there need not be a direct intrusion or physical trespass into the territory of the retaliating state as was required under both the traditional rule and a literal reading of Article 51. This gives the intermediacy rule the added flexibility necessary to reflect the realities of such a situation.

The Athens raid fulfills the provocation requirement for two reasons: (1) an Israeli national was killed,¹⁹⁵ and (2) the destruction of an El Al airplane, viewed as one of a series of attempts to destroy Israel's airlink

188. O'Brien, *supra* note 14, at 693-95.

189. Marshall, *Reflections on the Middle East*, 11 ORBIS 343, 346 (1967).

190. O'Brien, *supra* note 14, at 695-96.

191. *Id.*

192. I L. OPPENHEIM, *supra* note 74, at 255, 258-59.

193. D. BOWETT, *supra* note 134, at 87-105; I. BROWNLIE, *supra* note 152, at 289-98; I L. OPPENHEIM, *supra* note 74, at 256-57; Waldock, *supra* note 140, at 466-67, 503.

194. An example of such a threat is the installation of surface to surface missiles directed at the aggrieved state. This is a serious threat to the territorial integrity of this aggrieved state. Attacking the aircraft of a state is also considered a significant threat to the national interest. I. BROWNLIE, *supra* note 152, at 433. It should be noted that the mere loss of property owned by nationals abroad is not deemed a sufficient injury in itself to justify an armed reprisal. D. BOWETT, *supra* note 134, at 111.

195. Falk, *supra* note 9, at 416. The killing of a national in itself is sufficient provocation when it is done deliberately, manifesting a policy of aggression directed against a state's citizens abroad.

with the outside world,¹⁹⁶ constitutes a threat to its national existence¹⁹⁷ since Israel is surrounded on three sides by hostile states, making air traffic a principal means of maintaining a viable economy. Even though Israel's territorial integrity was not violated, a vital national interest was infringed. Thus, at this juncture, the Athens raid constitutes an adequate provocation to justify an armed reprisal.

While the customary rule of armed reprisals requires that a reasonable amount of time elapse prior to the retaliation¹⁹⁸ during which all peaceful solutions must be exhausted,¹⁹⁹ the intermediacy rule should not be so strict. During intermediacy, there is a continuing relationship of hostility. Thus, diplomatic overtures to a state to take decisive action would in all likelihood be ignored.²⁰⁰ Such was the case with Israeli warnings to the Arab nations with respect to fedayeen activity. Furthermore, if other means of self-help short of armed coercion are available to stop the illegal acts being perpetrated against the responding state, *i.e.*, embargo, raising tariffs, or closing a frontier, then those means must be used.²⁰¹ These economic sanctions are effective, however, only where the aggrieved state is in a position of economic superiority such that the offending state's economy is dependent upon the economy of the aggrieved. Intermediacy, by definition, suggests that the issues in controversy between the states involved are not likely to be settled peacefully. Therefore, the likelihood of settling the particular delinquency in question is slight. If such peaceful solution is possible, then it must be attempted prior to the commission of an armed reprisal.

During quasi-belligerency, an immediate armed reprisal should be permitted where there exists strong indicia that the provocation is only one of a series of international delinquencies. Admittedly, some time must elapse within which the culpable state can make redress. Where a series of international wrongs are involved, and the government controlling the territory from which they emanate remains silent, it will, in all probability, make no difference whether the injured state waits one day or one month for the injuring state to offer reparations. Therefore, it seems reasonable to allow an immediate response where a sufficient time has elapsed during which the culpable government could issue a policy statement regarding the provocation. It follows from this reasoning that the Israeli Government was justified in waiting only two days

196. *Id.* at 417-19.

197. Attacks upon a nation's aircraft have been considered a threat to a significant national interest that would justify an armed reprisal. I. BROWNLIE, *supra* note 152, at 433.

198. II L. OPPENHEIM, *supra* note 18, at 142, *noted in* Note, *supra* note 12, at 113.

199. II L. OPPENHEIM, *supra* note 18, at 136.

200. Nevertheless, there must be a demand for redress either through diplomatic channels or by official government statements because this will impress upon the minds of the leaders of the delinquent country that it should take positive steps to rectify the situation. This is especially true where the nation plans to use a reprisal to compel the delinquent state to act. *Id.* at 142 n.6.

