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Economic Sanctions and International Terrorism

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Economic Sanctions and International Terrorism

*Kenneth W. Abbott**

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I. INTRODUCTION

Economic sanctions have become a prominent part of the American response to foreign state involvement in international terrorism.¹ Since the early 1970s,² a series of Congressional statutes³ has authorized or required the Executive to curtail a broad range of economic relationships with countries the Secretary of State has determined to be supporters of terrorism, a group that now includes Libya, Syria, South Yemen, Iran and Cuba⁴ and earlier included Iraq.⁵ Under these statutes, the United

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1. United States Department of State, *Economic Sanctions to Combat International Terrorism*, Bureau of Public Affairs Special Report No. 149, July 1986, at 1 [hereinafter *State Department Report*].

2. For a discussion of the early history of these statutes, see Abbott, *Linking Trade to Political Goals: Foreign Policy Export Controls in the 1970s and 1980s*, 65 *MINN. L. REV.* 739, 766-71 (1981).

3. For a thorough review of these statutes and others relating to the President's ability to use economic sanctions, see B. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME* (forthcoming); see also *State Department Report*, *supra* note 1, at 3-5.

4. Export Administration Act, § 6(j)(1), 50 U.S.C. app. § 2405(j)(1) (1982), requires

States has restricted all forms of foreign assistance,⁶ Eximbank and OPIC financing,⁷ arms sales,⁸ commercial exports⁹ and imports,¹⁰ trade preferences,¹¹ air transportation¹² and other transactions¹³ with one or

the Executive branch to notify specific Congressional committees before granting licenses for certain exports to countries that the Secretary of State has determined "repeatedly" provide support for acts of terrorism. The Export Administration Regulations reflect the Secretary's determination. See 15 C.F.R. §§ 385.1(b)(1) (Cuba), 385.4(d) (People's Democratic Republic of Yemen, Syria, and Iran), 385.7(b) (Libya) (1987).

5. The Secretary of State removed Iraq from the list of states supporting terrorism, and hence from the related restrictions under the Export Administration Regulations in 1982 because of its "improved record." See 47 Fed. Reg. 9201, 9204 (1982).

6. See 22 U.S.C. § 2371 (1982), prohibiting the granting of the specified forms of foreign assistance to any country that the President determines (1) grants sanctuary from prosecution to any individual or group that has committed an act of international terrorism, or (2) otherwise supports international terrorism. The restriction applies to all forms of assistance under the Foreign Assistance Act, the Agricultural Trade Development and Assistance Act of 1954, the Arms Export Control Act, the Export-Import Bank Act and the Peace Corps Act. The President can waive the restriction on national security and humanitarian grounds. See also Foreign Assistance and Related Programs Appropriations Act of 1986, Pub. L. No. 99-190, § 512, 99 Stat. 1291, 1304 (1985) (prohibits use of appropriated funds for aid to Cuba, Iraq, Libya, South Yemen, and Syria).

7. 22 U.S.C. § 2371 (1982) specifically restricts assistance under the Export-Import Bank Act; the Foreign Assistance Act, *supra* note 6, to which the section also applies, authorizes OPIC activities. As to Eximbank, see also 12 U.S.C. § 635(b)(1)(B) (1982) (authorizing denial of Eximbank financing for specified foreign policy reasons, including support of terrorism).

8. See *infra* notes 150-55 and accompanying text. The Arms Export Control Act prohibits the export of items on the Munitions List to countries supporting international terrorism. See State Department Report, *supra* note 1, at 3.

9. See *infra* note 137. See also 22 U.S.C. § 2349aa-8(b) (1982) (authorizing President to prohibit export to Libya of any good or technology subject to jurisdiction of the United States or exported by any person subject to jurisdiction of the United States).

10. See 22 U.S.C. § 2349aa-9(a) (1982) (authorizing President to ban imports of any good or service from any country that supports terrorism or terrorist organizations or harbors terrorists or terrorist organizations). See also *id.* at § 2349aa-8(a) (authorizing President to prohibit the importation into the United States of any article grown, produced, extracted or manufactured in Libya).

11. See 19 U.S.C. § 2462(b)(6) (1982) (prohibiting designation of any nation supporting terrorism as beneficiary developing country under Generalized System of Preferences, with exception for national economic interest of the United States).

12. See 49 U.S.C. § 1514 (1982) (authorizing President to suspend air service to any country he determines to be violating Hague air safety convention or supporting any terrorist group that supports the seizure of aircraft, regardless of bilateral air service agreements, and to any third state that maintains air service to such a country); 49 U.S.C. § 1515(e)(2)(D) (1982) (authorizing, and in some cases requiring, President to restrict air service to foreign airports that do not provide adequate security and to third country airports that continue to serve such airports). See also *id.* at § 1515a(b). The

more of the designated states.

The use of such measures has grown apace in recent years. The United States has steadily tightened economic sanctions aimed at Libya in particular over the last decade. This process culminated in President Reagan's national emergency declaration of January 1986¹⁴ which prohibited virtually all economic transactions with Libya and froze Libyan assets subject to United States jurisdiction.¹⁵ The United States also strengthened sanctions against Syria in November 1986 and June 1987, although to a much lesser extent,¹⁶ and tightened controls on exports to

State Department takes the position that the Federal Aviation Act also "contains sufficient authority" for the Department of Transportation to prohibit sales in the United States of airline tickets to countries against which the President has imposed aviation sanctions. *See* State Department Report, *supra* note 1, at 4.

13. Under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06 (1982) [hereinafter IEEPA], upon declaring a national emergency based on the existence of "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the [United States] national security, foreign policy, or economy," the President may interrupt virtually any economic transaction with foreign persons. *Id.* at § 1701(a). In January 1986, for example, President Reagan imposed economic sanctions on Libya under the IEEPA. Those sanctions included a ban on exports and imports, a prohibition on new private loans and credits, financial controls designed to restrict travel to Libya and the blocking of certain Libyan assets in the control of United States persons. *See infra* notes 14-15.

Statute requires the United States representative to the International Monetary Fund [hereinafter IMF] to oppose IMF assistance to countries harboring terrorists. 22 U.S.C. § 286e-11 (1982).

14. Exec. Order No. 12,543, 51 Fed. Reg. 865 (1986).

15. Libyan Sanctions Regulations, 31 C.F.R. § 550 (Treasury Department regulations prohibiting exports, imports, transportation and travel to and from Libya, performance of contracts supporting projects in Libya and extensions of credit to the government of Libya and blocking assets of the government of Libya within the United States or under the control of United States persons); Exec. Order No. 12,544, 51 Fed. Reg. 1235 (1986) (ordering blocking of assets); 15 C.F.R. §§ 385.7, 390.7 (1987) (Commerce Department regulations revoking export authorizations inconsistent with Libyan Sanctions Regulations); *In re* Suspension of Operations Between United States and Libya, Order 86-2-23, Doc. No. 43,711 (Department of Transportation, 1986), *reprinted in* H.R. Doc. No. 249, 99th Cong., 2d Sess. (1986). For a thorough discussion of the Libyan sanctions, see Bialos & Juster, *The Libyan Sanctions: A Rational Response to State-Sponsored Terrorism*, 26 VA. J. INT'L L. 799 (1986).

Just over two months later, of course, the United States went beyond economic sanctions, using military force against Libya. For a collection of documents relating to the bombing, see DEP'T ST. BULL., June 1986, at 1-23.

16. For a description of the sanctions the United States imposed in 1986, see U.S. Takes Measures Against Syria, White House Statement, Nov. 14, 1986, *reprinted in* DEP'T ST. BULL., Jan. 1987, at 79 [hereinafter White House Statement]. The actions taken included a decision to expand certain export controls, termination of Eximbank

Iran in 1984.¹⁷ For the most part, however, these have been unilateral American measures; international cooperation has been extremely modest.¹⁸

Understanding and evaluating antiterrorism sanctions is no easy task. Terrorism and state support for terrorism are complex, sometimes ambiguous phenomena. Economic sanctions can also be complex and subtle instruments.¹⁹ Sanctions against terrorism, then, involve complexity com-

financing, see 51 Fed. Reg. 43,796 (1986), notification of intention to terminate the United States-Syria air service agreement, a prohibition on the sale of tickets in the United States for transportation by Syrian Arab Airlines, advice to United States oil companies that continued Syrian oil operations would be inappropriate, more vigorous visa procedures, a stronger travel advisory relating to Syria and certain diplomatic sanctions. DEP'T ST. BULL., Jan. 1987, at 79.