201. *See* notes 57, 60 & 61 *supra*.

before responding to the Athens incident. During this two day period, the Prime Minister of Lebanon not only condoned the Athens raid, but actually applauded it.²⁰²

C. Imputed Responsibility

As was stated with respect to the customary rule, an armed reprisal is valid only if directed toward the government responsible for the breach of international law. If the delictual conduct is directly attributable to the government, then, without further inquiry, the government is legally responsible and may be the object of an armed reprisal.²⁰³ A more difficult question is presented where paramilitary organizations operating within the borders of a state are the perpetrators of the international injury. In order to retaliate against the state, there must be a nexus between the government and the groups responsible for the provocation.²⁰⁴ This nexus is not established merely by demonstrating that the wrongdoers are citizens of the offending state.²⁰⁵ However, it is established where the nationals proceed to commit a breach of international law at the direction or with the authorization, implicit or explicit, of their government, or where the government has failed to act to prevent the delinquency.²⁰⁶ In such circumstances, the illegal acts may be imputed to the government. The government is as liable as if it conducted the action itself through its regular armed forces.²⁰⁷ If, however, the State is incapable of controlling the activities of the guerrillas, then its failure to control them does not render it responsible.²⁰⁸

The Beirut raid was directed primarily against the Lebanese Government for what Israel believed to be its role in the Athens raid. The retaliation at Beirut meets this aspect of the intermediacy test only if Lebanon was, in fact, legally responsible. If Lebanon was responsible because it did not attempt to punish the wrongdoers or take steps to insure against the recurrence of similar delinquencies,²⁰⁹ then it has violated its duty under international law to protect Israel against future

202. See note 210 *infra*.

203. I L. OPPENHEIM, INTERNATIONAL LAW 338 (8th ed. H. Lauterpacht 1954); Note, *supra* note 12, at 110. Note that this is the eighth edition of the Oppenheim treatise.

204. Falk, *supra* note 9, at 441.

205. No state is absolutely responsible for international delicts committed by its nationals acting within its territory. I L. OPPENHEIM, *supra* note 203, at 337; Note, *supra* note 12, at 111.

206. I L. OPPENHEIM, *supra* note 203, at 228; Note, *supra* note 12, at 111. In addition to exercising reasonable care, if the illegal acts do occur, a duty to punish the wrongdoers exists. *Id.*

207. I L. OPPENHEIM, *supra* note 203, at 338; Note, *supra* note 12, at 111.

208. Note, *supra* note 12, at 112. In customary international law, some nations have been held responsible for acts over which they had no control. E. COLBERT, *supra* note 20, at 67. However, where no ability to control is present, an armed reprisal against this nation is punitive, not deterrent in its effect. This violates the proportionality requirement. See pp. 305-06 *infra*.

209. Note, *supra* note 12, at 110.

attacks.²¹⁰ That Lebanon did not act to prevent the Athens raid has already been documented;²¹¹ that it had the capacity to do so was clearly demonstrated in the months following the Beirut reprisal. During that time, the commandoes within Lebanon were silent. There were no subsequent raids against Israel and, in fact, no belligerent activity of any kind originating from Lebanese territory. From this, it is reasonable to conclude that prior to the Beirut reprisal the government of Lebanon had the capability to limit the fedayeen activity.

One further problem with imputing responsibility to a government is the perspective from which culpability is to be judged. If there is evidence which indicates to a substantial degree that there exists the requisite nexus between the breach of international law and the government allegedly responsible, then such a link may be inferred by the responding state for the purposes of this element of the test. The culpability requirement of this test was also an element of the customary rule.²¹²

D. The Unavailability of Remedies Under the United Nations

Any test which permits the use of force must be cognizant of the intent of the United Nations' members in attempting to limit the use of force by the United Nations Charter. Ideally, the United Nations should be a forum in which all international disputes are settled, thereby eliminating the undesirable alternative of having each state act on its own initiative to enforce international law. However, there are at least two situations where reliance upon the United Nations for peaceful solution is impracticable. First, a state would not resort to the United Nations where there is a threat to this state's national interests, and either (a) past experience in the United Nations has shown that no action will be forthcoming from that body,²¹³ or (b) one of the nations on the Security Council has aligned itself with the delinquent state and uses its veto power to block action against the aggressor state.²¹⁴ Secondly, resort to the United Nations should not be required where that body is powerless to provide a remedy because the offender is not a member²¹⁵ or not a state, and, therefore, not amenable to United Nations action.