Congress did not expand the export controls that the White House statement mentioned until June 1987. 52 Fed. Reg. 23,167 (June 18, 1987). At that time, the United States required validated licenses for exports to Syria of all goods and technical data controlled for national security purposes and all aircraft, helicopters and related components regardless of the identity of the purchaser or the size of the transaction. The Commerce Department also made certain outstanding licenses invalid for exports to Syria. *Id.* For a description of the restrictions previously in effect, see *infra* notes 198-214 and accompanying text.

Under the 1987 Regulations, the government will generally deny validated license applications, but it will give favorable consideration, on a case-by-case basis, to several categories of newly controlled transactions including transactions under prior contracts, re-export of certain previously exported goods not originally destined for Syria, exports of foreign-produced goods with a United States-origin content of 20% or less by value and sales of medical equipment. 52 Fed. Reg. 23,167, 23,168 (June 18, 1987), (renumbering 15 C.F.R. § 385.4(d)(4) as § 385.4(d)(5) and adding a new § 385.4(d)(4)).

17. It extended controls on exports of aircraft and helicopters to smaller and less costly models. The government also extended antiterrorism restrictions on items whose export it had restricted for national security reasons to lower value shipments and placed controls on the export of certain outboard marine engines. Under the licensing policy announced at the same time, the United States generally denies licenses for all the controlled items with narrow exceptions for certain preexisting contracts and for foreign-produced goods with low United States content. See 15 C.F.R. § 385.4(d) (1987).

18. See State Department Report, *supra* note 1, at 2-3. European countries have agreed to participate in narrower sanctions, such as restrictions on arms sales to Libya, and have represented that they would endeavor to prevent their firms from replacing United States firms as suppliers to Libya and other target states. See 15 C.F.R. § 385.4(d); Statement of Ministers of Foreign Affairs of the Twelve Meeting in Brussels on Combating International Terrorism, Jan. 27, 1986, reprinted in 25 I.L.M. 208, 209 (1986).

19. For a discussion of economic sanctions as both instruments of coercion and devices for symbolically communicating varied messages to multiple audiences, see Abbott, *Coercion and Communication: Frameworks for Evaluation of Economic Sanctions*, N.Y.U. INT'L L. & POL. (forthcoming).

pounded by complexity.

In this Article I hope to take at least a step toward clarifying these matters by presenting a framework for the analysis of antiterrorism sanctions and using that framework to discuss several of the sanctions that the United States currently employs.

Parts Two and Three of this Article set out the elements of the framework. Part Two begins by describing the varying forms or levels of state involvement in terrorism,²⁰ shown graphically in Figure 1.²¹ All forms of state involvement are not alike, at least analytically, and Part Two will discuss the appropriateness of employing sanctions or other measures of influence against different levels of involvement. Part Three will describe in general terms, without reference to the problem of terrorism, the four principal rationales for the use of economic sanctions.²² Figure 2 depicts these rationales.²³

Part Four of this Article will then join these two elements together,²⁴ producing the matrix shown in Figure 3.²⁵ The levels of state involvement appear on the horizontal axis of this matrix and the rationales for sanctions appear on the vertical axis. Part Four will sketch the application of the four sanctions rationales to state involvement in terrorism—the four rows of the matrix—and illustrate their application with examples from current American sanctions.

II. STATE INVOLVEMENT IN TERRORISM

As Figure 1 shows, one can picture state involvement in terrorism as running along a continuum, from the absence of state support at the left, to the most direct and extensive forms of involvement at the right. For analytical purposes, I have divided this continuum into three discrete sections representing three distinct levels of involvement, although the boundaries between these sections are difficult to draw with precision.

At the first level independent terrorist groups, which Robert Kupperman describes as “self-sustaining organisms,”²⁶ operate without significant state involvement. They may move from state to state or operate from some jurisdictional no-man’s land, such as portions of Lebanon. If

20. See *infra* notes 26-37 and accompanying text.

21. See *infra* Appendix p. 326.

22. See *infra* notes 57-79 and accompanying text.

23. See *infra* Appendix p. 327.

24. See *infra* notes 80-220 and accompanying text.

25. See *infra* Appendix p. 328.

26. Kupperman, *Terror, the Strategic Tool: Response and Control*, 463 ANNALS 24, 32-33 (1982).

they operate from a single state, state officials may not know of them or may actively oppose them but be unable to deal with them effectively.

At the second level states provide "support" to otherwise independent terrorist groups. This support can take a wide variety of forms. At the boundary between the first and second levels it may amount to nothing more than toleration of the presence of terrorist groups within a state. Somewhat more affirmatively, it may take the form of moral or verbal support. Support may include sanctuary following a terrorist act. Toward the right-hand boundary, it may consist of more active *ex ante* assistance such as training, the provision of passports, arms, and intelligence information, logistical assistance and similar forms of support.

At the third level states "sponsor" terrorism: they incite groups or individuals to commit terrorist acts, direct acts of terrorism, recruit terrorists for their own programs and carry out terrorist acts through their own agents.

In the real world it will often be difficult to place a state's activities precisely on this scale because of the difficulty of obtaining adequate, reliable information. This problem is common to many areas of international relations but is particularly acute here because of the secrecy with which states customarily clothe their involvement in terrorism.²⁷ This lack of information forces American officials to speak vaguely of a state's links or connections to terrorism,²⁸ for example, and even to take action without knowing the precise level of state involvement.²⁹ In theory, however, the three levels of state involvement in terrorism call for different kinds of analysis and may also call for different measures, at least in degree.

In all three settings it is individuals who carry out acts of terrorism.

27. See Axelrod & Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, in COOPERATION UNDER ANARCHY 226, 235 (K. Oye, ed. 1986); Bialos & Juster, *supra* note 15, at 840-41; Wilkinson, *State-Sponsored International Terrorism: The Problems of Response*, 40 WORLD TODAY 292, 294 (1984) (states supporting terrorism act clandestinely and deny responsibility); *Terrorism: Oversight Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st and 2nd Sess. 3, 5 (1986) [hereinafter *Terrorism: Oversight Hearings*] (testimony of Wm. Quandt, Brookings Institute) (any state supporting terrorism will try to "cover its tracks").

28. See *Terrorism: Oversight Hearings*, *supra* note 27, at 42, 44 (testimony of Prof. Martha Crenshaw, Wesleyan Univ.); Press Conference of John Whitehead, Deputy Secretary of State, Jan. 27, 1986, *reprinted in* 25 I.L.M. 209, 214-18 (1986).

29. At the time of the Libya embargo, the United States government apparently had only general evidence of Libyan support and sanctuary for the terrorists involved in the Rome and Vienna airport shooting incidents. Later, evidence emerged linking Libya more directly with those incidents. See Bialos & Juster, *supra* note 15, at 807 n.30.

Whatever the level of state involvement, improving the mechanisms for capturing, trying and punishing individual terrorists, largely in the hope of deterring others, is an important strategy. Most of the legal developments in the fight against terrorism—notably the several multilateral antiterrorism conventions, which require signatory states to take custody of persons accused of specified terrorist acts and either extradite them or submit them to the appropriate authorities for prosecution—are part of this strategy.³⁰ When terrorist groups are acting independently of state involvement, it is one of the few strategies available.³¹

30. International Convention Against the Taking of Hostages, arts. 6, 8, G.A. Res. 146, 34 U.N. GAOR Supp. (No. 39), U.N. Doc. A/C.6/34/L.23 (1970), *reprinted in* 18 I.L.M. 1456 (1979); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, G.A. Res. 3166, U.N. GAOR Supp. (No. 30) at 146, U.N. Doc. A/RES/3166 (1974), *reprinted in* 13 I.L.M. 41 (1974), arts. 6-7; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, arts. 6-7, 22 U.S.T. 1641, T.I.A.S. No. 7192, *reprinted in* 10 I.L.M. 133 (1971); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, arts. 6-7, 24 U.S.T. 565, T.I.A.S. No. 7570, *reprinted in* 10 I.L.M. 1151 (1971). *See also* Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1983, art. 16, 20 U.S.T. 2941, T.I.A.S. No. 6768, *reprinted in* 2 I.L.M. 1042 (1963). These conventions also call for cooperation in law enforcement: exchanges of information, coordination of administrative measures and assistance in criminal proceedings. For descriptions of the antiterrorism conventions and other legal developments, see Murphy, *Legal Controls and the Deterrence of Terrorism: Performance and Prospects*, 13 RUTGERS L.J. 465 (1982); Murphy, *Recent International Legal Developments in Controlling Terrorism*, 4 CHINESE Y.B. INT'L L. & AFF. 97 (1984). *See also* General Assembly Resolution on Measures to Prevent International Terrorism, G.A. Res. 61, 40 U.N. GAOR Supp. (No. _____), U.N. Doc. A/RES/40/61 (1986) *reprinted in* 25 I.L.M. 239 (1986); Tokyo Economic Summit Statement on Terrorism, May 5, 1986, *reprinted in* DEP'T ST. BULL. (July 1986), at 5; Venice Economic Summit Statement on Terrorism, N.Y. Times, June 10, 1987, at 6, col. 1.

31. Another strategy is a defensive strategy, based on measures like improving airport security. The multilateral antiterrorism conventions require signatory states to take precautions within their respective territories against the particular forms of terrorism that the conventions address. *See* Murphy, *Recent International Legal Developments in Controlling Terrorism*, *supra* note 30, at 100-01.

The General Assembly Resolution on Measures to Prevent International Terrorism, *see supra* note 30, at paras. 11-13, calls upon states to take measures that the International Civil Aviation Organization [hereinafter ICAO] has recommended and provided for in the conventions to protect civil aviation and other forms of public transport, urges the ICAO to continue its efforts and requests the International Maritime Organization to study the problem of terrorism on ships with a view to recommending protective measures.

The Tokyo Economic Summit statement commits the "Summit Seven" countries to certain defensive measures, including limiting the size of diplomatic and consular mis-

State sponsored terrorism, at the other extreme, is quite a different matter. If Libya orders its agents to bomb American facilities, for example,³² it is acting as the principal in the transaction; the individual terrorists planting explosives at its direction are mere agents. The state is initiating terrorist acts that would not otherwise have taken place. Its orders, along with the practical assistance it provides, are the proximate cause of any damage that results. A state in that position is, in short, the primary wrongdoer. The state has acted, moreover, with specific willful intent. It is clearly appropriate for the international community to hold such a state responsible for its actions and to search for strategies that will punish, deter or otherwise change its behavior.

State support, the range of state involvement between mere toleration and extensive involvement just short of outright sponsorship, presents the most interesting situation. At the upper end of the range the boundary between support and sponsorship is indistinct. According to United States sources, for example, from the mid-1970s through 1983, Syria—one of the “charter members” of the State Department’s terrorism list—managed numerous terrorist acts directly, using its own personnel. This is a clear case of sponsorship.³³ In 1986 the British trial of Nizar Hindawi again exposed direct Syrian sponsorship³⁴ and led to strengthened American sanctions.³⁵ Between those dates, however, Syria turned to a different strategy, one of supporting independent terrorist groups that shared its own aims, like the group led by Abu Nidal, in

sions of terrorist-supporting states, tightening visa requirements for persons travelling from such states and denying entry to persons expelled from another state because of conviction for or suspicion of terrorist offenses. See Tokyo Economic Summit Statement on Terrorism, *supra* note 30.

The Council of Europe called for similar steps in November 1986, with the support of the United States. See DEP’T ST. BULL. 79 (Jan. 1987).

Another possible strategy is to restrict the availability of certain kinds of weapons so that terrorist groups cannot obtain them. The Western nations have cooperated in controlling access to nuclear material pursuant to this strategy. See Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, *reprinted in* 18 I.L.M. 1419, 1422-31 (1979).

32. According to the United States, Libya in 1986 ordered its embassy staffs in several countries to conduct terrorist attacks on American facilities. See Address of Robert Oakley, Acting Ambassador at Large for Counter-Terrorism, to U.S. Conference of Mayors, June 16, 1986, *reprinted in* DEP’T ST. BULL., Aug. 1986, at 1, 2.

33. See *Syrian Support for International Terrorism: 1983-86*, DEP’T ST. BULL., Feb. 1987, at 73.

34. See *id.* at 73-74.

35. See *supra* note 16.

order to make its own participation easier to deny.³⁶ In terms of intent, at least, such support is indistinguishable from outright sponsorship.

In other respects, however, the individual terrorists receiving state support remain the primary wrongdoers, and the involvement of the supporting state is secondary. The supporting state may supply a terrorist group with passports, sanctuary or even arms, but it is not directly involved in the terrorist actions that such a group may perpetrate. In terms of initiative and causation, too, the supporting state may make a lesser contribution than the sponsoring state since the terrorists would be trying to carry out the acts of terrorism even without the supporting state's assistance.

In addition, by contrast to the Syrian example, the supporting state may well have a lesser degree of intent than the sponsoring state. A state may lend its support to a terrorist group out of a desire to gain political favor with other supporting states or out of general sympathy with a cause; it may know the likely consequences of its aid but lack the willful intent of the sponsoring state.³⁷ A state may also lend its support out of fear. At the lower end of the range, a state may even provide sanctuary to terrorist groups out of simple negligence.

Through most of the range, then, one can characterize the terrorist-supporting state, with its secondary involvement, as a "gatekeeper," a party whose cooperation makes wrongdoing by others possible, or at least easier.³⁸ Simple domestic analogues include the bartender who serves liquor to an almost-drunken driver and the accountant who provides a clean report on a fraudulent deal.³⁹ In domestic society we sometimes impose legal restraints and expend scarce enforcement resources on gatekeepers like these as well as on primary wrongdoers. In other situations, however, we disregard the activities of gatekeepers because of the additional costs and practical problems of secondary enforcement or because secondary enforcement seems unlikely to prevent much additional wrongdoing.⁴⁰ The economic theory of gatekeeper liability attempts to explain when secondary enforcement is called for and when it is likely to be successful;⁴¹ one can usefully apply this theory to the treatment of terrorist-supporting states.

36. See *Syrian Support for International Terrorism*, *supra* note 33, at 73.

37. Even Syria, it seems, was not aware of all the actions of the Abu Nidal group. See *Syrian Support for International Terrorism*, *supra* note 33, at 74.

38. See Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. L., ECON. & ORG. 53, 53-54 (1986).

39. See *id.* at 63-65.

40. See *id.* at 54, 66, 87-88, 93.

41. See *id.*

In general, secondary enforcement is necessary only when direct deterrence of primary wrongdoers—the normal method of controlling wrongdoing—is insufficient to reduce wrongdoing to an acceptable level.⁴² Terrorism poses substantial difficulties for primary deterrence. First, because of their tactics, terrorists are often hard to identify and apprehend.⁴³ Second, the penalties terrorists face, discounted by the odds of capture, may not appear severe.⁴⁴ Despite considerable effort, the international community has not yet created an institutional framework—an international criminal court or even a strong network of extradition treaties—guaranteeing that states will prosecute an accused terrorist who they apprehend.⁴⁵ Terrorists can discount the nominal penalties even further. Finally, even if prosecution were certain and the penalty were death, the rational calculation of penalties would not deter some fanatic terrorists, like the *fedayeen*, the self-sacrificers.⁴⁶ If the international

42. See *id.* at 56.

43. See Bremer, *Practical Measures for Dealing with Terrorism*, DEP'T ST. BULL., Mar. 1987, at 1, 1-2; Secretary of State Shultz, *Low-Intensity Warfare: The Challenge of Ambiguity*, U.S. Dep't of State Current Policy No. 783, reprinted in 25 I.L.M. 204, 205 (1986) ("Despite . . . the widespread recognition that their acts are criminal, few terrorists are caught, and fewer still are punished to the full extent they deserve.")

44. Direct deterrence assumes that a wrongdoer acts as if he were calculating the expected net return of wrongdoing, that is, the expected benefit of the wrongdoing to him less the costs of the wrongdoing and any expected penalty. The expected penalty is the punishment the wrongdoer is likely to incur multiplied by the probability that he will be captured, tried, convicted and subjected to punishment. See Kraakman, *supra* note 38, at 56; R. POSNER, *ECONOMIC ANALYSIS OF LAW* 164-65 (2d ed. 1977). The difficulty of detecting wrongdoing and procuring the conviction and punishment of wrongdoers are common problems in efforts to increase expected penalties and thus strengthen deterrence. See Kraakman, *supra* note 38, at 57.