210. See Falk, *supra* note 9, at 420-21. There is evidence that the Arab guerrillas are permitted to conduct all of these activities by the Lebanese Government. N.Y. Times, Feb. 9, 1969, § 6 (Magazine), at 26, col. 4. See Note, *supra* note 12, at 111. Instead of condemning the Athens raid, the Lebanese Government applauded the raid as "legal and sacred." N.Y. Times, Jan. 5, 1969, § 4, at 1, col. 2.

211. See note 12 *supra*.

212. See note 94 and accompanying text *supra*.

213. J. STONE, NO PEACE — NO WAR IN THE MIDDLE EAST 4, 5 (1969). Too many members of the Security Council are politically committed to voting favorably for Arab causes. It was unlikely that any pro-Israeli resolution would be adopted since five out of the fifteen Members of the Security Council refuse "even to maintain diplomatic relations with her." *Id.* at 4.

214. Blum, *supra* note 92, at 98; See also Yost, *The Arab-Israeli War: How It Began*, 46 FOREIGN AFFAIRS 304 (1968). It should be noted that the Soviet Union vetoed a comparatively weak resolution that was pro-Israel and anti-Syrian. *Id.* at 304-05.

215. See note 131 and accompanying text *supra*.

The Beirut raid qualifies under the first exception. Israel had been censured previously for engaging in armed reprisals,²¹⁶ and it was apparent to the Israeli Government that the United Nations would not act so as to protect Israeli interests. In addition, the Soviet Union, a member of the Security Council, was inextricably tied to the Arab cause, and would oppose any measure condemning the Arab states.²¹⁷ This rationale does not address the question whether a right of reprisal exists in spite of Article 51 or whether the right is abrogated by that provision. Rather, it presumes the existence of a natural right to take those measures necessary for survival.

E. Proportionality

Once it is determined that the use of force is justifiable under the test, a further question remains, namely, the determination of the amount of force that may be employed by the responding state. The customary rule required that the reprisal be proportional, but as has been seen, that is subject to at least four different meanings.²¹⁸ Proportionality, as used in an intermediacy context, means that amount of force necessary to deter future acts which threaten national interests of the responding state. The objective of the reprisal must be to compel a cessation of delictual conduct.²¹⁹ If the amount of force used precipitates a war, then it is *prima facie* disproportionate.²²⁰ A further restriction on the use of force is that it must be exercised so as to evidence a high regard for human life,²²¹ else it fails to meet this standard of proportionality. Finally, if there is no reasonable expectation on the part of the retaliating state that a reprisal will effectively deter future illegal conduct,²²² then its purpose is to punish, and the reprisal would be considered illegal.²²³

216. Israel was censured in 1966 by a 14-0 vote for conducting an armed reprisal against the Jordanian village of Es Samu in response to guerrilla raids along the border. O'Brien, *supra* note 14, at 699.

217. *See* note 214 *supra*.

218. For a discussion of the customary rules concerning proportionality, *see* notes 103 to 108 and accompanying text *supra*.

219. If the purpose of the reprisal is to protect a state from future attacks of this nature, a dollar-for-dollar limitation renders this purpose unachievable. It may take substantially more force to compel a state to assume its international duty. A senior Israeli military officer commented:

Replying on the basis of a wing for a wing and a propeller for a propeller was ruled out. This would not have carried the message. We had to make the point clearly.

N.Y. Times, Dec. 31, 1968, at 3, col. 1.

220. *See* L. ORFIELD & E. RE, *supra* note 46, at 910.

221. Falk, *supra* note 9, at 441; Note, *supra* note 12, at 114.

222. When judging whether an expectation is reasonable it must be viewed from the position of the nation launching the reprisal rather than through an *ad hoc* determination. The capability of a nation to control elements within its border, the support given to it by these groups, the political statements issued by this government, the likelihood of provoking a war should be some of the relevant factors that bear upon the question of reasonable expectation.

223. Since the purpose is to deter, a reprisal that has punishment as its sole purpose fails to measure up to this purpose because it achieves only revenge. It does

The Beirut raid fulfills this requirement because it was executed humanely²²⁴ — neither civilians nor military personnel were injured in any manner. Its purpose was to deter Lebanese guerrilla activity by forcing the Lebanese Government to limit commando interference with significant Israeli national interests, namely, its air traffic²²⁵ and links with the outside world.

F. *Appropriate Targets*

Having ascertained the amount of force permissible, it remains to delimit the type of targets against which an armed reprisal may be executed. This involves a preliminary determination of responsibility. Naturally, innocent states are not appropriate targets for retaliation, but if a government is directly or indirectly responsible for a breach of international law, then the state it represents is an appropriate target. Within such a state, the attack itself is appropriate if it: (1) communicates that the responding state is holding the offending state responsible, and (2) achieves the desired objective of deterrence. More specifically, some targets are more appropriate than others. Where the provocation is attributable to a group of guerrillas, as in the instant example, one appropriate target would be the base camps where these guerrillas train. These groups might be deterred and, in any event, would know that Israel was holding them responsible. However, this might not be an effective

not result in an injunctive type remedy that this view of proportionality has as its goal. This is why Israel did not retaliate for the Iraqi hangings. N.Y. Times, Jan. 30, 1969, at 2, col. 2.

224. Falk, *supra* note 9, at 41; Note, *supra* note 12, at 115.

The Israeli representative to the Security Council stated:

An opinion was expressed in this Council that Israel's action was disproportionate to the terror attacks that preceded it. When would Israel's action have been proportionate to them? Had the assailants of the aircraft in Athens succeeded in blowing up the airplane and killing the fifty persons aboard, or had they brought about the explosion of other airplanes on the field and of the airport installations, would that have made the Israeli action proportionate? Should we have waited until Arab warfare succeeded in bringing about such a catastrophe? Should we have waited until terror attacks from Lebanon against Israel territory resulted in more casualties and more damage? Are we engaged here in keeping the score of success and failure in murder or in an effort to thwart it? Is proportionality between one act and another to be established by the impressiveness of the damage caused or by the extent of the act's danger, by its purpose, by its background and motivation?

It is odd to hear several supporters of Arab aggression in the Middle East suggest that Israel pay compensation for the aircraft destroyed at the Beirut airfield. And who will pay for the loss of Israeli lives? Is the single life of the Israeli engineer killed in Athens while on a United Nations mission worth less than all the metal and wire and upholstery destroyed in Beirut? Who will determine that? Or are the shares of the owners of the Arab airlines more privileged than human life? Who will compensate Israel for the hundreds of its citizens killed in the course of the existing cease-fire? Who will make reparation for the damage to the border villages that are being shelled incessantly or the Jews lingering since June 1967 in Arab concentration camps, for the property of nearly a million Jewish refugees from Arab lands, or for the twenty years of Arab war against Israeli territory and people?

U.N. Doc. S/PV1461, at 56 (1968) (remarks of Mr. Tekoah of Israel).

225. Note, *supra* note 12, at 114-15.

response for any one of several reasons: (1) the terrorists may be religiously motivated and a direct attack upon them would only intensify their hatred for the responding state; (2) the government may be responsible for aggression emanating from its territory and to punish the aggressors and not the government might be deemed by some publicists to be an unjust response; or (3) a direct attack upon the guerrillas may elicit more support for a movement which does not already have overwhelming popular support. While a direct response against the government will often cause that government to take the steps desired by the responding state, it may not be effective where the government is not able to control subversive elements. In such a situation, guerrilla training camps would be a more appropriate target.

A reprisal directed against civilians is inappropriate since this would be done more to punish than to deter future aggression. It has been stated above that the reprisal must show a high regard for human life. Concomitantly, it should also be noted that privately owned property may be a target for reprisal. The goal of using private property as a target would be to arouse public opinion. This in turn would put pressure on the government to limit guerrilla activity. Such a response might achieve the deterrence objective, but there may be a question as to whether it would satisfy the communicative objective. That is, the reprisal may not communicate to the offending state that it was being held responsible. Unless the communicative criterion is present, the target chosen is not appropriate.

The Beirut raid resulted in the destruction of \$43.8 million worth of aircraft²²⁶ owned by private individuals, Arab corporations, inter-governmental corporations and foreign states.²²⁷ The attack upon both privately and governmentally owned property did communicate the reason for the response — that the Lebanese Government was being held responsible for the Athens attack, and had better limit the activities of the guerrillas operating from within its borders. Hence, this part of the test is satisfied. In conclusion, then, the Beirut raid meets the criteria established for a legal armed reprisal during intermediacy.