45. Not all states adhere to the multilateral "extradite or submit to prosecution" conventions discussed above, see *supra* note 30, and these conventions cover only certain specific forms of terrorism. For an important regional convention designed to improve the process of extraditing terrorists, see European Convention on the Suppression of Terrorism, T.S. 90, reprinted in 15 I.L.M. 1272 (1976). See also Supplementary Extradition Treaty, U.S.-U.K., Treaty Doc. 99-8, 99th Cong., 1st Sess. 1985, in force 1986. In John Murphy's words, all of the relevant conventions together constitute a "grossly inadequate response to international terrorism." Murphy, *Recent International Legal Developments*, *supra* note 30, at 109. Further, many governments contrive to let accused terrorists go free, with or without trial despite their obligations under the various conventions. See Pierre, *Politics of International Terrorism*, 19 ORBIS 1251, 1264-65 (1976); Liskofsky, *The Abu Daoud Case: Law or Politics*, 7 IS. Y.B. H. RGTS. 66 (1977).

46. See Pierre, *supra* note 45, at 1254. In the normal analysis of deterrence, the equivalent problem involves persons whose judgment is impaired, so that they cannot make a rational calculation of expected net benefit or cost. See Kraakman, *supra* note 38, at 56.

community cannot solve these problems—and they are not easily solved—and if that community still perceives the level of terrorism as unacceptably high,⁴⁷ secondary enforcement may be necessary.

We normally turn to secondary enforcement, however, only when private incentives are insufficient to restrain gatekeepers from helping wrongdoers without the investment of additional social resources.⁴⁸ Many observers believe, for example, that most lawyers and accountants voluntarily guard against participating in fraudulent acts by their clients in order to protect their own valuable reputations.⁴⁹

For most countries, similarly, the desire to avoid a reputation as a supporter of terrorism—a reputation that might harm their chances of entering into desirable relationships—provides a sufficient incentive.⁵⁰ For a few states, however, this incentive is irrelevant, or at least insufficient, and a few states are all it takes to support a significant level of terrorism.

If secondary enforcement were thought desirable, it could, in theory, take the form of positive sanctions such as rewards for withholding support from terrorist groups. It is difficult, however, to determine when a state has in fact withheld its support. It is easier, in spite of the pervasive information problems,⁵¹ to tell when a state has failed to prevent wrongdoing⁵² and to respond accordingly.

Based on considerations like these, the international community has moved to impose a form of secondary liability, at least implicitly to be enforced by negative sanctions, on terrorist-supporting states as well as on terrorist-sponsoring states. It has done so most clearly in the Declara-

47. Most commentators on terrorism support such a perception and call for stronger measures. A few commentators, however, argue that the present level of terrorism is bearable and that additional measures, especially the use of military force, would be an overreaction. See, e.g., *Terrorism, Oversight Hearings*, *supra* note 27, at 49-50 (statement of Prof. Martha Crenshaw); Jenkins, *Statements About Terrorism*, 463 ANNALS 11, 12-16 (1982).

48. See Kraakman, *supra* note 38, at 54, 60-62.

49. See *id.*

50. Many international relations scholars argue that concern for reputation, especially a reputation for adhering to agreements and conforming to community norms, is a major influence on the conduct of states. Even states that would not conform to a norm for ethical reasons may do so for the self-interested reason that other states may be less likely to enter into agreements or other relations with them in the future if they acquire reputations for flouting community norms. For a discussion of the influence of reputation, see R. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 105-06 (1984).

51. See *supra* note 26.

52. See Kraakman, *supra* note 38, at 60.

tion on Friendly Relations,⁵³ adopted by consensus in the United Nations General Assembly in 1970, as an elaboration on the obligation of states to refrain from the use of force against the territorial integrity or political independence of other states or in any other manner inconsistent with the purposes of the United Nations under its Charter.⁵⁴ The Declaration addresses sponsorship by imposing a duty to refrain from organizing, instigating and participating in forceful terrorist acts in another state. It also addresses support by imposing a duty to refrain from assisting such acts. It even reaches to the lower end of the support category by articulating a duty to refrain from acquiescing in the use of a state's territory for organized activities directed toward the commission of terrorist acts abroad.⁵⁵

At least in the case of state support for terrorism, though, these broad duties ignore certain additional questions that the theory of secondary enforcement tells us we should ask. The two most important questions are: (1) to what extent will secondary enforcement be effective in reducing wrongdoing and (2) will any such reduction be worth the additional costs?⁵⁶ With the legal obligations already established, states will or should face these questions when they consider imposing economic sanctions.

III. RATIONALES FOR ECONOMIC SANCTIONS

Figure 2 shows the four most important rationales for the use of economic sanctions arranged from the most broadly coercive—*economic*

53. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1971), reprinted in 9 I.L.M. 1292 (1970) [hereinafter Declaration]. See Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 714-16 (1986). The Tokyo Economic Summit statement reaffirms the condemnation of terrorism in all its forms and those, including governments, who sponsor and support it. Tokyo Economic Summit Statement on Terrorism, *supra* note 30.

54. U.N. CHARTER art. 2, para. 4.

55. The section of the Declaration that elaborates on the principle of nonintervention in matters within the domestic jurisdiction of other states also provides: "no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State . . ." Declaration, *supra* note 53, at 1295. It is unclear whether giving sanctuary to terrorists following completion of a terrorist act abroad would alone constitute a violation of the duties stated in the Declaration. For a discussion of state responsibility for terrorist acts, see Lillich & Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217 (1977).

56. See Kraakman, *supra* note 38, at 61.

warfare and imposing costs—to the most selective and subtle—*denial of means and symbolic communication*.

Economic warfare is normally a supplement to or a substitute for actual combat; the strategy was highly developed during the two World Wars.⁵⁷ This rationale assumes that the “enemy” will need extensive resources for combat, as in a protracted conventional war, and that it will divert any resources that its civilian economy saves by engaging in trade or other international transactions, at least in part, to strengthen its military capacity.⁵⁸ The logic of the theory would support a total embargo, since all economic transactions produce gains from trade. More commonly, however, the theory provides the rationale for controls on transactions particularly important to the enemy’s economy—bottleneck transactions—whether directly related to its military sector or not.⁵⁹

Imposing costs, or the strategy of leverage,⁶⁰ is the most familiar rationale for economic sanctions.⁶¹ Under this theory, the sanctioning state links its trade, foreign assistance, arms sales and other international economic transactions to changes in the target state’s behavior: if the target acts in ways the sanctioning state does not approve of—by supporting terrorist activities, for example—the sanctioning state suspends those transactions, imposing costs on the target’s economy (as well, of course, as on its own); if the target’s behavior improves, the sanctioning state permits such transactions to resume.⁶² The theory assumes that the target state will rationally balance the benefits of its current policies against the discounted costs of subsequent retaliation and conclude that a change in policy is in its own interests.⁶³

This is essentially the same theory of rational deterrence that underlies many sanctions against individual offenders in domestic society.⁶⁴ The aim of imposing costs is not to reduce the target state’s capabilities,

57. See Mastanduno, *Strategies of Economic Containment: U.S. Trade Relations with the Soviet Union*, 37 *WORLD POL.* 503, 506-10 (1985); Gilpin, *Structural Constraints on Economic Leverage: Market-Type Systems*, in *STRATEGIC DIMENSIONS OF ECONOMIC BEHAVIOR* at 105-06 (G. McCormick & R. Bissell eds. 1984).

58. See Mastanduno, *supra* note 57, at 507-08.

59. See *id.* at 509-10.

60. See G. HUFBAUER & J. SCHOTT, *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 2 (1985); Gilpin, *supra* note 57, at 105-06.

61. See Gilpin, *supra* note 57; Abbott, *supra* note 2, at 798-800; G. HUFBAUER & J. SCHOTT, *supra* note 60. For a discussion of the Hufbauer & Schott analysis as an example of the “imposing costs” rationale, see Abbott, *supra* note 19.

62. See Mastanduno, *supra* note 57, at 514-15; Abbott, *supra* note 2, at 799-800 (discussing views of Samuel P. Huntington).

63. See Abbott, *supra* note 2, at 798-99.

64. See *supra* text accompanying note 40.

as in economic warfare, but to affect its intention or will to engage in particular conduct.⁶⁵ If the sanctioning state is unable to force a change in the target state's conduct, it can at least exact a price for defying its demands.⁶⁶ The strategy is closely related to the doctrine of countermeasures—retorsion and reprisal—in international law, one of the important ways in which states enforce legal obligations in the decentralized international system.⁶⁷

Denial of means, like economic warfare, is designed to reduce a target state's capabilities, but in a much more limited and selective way. The denial of means rationale typically leads to restrictions on exports or other transactions that directly contribute to a particular disfavored activity.⁶⁸ The best example of this technique is the strategic embargo that the United States and other Western nations maintain against the Soviet Union.⁶⁹ The embargo is designed to prevent the Soviets from obtaining selected items that would contribute directly and substantially to their military capabilities: arms and a variety of other high technology civilian items with military applications, so-called dual use items.⁷⁰ On the same rationale, the United States restricts the export of crime control equipment—which some commentators refer to as “citizen control equipment”⁷¹—to nations that violate human rights⁷² and the export of certain

65. See Mastanduno, *supra* note 57, at 514-15; Gilpin, *supra* note 57, at 105-06.

66. See Knorr, *Economic Relations as an Instrument of National Power*, in STRATEGIC DIMENSIONS OF ECONOMIC BEHAVIOR, *supra* note 57, at 183, 200 (imposing costs may make target state more likely to comply with future demands); D. BALDWIN, ECONOMIC STATECRAFT 132-33 (1985) (imposing costs on target state is form of influence, even if target does not change policy).

67. See *infra* note 103. States employ coercive economic measures in all sorts of interstate relations, not only in response to violations of international norms. Despite efforts to declare such measures unlawful aggression or use of force, the international community appears prepared to accept a considerable amount of economic coercion as inevitable. See generally Editorial Comment, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405 (1985).

68. See Knorr, *supra* note 66, at 190-94; Mastanduno, *supra* note 57, at 510. Kraakman describes this strategy in general terms as involving “efforts to regulate activities or inputs that are precursors to misconduct.” Kraakman, *supra* note 38, at 57.

69. See Mastanduno, *supra* note 57, at 524-29; D. BALDWIN, *supra* note 66, at 235-50.

70. Although it may have retarded Soviet military capacity less than a well-designed economic warfare strategy—focusing on bottleneck items in the Soviet economy rather than on items with direct military applications—the selective embargo technique has been the basis on which the United States—which prefers broader controls—and Europe—which prefers less extensive controls—have been able to cooperate in strategic trade controls. See D. BALDWIN, *supra* note 66, at 245-46.

71. See *U.S. Export Control Policy and Extension of the Export Administration Act*:

vehicles and machinery for producing military equipment to nations engaged in regional conflicts.⁷³

Symbolic communication is a much misunderstood function of economic sanctions. Commentators often suggest that symbolic controls have no instrumental function, that they are simply a way of letting off steam or playing to a domestic political audience.⁷⁴ In fact, however, sanctions can perform important functions even when they cannot reduce the target state's capabilities or force it to change its policies.⁷⁵

Sanctions can communicate, more credibly than mere words, the sanctioning state's commitment to a particular position, the seriousness with which it views foreign conduct, its intention to act and its willingness to bear costs. Sanctions can also communicate the threat of harsher action to follow in the future. Messages like these can be important instruments of deterrence.⁷⁶ Sanctions can also communicate moderation and restraint, perhaps avoiding unnecessary conflict.⁷⁷ They can create a psychological sense of isolation or shame or spur reconsideration of target state policies even if they impose no substantial costs on the target.⁷⁸ Sanctions can communicate diverse messages like these to states, groups and individuals other than the immediate target state.⁷⁹

Of the four rationales discussed here, then, two—the first and third—are concerned with affecting capabilities, and two—the second and fourth—with affecting intentions and will. Any given sanction, however, may reflect two or more rationales at the same time. Indeed, almost all sanctions communicate some message regardless of their other effects.

Hearings on S. 737 and S. 999 Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs - Part II, 96th Cong., 1st Sess. 145, 157-58 (1979) (statement of Jerry Goodman) (crime control equipment can be used to monitor and repress dissidents and minorities).

72. See 50 U.S.C. app. § 2405(j); 15 C.F.R. § 376.14, 385.4(d)(1)(a). For a discussion of the origin of these controls, see Abbott, *supra* note 2, at 787-90.

73. See 15 C.F.R. § 376.16, 385.4(d)(1). For a discussion of the regional stability policy, see Abbott, *supra* note 2, at 761-62.

74. See D. BALDWIN, *supra* note 66, at 96-97; Abbott, *supra* note 2, at 822-24.

75. See D. BALDWIN, *supra* note 66, at 97-101.

76. See *id.* at 102-14.

77. See *id.* at 104, 185 (United States embargo of Cuba demonstrated restraint when compared with the history of military intervention in Latin America).

78. See *id.* at 61-65.

79. See *id.* at 17-18.

IV. THE RATIONALES FOR SANCTIONS APPLIED

We are now ready to consider how the major rationales for economic sanctions apply—in principle and in the practice of the United States—to the different levels of state involvement in terrorism, by examining the matrix in Figure 3.

On most rows of the matrix, the same entries apply to both state supported and state sponsored terrorism, the last two columns. Once the international community has decided on secondary liability for the support of terrorism, in other words,⁸⁰ most sanctions strategies are both appropriate and used in practice, subject to considerations of cost and effectiveness, for dealing with both forms of state involvement. The distinctions between sponsorship and support and among degrees of support are reflected primarily in the strength of the sanctions applied.⁸¹ Economic warfare is an exception, however. This rationale seems appropriate, if at all, only for dealing with states that sponsor terrorism or that willfully provide extensive support as a substitute for sponsorship, as a form of hostilities.⁸²

Only the denial of means and symbolic communication rationales are relevant to all three columns of the matrix, including the first column, which represents the absence of state involvement. Restrictions on munitions exports, for example, can limit the ability of terrorist groups to obtain sophisticated arms; many kinds of sanctions can convey messages of commitment directly to such groups, although this is rarely their primary purpose. The economic warfare and imposing costs rationales, in contrast, focus exclusively on supporting or sponsoring states.

The remainder of this section will consider individually the four rows of the matrix, each corresponding to one of the rationales for economic sanctions.

A. *Economic Warfare*

Many commentators and policy makers have come to see state sponsorship of terrorism as a form of low intensity warfare against the West.⁸³ President Reagan has extended this perspective to repeated state

80. See *supra* notes 53-55 and accompanying text.

81. See *infra* notes 110-115 and accompanying text.

82. See *infra* note 84 and accompanying text.

83. See Jenkins, *New Modes of Conflict*, 28 *ORBIS* 5, 12 (1976) (some governments see terrorism as a "weapons system," an inexpensive way of waging war); Pierre, *supra* note 45, at 1268-69 (states may see terrorism as "continuation of warfare by other means," inexpensive, covert, and efficient); Kupperman, *supra* note 26, at 25, 32 (support of terrorism is low-cost, low-risk strategy for states); Wilkinson, *Terrorism: The*

support of terrorism. In ordering the embargo of Libya in January 1986, the President said, "By providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression . . . just as if [it] had used its own armed forces."⁸⁴

Against this background the economic warfare rationale might appear to support sanctions against states that sponsor or provide extensive support for terrorism. The theory would be that sanctions could reduce the capacity of such states to engage in this form of combat by denying them economic gains from trade that they could use to support terrorism. One could view the United States embargo of Libya⁸⁵ as a current application of this rationale.

One must question, however, whether the rationale is appropriate, even for terrorist-sponsoring states. Economic warfare assumes that the enemy needs extensive economic resources for its military sector; its model is a full-scale conventional war.⁸⁶ Terrorism, however, requires a much smaller commitment of resources than even a limited war; this is a large part of its appeal.⁸⁷ While the authoritarian states that sponsor terrorism could probably divert all the gains from trade realized by their civilian economies to the support of terrorism, they will rarely need to do so.

In terms of the economic warfare rationale alone, then, embargoes of terrorist-supporting states, and even extensive bottleneck controls on transactions of strategic importance to their civilian economies, are probably ill-advised. Such sanctions are unlikely to reduce the economic capacity of the target states sufficiently to limit their sponsorship of terrorism, and the costs incurred by the sanctioning states⁸⁸ are accordingly likely to be out of proportion to the benefits.⁸⁹

International Response, 34 *WORLD TODAY* 5, 6 (1978) (states developing "proxy" terrorists as weapon of coercive diplomacy); Shultz, *supra* note 43, at 205; Tokyo Economic Summit Statement on Terrorism, *supra* note 30 (summit states abhor use of terrorism as blatant instrument of government policy).

84. Economic Sanctions Against Libya, Statement by President Reagan, President's News Conference of Jan. 7, 1986, *reprinted in* 25 *I.L.M.* 175 (1986).

85. *See supra* notes 14-15, 84 and accompanying text.

86. *See supra* note 85 and accompanying text.