VIII. THE GULF OF TONKIN — A SECOND EXAMPLE

Having outlined a test for judging reprisals during intermediacy and having applied it to the Beirut reprisal, an additional reprisal, a response to the Gulf of Tonkin²²⁸ raid, will be examined to determine

226. Falk, *supra* note 9, at 415; N.Y. Times, Jan. 5, 1969, § 4, at 1, cols. 2-3.

227. Lebanon did not own all of the aircraft destroyed; many were owned by other Arab governments in conjunction with foreign investors and governments such as the United States. Falk, *supra* note 9, at 415 n.1; N.Y. Times, Jan. 5, 1969, § 4, at 1, cols. 2-3.

228. 110 CONG. REC. 18399 (1964) (remarks of Senator Fulbright).

On August 2 the U.S. destroyer *Maddox* was attacked without provocation by North Vietnamese torpedo boats in international waters in the Gulf of Tonkin. . . . The United States thereupon warned the Hanoi regime of "grave consequences"

whether it was justifiable under this analysis. This reprisal occurred subsequent to two alleged attacks on American destroyers in "international waters"²²⁹ by North Vietnamese torpedo boats. The provocation induced the United States Congress to pass the Gulf of Tonkin Resolution,²³⁰ but neither this enactment, the political implications of that conflict, nor its constitutionality are apposite to the scope of this Comment.²³¹

A. Intermediacy

The United States, prior to the Gulf of Tonkin incident, was not in a state of war with North Vietnam, as the level of military involvement was insignificant and the American role was primarily advisory and financial. However, the relationship between North Vietnam and the United States prior to this reprisal could hardly be termed peaceful. On the contrary, it was one of continuing animosity and hostility. This hostility dates back to the American support for the French during their struggle with the Viet Minh.²³² The issues that flow from this hostility are so "fundamental and deep-rooted" that even today, seven years after the Gulf of Tonkin incident, they have not been resolved. Ostensibly to prevent the spread of communism, the United States politically and militarily supported the South Vietnamese Government to the consternation of the North Vietnamese who maintain that the United States is supporting a violation of the Geneva Agreement which provides for the reunification of the South and the North.²³³ A further issue is the clash of ideologies — communism and democratic capitalism. It is submitted that these issues obstruct any hope of resolving ancillary issues such as

in the event of further military attacks on American forces. On August 4 [1964] the *Maddox* and another destroyer, the *C. Turner Joy*, were again attacked by North Vietnamese torpedo boats in international waters. . . . The United States thereupon responded with air strikes against North Vietnamese torpedo boats and their supporting facilities at various points on the coast of North Vietnam.

The American action was limited and measured in proportion to the provocation which gave rise to it. It was an act of self-defense wholly consistent with article 51 of the United Nations Charter and an act of limited retaliation wholly consistent with the international law of reprisal. The single, most notable fact about the American action was its great restraint as an act of retaliation taken by a great power in response to the provocation of a small power.

229. North Vietnam is one of several nations that assert that its territorial waters extend to a twelve mile limit, whereas the United States has consistently maintained a policy that three miles is the maximum limit to territorial waters. In order to demonstrate its non recognition of the twelve mile limit, the United States ships "deliberately" sailed into this twelve mile area. However, the attack itself occurred when the destroyers were beyond the twelve mile limit. *Id.* at 18409.

230. 78 Stat. 384 (1964).

231. As to whether the Gulf of Tonkin Resolution may serve as the "functional equivalent" of a Congressional declaration of war, see Senate Committee on Foreign Relations, Statement of Nicholas deB. Katzenbach, National Commitments to Foreign Powers, S. REP. NO. 797, 90th Cong., 1st Sess. 22 (1967). See also Forkosch, *The Constitutionality of the Vietnam Venture And a Registrant's Right to Counsel Within the Selective Service System*, 22 S.C.L. REV. 287 (1970); Malawer, *The Vietnam War Under the Constitution: Legal Issues Involved in the United States Military Involvement in Vietnam*, 31 U. PITT. L. REV. 205 (1969).

232. See generally HO CHI MINH ON REVOLUTION 216-17 (B. Fall ed. 1967).

233. *Id.* at 314.

release of prisoners of war, a single election in both North and South Vietnam, support for the guerrilla movement, or even a cease fire.