87. Most commentators observe that certain states have turned to the support of terrorism precisely because it is a low-cost strategy, especially when one compares it with more conventional military action. *See supra* note 83.

88. For a discussion of these costs, in the context of the imposing costs rationale, see *infra* notes 138-48 and accompanying text.

89. David Baldwin stresses the need to compare the use of economic sanctions with other courses of action available to governments, including doing nothing, when evaluating the effectiveness of sanctions; he properly points out that most analyses of sanctions

Judging from the statements of American officials, at least, the United States did not intend its embargo of Libya to be an exercise in economic warfare. It based the embargo primarily on two other sanctions rationales: imposing costs⁹⁰ and symbolic communication,⁹¹ both of which I will discuss below. In practice, of course, sanctions implementing these two rationales can be all but indistinguishable from economic warfare.

B. *Imposing Costs*

Sanctions designed to impose economic costs are largely irrelevant to terrorism carried on without state support; they are too blunt an instrument to be used in pressuring small groups of terrorists. Sanctions based on this rationale have become one of the major enforcement strategies for dealing with terrorist-supporting and sponsoring states, however, and as such one must consider them at some length.

The United States has expressly based many of its antiterrorism sanctions, at least in part, on the rationale of imposing costs. A 1986 State Department report entitled *Economic Sanctions to Combat International Terrorism* states that "economic sanctions are an integral part of [the] peaceful measures that we can take to deter states from supporting terrorism," and that sanctions "may be used to pressure targeted states to change their policies."⁹² Numerous statements by the President and the Department of State demonstrate that imposing costs on Libya in order to deter future support for terrorists or simply to exact a price for non-

proceed in a vacuum. See D. BALDWIN, *supra* note 66, at 15, 123-28. In the present context, the point is that sanctions based on the economic warfare rationale, are unlikely to reduce significantly the economic capacity of the target state to sponsor terrorism, but will require the sanctioning state to incur economic and other costs. Thus, while some alternatives may be more effective, net of costs, and others less effective, economic warfare will typically be less effective than doing nothing. If one also considers other rationales for economic sanctions, however, the calculus may well change.

90. See *infra* notes 91-148 and accompanying text.

91. A principal goal of the embargo appears to have been to help isolate the government of Colonel Qadhafi from the "civilized world." See National Emergency with Respect to Libya, President Reagan's Letter to the Speaker of the House and the President of the Senate, Jan. 7, 1986, *reprinted in* 25 I.L.M. 174, 175 (1986) ("We must demonstrate by firm political and economic sanctions that . . . states that engage in [the support of terrorism] cannot expect to be accepted members of the international community."); Economic Sanctions Against Libya, President Reagan's Statement at News Conference of Jan. 7, 1986, *reprinted in* 25 I.L.M. 175, 176 (1986) ("Qadhafi deserves to be treated as a pariah in the world community. We call on our friends . . . to join with us in isolating him."). For a discussion of a similar rationale in the case of the Syria sanctions, see *infra* note 193 and accompanying text.

92. See State Department Report, *supra* note 1, at 1.

compliance with international norms and American demands was a major motivation for the 1986 embargo.⁹³ Secretary of State Shultz applied the same rationale to the subsequent bombing of Libya: "If you raise the cost, you do something that should eventually act as a deterrent. That is the primary objective. . . ."⁹⁴

The leverage rationale is also apparent in the coverage of more modest antiterrorism sanctions. United States export controls, for example, have focused on commercial aircraft,⁹⁵ high technology products,⁹⁶ sophisticated oil field equipment,⁹⁷ and other items that play important roles in the economies of the target states, but which those states cannot easily produce themselves or obtain from other sources. In 1982 the United States prohibited oil imports from Libya, restricting an important source of foreign exchange.⁹⁸ The Bonn Declaration⁹⁹—one of the few multilateral steps toward sanctioning supporters of terrorism, under which the Summit Seven states agreed to halt bilateral air traffic service to countries that refuse to extradite or prosecute airplane hijackers¹⁰⁰—similarly reflects the imposing costs rationale.¹⁰¹

93. See National Emergency with Respect to Libya, *supra* note 91, at 174 (prior sanctions have not deterred Libya from use of terrorism); Economic Sanctions Against Libya, *supra* note 91, at 175 (sanctions necessary to exact a "high price" from Qadhafi for support of terrorism); Sanctions Against Libya, Statement by Principal Deputy Press Secretary to the President, Jan. 8, 1986, *reprinted in* 25 I.L.M. at 179 (1986) (sanctions necessary to exact "high cost" and "premium," to convince Qadhafi that "terrorism will not be cost-free").

94. See Statement of Secretary of State Shultz, DEP'T ST. BULL., June 1986, at 3, 4.

95. For years those concerned with the design of economic sanctions have seen commercial aircraft, which have until recently been produced primarily in the United States, as one of the greatest potential sources of leverage over terrorist-supporting states. See Abbott, *supra* note 2, at 769-70.

96. The United States has for several years restricted exports to terrorist-supporting states of all high-technology products and technical data controlled for national security purposes. See *id.* at 770-71; 15 C.F.R. § 385.4(d) (1987).

97. In restricting exports to Libya in 1982, the Department of Commerce announced that it would deny export licenses for oil and gas equipment and related technical data. Expansion of Foreign Policy Export Controls Affecting Libya, 47 Fed. Reg. 11,247 (1982); 15 C.F.R. § 385.7(a) (1987).

98. Proclamation No. 4907, 47 Fed. Reg. 10,507 (1982), continued by Proclamation No. 5141, 48 Fed. Reg. 56,929 (1983).

99. *Reprinted in* 17 I.L.M. 1285 (1978).

100. In a statement on terrorism at the 1987 Venice Economic Summit, the Summit Seven states agreed on measures to extend and strengthen the sanctions they would impose under the Declaration. See Venice Statement on Terrorism and Annex thereto, *reprinted in* N.Y. Times, June 10, 1987, at 10, col. 3.

101. See Bienen & Gilpin, *Economic Sanctions as a Response to Terrorism*, 3 J. STRATEGIC STUDIES 89, 95 (1980).

In the decentralized international system, economic sanctions like these have a special place, for they are one of the few ways in which states can implement the theory of rational deterrence in support of international norms.¹⁰² Under international law, a state injured by another state's violation of a legal obligation is entitled to respond with countermeasures, or measures of self-help, even if those measures might otherwise be unlawful.¹⁰³ International law theory often justifies such countermeasures as restoring symmetry or equality between the states involved.¹⁰⁴ According to the *Revised Restatement of Foreign Relations Law*, international law permits countermeasures only to induce the violating state to terminate or remedy its violation or to prevent further violation.¹⁰⁵ Because countermeasures impose costs on a violating state, however, the threat of their use clearly functions as a deterrent.¹⁰⁶ Since states supporting or sponsoring terrorism violate a legal obligation,¹⁰⁷ antiterrorism sanctions imposed by injured states¹⁰⁸ would normally constitute valid countermea-

102. See *supra* notes 56-67 and accompanying text. For a discussion of the problems of decentralized retaliation in maintaining international cooperation, see Axelrod & Keohane, *Achieving Cooperation Under Anarchy*, *supra* note 27, at 232-47.

103. See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 905 (Tent. Draft No. 6, 1987); Case Concerning Air Services Agreement Between France and the United States, Arbitral Award of Dec. 9, 1978, 18 U.N.R.I.A.A. 417 ¶ 81. The injured state is also entitled to take measures of "retorsion," traditionally those countermeasures a state is legally free to take whether or not another state has breached an international legal obligation. "Reprisal," in contrast, is the usual term for counter-measures that would be unlawful were it not for a prior violation of international law. See L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 541-42 (2d ed. 1987) [hereinafter L. HENKIN]. Traditionally reprisals were punitive measures, often involving the use of force. See RESTATEMENT, *supra*, at § 905, comment f.

104. See Case Concerning Air Services Agreement, *supra* note 103, at ¶ 90.

105. RESTATEMENT, *supra* note 103, at § 905(1)(a), comment f.

106. An official comment to the *Revised Restatement* states that the principle of "necessity" would ordinarily preclude countermeasures designed only as retribution for a violation, not as an incentive to terminate the violation or remedy it. *Id.* Section 905 itself, however, provides that a state may use countermeasures to prevent further violation, that is, to deter. *Id.* at § 905(1)(a), and another comment states that the principle of necessity would be satisfied if the violating state refused to negotiate, pay compensation or submit to third-party dispute resolution. See *id.* at § 905(1)(a), comment e.