It appears that the sentiment of the American people was against any deeper involvement in Vietnam prior to the Gulf of Tonkin provocation,²³⁴ and that Congress did not intend, even by adopting the Gulf of Tonkin Resolution itself, to authorize unrestrained military action.²³⁵ In addition, the North Vietnamese official position, at least as late as 1965, was that the struggle was still being waged by the National Front for Liberation rather than by North Vietnam.²³⁶ Thus, it is posited that during the period in which this reprisal took place, there was *no requisite intent to go to war* even though both states were taking indirect action; North Vietnam by supporting the guerrillas, and the United States by supporting the South Vietnamese. Therefore, the characteristics of inter-mediacy were present.

B. *Provocation and the Responsibility of North Vietnam*

The provocation, which consisted of an attack upon two American destroyers in international waters, was committed by torpedo boats in the service of North Vietnam. The question raised by this fact is whether responsibility may reasonably be imputed to the Government of North Vietnam for the actions of its naval contingent. Under international law, the acts of a government's military are directly imputed to that government.²³⁷ Additionally, in the interim period between the two attacks, the United States warned the North Vietnamese Government that subsequent acts of aggression would not be tolerated.²³⁸ Therefore, the North Vietnamese Government knowingly breached its international duty by not restraining an arm of its government from committing further acts of aggression.

Once it has been established that the provocation is attributable to the North Vietnamese Government, a further consideration remains with respect to whether or not the provocation was sufficient to induce an armed response; that is, whether or not the provocation was a violation of international law. In the instant example such a determination is dependent upon two factors: (1) whether the provocation endangered the territoriality or nationals of the retaliating state or was directed at an interest essential to its preservation; and (2) whether the provocation was justified under the circumstances. The attack by the North Vietnamese torpedo boats cannot be viewed as an isolated incident. Rather, it must be viewed in the entire panorama of hostility between North Vietnam and the United States. Thus, the continuous hostility between

234. See 110 CONG. REC. 18350-51 (1964) (remarks of Senator Morse and correspondence advocating no deeper commitment in Vietnam).

235. *Id.* at 18456 (remarks of Senator Keating).

236. See HO CHI MINH ON REVOLUTION 327-28 (B. Fall ed. 1967).

237. I L. OFFENHEIM, *supra* note 203, at 339.

238. See note 228 *supra*.

the two nations and the supplying of guns and ammunition to the guerillas²³⁹ throughout Southeast Asia elevate such a provocation to a point where a retaliation would not be an unreasonable or unwarranted response. Further, the provoking attack was upon naval vessels, a violation of the freedom of the seas, and it endangered American lives. Under these circumstances, the provocation endangered vital national interests.²⁴⁰ However, if the two destroyers precipitated the attack by their own acts of provocation, then it would follow that the attack by the North Vietnamese was justified and no armed reprisal would have been warranted.

When the Gulf of Tonkin Resolution was considered by Congress, one opponent argued that these destroyers had, three days prior to the act of provocation, supported a venture by the South Vietnamese Navy which involved the shelling of two North Vietnamese islands. This, it was submitted, could have been interpreted by the North Vietnamese as an act of aggression to which they felt compelled to respond.²⁴¹ The continued presence of American ships in the vicinity of the two islands, whether the ships were in international waters or within the territorial waters of North Vietnam, raises the inference that the attacks were responses to the American involvement in the bombardment of the two islands, rather than wholly unprovoked attacks.²⁴² The facts on this issue are not sufficiently clear to make a conclusive determination. However, the facts do raise the point that a provocation, if justified, cannot support an armed reprisal in response to it.

C. *The Unavailability of Remedies Under the United Nations*

If the provocation is sufficient, the right to implement a reprisal arises only if there are no remedies in the United Nations, and all other amicable means of settling the dispute have been exhausted. If the response is purely an act of self-defense, it would be a permissible use of force under Article 51 of the Charter. The reprisal against the naval bases was an act of self-defense, yet, it was not merely an act to punish North Vietnam for violation of its international obligations. It was an attempt to accomplish a defensive purpose,²⁴³ *i.e.*, the prevention of future attacks on American ships. The United States could have submitted the dispute to the United Nations. However, it was not incon-

239. 110 CONG. REC. 18408 (1964) (remarks of Senator Fulbright concerning aggression already attributable to North Vietnam).

240. *Id.* at 18415 (remarks of Senator Stennis).

Today, we have no choice. Our flag has been attacked, and our country has been challenged in international waters — on the high seas — where we had a right to be. Our flag and our men have been fired upon. Many hundreds, if not thousands, of our naval personnel could have lost their lives had the torpedoes been more accurately aimed and hit one or more of the destroyers.