107. See *supra* notes 53-55 and accompanying text.

108. States not directly injured by a violation of a legal obligation—including obligations relating to the support of terrorism—have sometimes joined in economic sanctions on the theory that the violation affected a community interest. See L. HENKIN, *supra* note 103, at 550-51. Action under the Bonn Declaration, see *supra* text accompanying note 99, would appear to fall within this category.

asures under international law.¹⁰⁹

The principal restriction on the use of countermeasures is that the measures taken must be proportionate or equivalent to the original offense.¹¹⁰ This principle is in all circumstances difficult to apply,¹¹¹ but most of the antiterrorism sanctions the United States has imposed appear to have been roughly proportional.

The United States has generally imposed and strengthened sanctions in response to such factors as the duration and extent of the target state's support for terrorist groups, the target state's sponsorship of or direct participation in terrorist acts, as opposed to more passive support, and the heinousness of the terrorist acts to which the target state's involvement contributed. In imposing the Libya embargo, for example, President Reagan stressed Libya's longstanding "pattern of aggression,"¹¹² Colonel Qadhafi's use of terrorism as "one of the primary instruments of his foreign policy"¹¹³ and Libya's role in the Rome and Vienna airport killings carried out by the Abu Nidal terrorist group.¹¹⁴ Similarly, in strengthening sanctions against Syria in 1986, the United States stressed Syria's long pattern of support for terrorism, both as sponsor and supporter, and the evidence of its direct participation, through military and diplomatic personnel, in the attempted bombing of an *El Al* passenger plane by a terrorist recruited for the purpose.¹¹⁵

109. In the absence of relevant treaty commitments, in fact, the international community would consider most economic sanctions to be retorsions, which states may validly take to respond to violations of international law or unfriendly acts. See L. HENKIN, *supra* note 103, at 548-49.

110. See RESTATEMENT, *supra* note 103, at § 905(1)(b); Case Concerning Air Services Agreement, *supra* note 103, at ¶ 83. The requirement may also apply to acts of retorsion. See L. HENKIN, *supra* note 103, at 550; RESTATEMENT, *supra* note 103, at § 905, comment a (diplomatic relations, communication, and trade are "fundamentals of interstate intercourse and in practice are governed by the conditions of necessity and proportionally and are not seriously disrupted for any but the grossest violation.") It would be difficult to apply the test of "equivalence," see Case Concerning Air Services Agreement, *supra* note 103, at ¶ 83, in the case of countermeasures to the support or sponsorship of international terrorism, because "equivalent" measures might be unlawful, and would, in any case, be repugnant to most nations. L. HENKIN, *supra* note 103, at 547.

111. See Case Concerning Air Services Agreement, *supra* note 103, at ¶ 83.

112. See U.S. Department of State, *Libya Under Qadhafi: Pattern of Aggression*, reprinted in 25 I.L.M. 182 (1986).

113. See *id.*

114. See Economic Sanctions Against Libya, *supra* note 84, at 175 ("the latest in a series of atrocities which have shocked the conscience of the world.")

115. See White House Statement, *supra* note 16; *Syrian Support for International Terrorism: 1983-86*, DEP'T ST. BULL., Feb. 1987, at 73.

In spite of their seeming appropriateness, however, one must consider whether sanctions designed to impose costs on target states are likely to be effective in reducing undesirable conduct.¹¹⁶ Unfortunately, most commentators, whether analyzing sanctions in the abstract or looking at past experience, have concluded that sanctions are unlikely to succeed except in unusual circumstances.¹¹⁷ Well-respected analysts have reached this conclusion explicitly with regard to sanctions aimed at the support of terrorism.¹¹⁸ Without reviewing the large literature on this point, consider some of the basic problems.

First, successful deterrence may require better knowledge of target state activities than is often available.¹¹⁹ Failing to respond to state involvement in terrorism because of a lack of information will obviously do nothing to deter such involvement. Responding with economic sanctions when states have *not* been involved in terrorism, or have been involved at a lower level than is believed, will not only entail unnecessary costs for the sanctioning state,¹²⁰ but may "spread and [deepen] the conflict without punishing the terrorist groups themselves."¹²¹

Second, it will often be difficult to implement economic sanctions that impose significant costs on the target states. Most basically, a state can only utilize negative economic sanctions if there are economic links to sever.¹²² The United States has few economic links with most of the

116. See Kraakman, *supra* note 38, at 61; *supra* notes 86-87 and accompanying text.

117. For a number of years, a "striking consensus" on the inefficiency of economic sanctions viewed as instruments of leverage has prevailed among commentators. Abbott, *supra* note 2, at 821. Daoudi and Dajani have compiled pages of quotations demonstrating the overwhelming consensus. M. DAUDI & M. DAJANI, *ECONOMIC SANCTIONS: IDEALS AND EXPERIENCE* 43-48, 178-88 (1983). For a recent example, in 1984, the political scientist Klaus Knorr opined that one could best explain most recent uses of economic sanctions, at least those arising during "crises of high diplomacy," as "inept statecraft," or as "degradations of rationality." Knorr, *supra* note 66, at 203. Even Hufbauer and Schott, whose work in some ways rehabilitates the use of economic leverage, see G. HUFBAUER & J. SCHOTT, *supra* note 60, at 42 (in "modest policy change cases," states using economic sanctions have often "made some progress in achieving [their] goals"), find success to have been limited and to have come primarily in special circumstances. See *id.* at 42-47, 79-81.

118. See Bienen & Gilpin, *supra* note 101, at 89.

119. See *supra* note 27.

120. See *infra* note 138.

121. Axelrod & Keohane, *supra* note 27, at 235.

122. See G. HUFBAUER & J. SCHOTT, *supra* note 60, at 84-85. The authors observe that economic sanctions have typically been more effective when directed against friends and trading partners than when aimed at adversaries and states with few economic links. The conclusion to which this observation leads them—"attack your allies, not your adversaries"—is unfortunate, however. See Abbott, *supra* note 19.

states involved in terrorism:¹²³ for example, for some time it has had minimal trade and air traffic with Syria and has given it no foreign aid. In addition, economic sanctions will have little bite if alternate suppliers and markets are readily available.¹²⁴ In the modern economy this is usually the case.¹²⁵ The fact that other Western states, including many whose economic links to the terrorist-supporting states are more significant than those of the United States, are unwilling to impose strong anti-terrorism sanctions, exacerbates the problem¹²⁶ and leads to a charge of free-riding on American measures.¹²⁷ In terms of rational deterrence theory, a single state will often find it difficult to set a penalty high enough to deter terrorism effectively.¹²⁸

Third, even if a state can impose significant economic sanctions, its actions will only serve to reduce terrorism if the target states respond to the use or threat of sanctions by reducing their support or sponsorship. Some terrorist-supporting states—a radical Islamic state like Iran immediately comes to mind—may weigh the incentives presented by sanctions very differently from the rational state that the theory of deterrence assumes.¹²⁹ Against such a state, sanctions may be ineffective or even counterproductive. A similar problem with the deterrence of individual fanatic terrorists, one should note, was one of the principal reasons for considering secondary enforcement against supporting states in the first place.¹³⁰

Finally, secondary liability will only be effective if the gatekeepers can actually prevent the undesirable activities of the primary wrongdoers.¹³¹ Here the distinction between sponsorship and support becomes important. A state that sponsors terrorism and is the primary wrongdoer will presumably be able to call off the terrorists under its command, cease its own participation in terrorist acts and terminate recruitment, incitement

123. See Bialos & Juster, *supra* note 15, at 842-43, n.141.

124. See State Department Report, *supra* note 1, at 1; Abbott, *supra* note 2, at 800-10; Knorr, *supra* note 66, at 191-93.

125. See State Department Report, *supra* note 1, at 1; G. HUFBAUER & J. SCHOTT, *supra* note 2, at 80-81.

126. See *supra* note 50.

127. See Abbott, *Collective Goods, Mobile Resources, and Extraterritorial Trade Controls*, LAW & CONTEMP. PROB. (forthcoming).

128. See R. POSNER, *supra* note 44, at 170-71. It is probably true, however, that economic sanctions often work slowly and cumulatively, so that their effects are difficult to discern. See D. BALDWIN, *supra* note 66, at 133-34.