241. *Id.* at 18425 (remarks of Senator Morse).

242. *Id.*

243. *Id.* at 18399 (remarks of Senator Fulbright indicate that the United States believed that this reprisal did not violate article 51 but was within the scope of self-defense).

ceivable that the Soviet Union would have vetoed any proposal to impose sanctions on North Vietnam. Therefore, because the exercise of the Soviet veto was more probable than not on an issue that was of vital concern to the United States, the United Nations did not present an adequate remedy. It became necessary, therefore, to protect certain paramount national interests through the use of an armed reprisal rather than resort to an ineffective remedy.

D. *Proportionality and the Appropriateness of Targets*

The final two aspects of the test, proportionality and appropriateness of targets, will be applied conjunctively. The reprisal was limited in the amount of force utilized²⁴⁴ and was perpetrated for the purpose of deterring future attacks of a similar nature. Thus, the complete or partial destruction of torpedo boats and bases would accomplish this deterrent purpose. Under the proposed test for proportionality, this reprisal would be proportional to the provocation, proportionality here meaning that amount of force necessary to accomplish the objective sought. In directing the reprisal strictly against the source of the provocation, the United States chose targets that would reasonably tend to accomplish the objective to deter. The reprisal communicated to North Vietnam that the United States was holding it directly responsible for the provocation (the communicative aspect), and that North Vietnam should take measures to control its military forces or similar reprisals would be implemented (the deterrent aspect). Here, the selected targets reasonably tended to accomplish the purpose of deterrence, and thus would be appropriate.²⁴⁵ In conclusion, this reprisal was a valid exercise of the use of deterrent force in intermediacy *unless* there was a justification for the provoking act.

IX. CONCLUSION

It is posited that a dichotomous approach to international law problems is unrealistic. States are not always *either* at war *or* at peace with other states. Oftentimes their relationships fall within the characteristics of intermediacy. If the relationship is labeled intermediacy, the legal consequences of calling it a war are avoided. Yet, the relationship is being described as it really exists — a relationship of fundamental and deep-rooted differences which preclude a peaceful settlement even if one of the differences is resolved. Given a relationship of intermediacy, it is hoped that states will realize that many disputes can only be partially solved. Every dispute does not result in either victory or defeat. It is this polarization of thinking that intermediacy counteracts. If states

244. *Id.*

245. *Id.* It is apparent from the legislative history of the Gulf of Tonkin Resolution that the reprisal was restricted to the torpedo boats and the facilities that directly supported them.

would accept this kind of approach to problems, it is likely that world tensions would be reduced.

Having established that intermediacy is a useful tool for analyzing international law problems, the specific issue addressed was whether armed reprisals are permissible during intermediacy. It is submitted that such retaliatory acts are permitted during intermediacy. In reaching this conclusion, the customary rule and the United Nations Charter provisions with respect to armed reprisals were examined to show that they do not provide a satisfactory solution to contemporary problems. One reason for their inadequacy is that they fail to recognize intermediacy as a relationship between states. Specifically, the customary rule sets up requirements so strict that an aggrieved state cannot respond with that amount of force necessary to insure its survival. Similarly, the United Nations Charter provisions require that a state suffer an actual armed attack before responding with force. According to most public international lawyers, that force, characterized as self-defense in the Charter, is not to be deemed an armed reprisal at all. The result of both rules is that a state may suffer devastating injury before it can act, within the bounds of international law, to protect its vital national interests.

A test has been set forth by which the legality of reprisals during intermediacy can be judged. The test requires (1) a *status mixtus* relationship, (2) a provocation which endangers vital national interests, (3) a nexus between the delinquency and the state against which the reprisal is directed, (4) the unavailability of a remedy through the United Nations, (5) a proportional response, and (6) an appropriate target for the reprisal. If all of these elements are satisfied, the reprisal would be deemed legal. Both the Beirut raid and the United States response to the Gulf of Tonkin incident have been scrutinized under this test. Both have been found to be legal armed reprisals.

In essence, a new framework for analysis for a specific international law problem has been suggested. That framework has been used and, under it, a test established. That test has been applied to two factual settings to determine its validity. The question remaining is whether publicists and those who are concerned about public international law will use intermediacy as a framework for analyzing other international problems. Therefore, only in time can it be determined whether this framework better structures international expectations and enhances order in the international arena.

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