129. See *supra* note 88 and accompanying text.

130. See *supra* note 46 and accompanying text.

131. See Kraakman, *supra* note 38, at 61, 63, 66-74.

and similar activities. A terrorist-supporting state, however, may be unable to control the independent terrorist groups it has been assisting even if it withdraws its support.¹³²

Once a state terminates its support of terrorism, terrorists can follow several strategies available to any primary wrongdoer. First, they can shop for other states that are still willing to support them, or that are at least unable to evict them.¹³³ Members of the Abu Nidal group, for example, have moved their operations from Iraq to Syrian-controlled areas of Lebanon, have begun to take sanctuary in Eastern Europe and have begun to receive support from Libya as well as from earlier patrons.¹³⁴ Terrorists can turn to illicit markets—operated clandestinely by states or private interests—for arms, passports and other supplies.¹³⁵ They can disguise their activities so as to continue using the target state's territory as a base of operations and sanctuary. They can operate with reduced levels of assistance. Terrorist groups can also, of course, attempt to corrupt the original supporting state into continuing some facets of its support surreptitiously,¹³⁶ a strategy that exploits the difficulty of obtaining reliable information about state activities.¹³⁷

Along with these weaknesses in the effectiveness of economic sanctions as instruments of influence, one must also consider the costs of employing them.¹³⁸ Kraakman suggests three categories of costs associated with secondary enforcement.¹³⁹ The first, and most familiar, is administrative cost, the cost of monitoring and penalizing gatekeepers who violate established norms. Domestically, these costs are likely to be relatively minor, although highly visible, because they are marginal costs to a functioning enforcement system that will already be dealing with the primary wrongdoers.¹⁴⁰ Private costs are the costs of compliance that secondary enforcement imposes on gatekeepers, including the costs of the routines

132. See *Terrorism: Oversight Hearings*, *supra* note 27, at 45 (testimony of Prof. Martha Crenshaw).

133. See Kraakman, *supra* note 38, at 63, 66-67, 72-74.

134. See *Syrian Support for International Terrorism*, *supra* note 115, at 73.

135. See *infra* note 81 and accompanying text. Cf. Kraakman, *supra* note 38, at 66-69.

136. See Kraakman, *supra* note 38, at 63, 69-72.

137. See *supra* note 27 and accompanying text.

138. Effectiveness and cost are the two principal criteria for evaluating the performance of any strategy of enforcement. See Kraakman, *supra* note 44, at 61, 74-75. Together, effectiveness and cost determine the utility of a strategy, see D. BALDWIN, *supra* note 66, at 119, which one must then compare with the utility of other possible approaches. See *id.* at 120-28.

139. See Kraakman, *supra* note 38, at 75.

140. See *id.* at 75 n.61.

necessary to avoid liability and any residual risk of liability. Tertiary costs are those that fall on other parties, such as the innocent customers of gatekeepers who may be caught in the gatekeepers' enforcement routines. Although less visible than administrative costs, these two categories are also important social costs.

In sanctioning states involved in terrorism, the administrative costs will almost certainly be more significant than in domestic law enforcement, for they will not be marginal costs added to an ongoing enforcement system but an entirely different and additional set of costs.¹⁴¹ Administrative costs in this context will include, among others, the costs of monitoring targets and potential target states¹⁴² and of negotiating with those states¹⁴³ and with allies.

The greatest administrative costs, however, will be those resulting from the economic sanctions themselves. These costs include lost gains from trade, indirect economic costs arising out of a reputation for interrupting commercial transactions, additional indirect costs resulting from efforts to minimize the potential impact of extraterritorial application, political costs resulting from friction with targets, potential targets and their allies as well as with the sanctioning state's own allies, and disruption of the open trading system. Although these costs are very difficult to measure¹⁴⁴ or even to estimate,¹⁴⁵ their general nature is fairly well understood,¹⁴⁶ and I will not discuss them in greater detail here.

The private costs incurred by target or potential target states seeking

141. Under some circumstances, the costs incurred in imposing sanctions will constitute an advantage. See *infra* text accompanying note 187.

142. This will involve primarily the gathering of intelligence.

143. Section 3(8) of the Export Administration Act, 50 U.S.C. app. § 2402(8) (1982), requires the President to make reasonable efforts to secure the termination of state assistance to terrorists through "international cooperation and agreement" before using export controls for that purpose.

144. See D. BALDWIN, *supra* note 66, at 128-30; G. HUFBAUER & J. SCHOTT, *supra* note 60, at 65.

145. See, e.g., G. HUFBAUER & J. SCHOTT, *supra* note 60, at 64-65. The authors note, for example, that cutting foreign assistance as a sanction may actually help the sanctioning state financially, but that the lost contacts may translate into offsetting export losses. One might add to this observation that, if the sanctioning state used the money saved to increase aid to other countries, exports to and investment in those countries might correspondingly increase, although the same firms or industries would probably not be affected.

146. See, e.g., Abbott, *supra* note 2, at 826-57; State Department Report, *supra* note 1, at 2; Moyer & Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues and Policy Lessons of Three Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1, 149-56 (1983); G. HUFBAUER & J. SCHOTT, *supra* note 60, at 64-66.

to avoid sanctions would not seem severe, at least as compared with the problems arising in domestic economic settings.¹⁴⁷ It should not be difficult for such states to terminate activities directly supportive of terrorism, and doing so might actually bring economic benefits. Exercising due diligence to ensure that terrorist groups are not using state territory might be costly, though, and there might be some risk of residual liability.

Tertiary costs also seem likely to be less troublesome than in domestic law enforcement because there are relatively few transactions between potential target states and innocent persons that the threat of economic sanctions might distort. It is possible, however, that the members of a high-risk group—Palestinians, for example—could become victims of discrimination by a potential target state seeking to avoid all possible risk of sanctions.¹⁴⁸

Neither private nor tertiary costs, one should note, will be social costs of the sanctioning state, as they are in domestic contexts. In practical terms, then, these costs will not weigh heavily in decisions on the use of economic sanctions.

C. *Denial of Means*

The denial of means strategy calls for restricting sales of selected items that would contribute to a target state's capability to support or engage in a particular form of wrongdoing.¹⁴⁹ In the present context, for example, one might attempt to limit a target state's access to items needed to train, supply, equip and otherwise assist terrorist groups. If effective, this strategy would be a valuable complement to the strategy of leverage since it could help limit the capabilities of terrorist sponsoring and supporting states even when they ignored efforts to deter them. Because of the selective nature of the controls required, moreover, it would be less costly to the sanctioning state than the strategies previously considered.

Restrictions on the sale of arms to states involved in terrorism exemplify the denial of means rationale.¹⁵⁰ In the United States, under the Arms Export Control Act,¹⁵¹ the President may refuse to make military sales to foreign countries¹⁵² and may prohibit private arms sales¹⁵³ for

147. See Kraakman, *supra* note 38, at 75-77.

148. A domestic analogy is employer discrimination against Hispanics in order to avoid gatekeeper liability under a legal regime aimed at illegal aliens. See *id.* at 77.

149. See *supra* notes 68-73 and accompanying text.

150. These restrictions presumably implement the imposing costs and symbolic communications rationales as well.

151. 22 U.S.C. §§ 2751-2796c (1982 & Supp. I 1983).

152. *Id.* at § 2752(b).

foreign policy reasons. Under this authority, the government prohibits exports of items on the Munitions List to states that the Secretary of State has determined to be supporters of terrorism.¹⁵⁴ In addition, the Act requires the President to terminate arms sales to any country that grants sanctuary to an individual or group that has committed a terrorist act.¹⁵⁵ The Western allies have generally cooperated in the restriction of arms sales,¹⁵⁶ presumably reflecting the widespread concern about the consequences that might ensue if terrorists gained access to sophisticated weapons.¹⁵⁷ These restrictions, by reducing to some extent the availability of weapons on international markets, especially in volatile regions, may have served to hamper even independent terrorist groups.

Under the Export Administration Act (EAA), the United States has explicitly adopted the denial of means rationale for its antiterrorism export controls on goods other than munitions. First, according to the State Department, the licensing requirements in force under the EAA for antiterrorism purposes are "aimed at restricting the export of goods or technology that would contribute significantly to the military potential or enhance the terrorist-support capabilities of [target] countries."¹⁵⁸ In addition, the EAA requires the executive branch to determine whether any proposed export valued at more than \$1 million and destined for a terrorist-supporting state would make a significant contribution to the military potential of that state or would "enhance the ability of [that] country to support acts of international terrorism."¹⁵⁹ If so, the Executive

153. *Id.* at § 2778.

154. See State Department Report, *supra* note 1, at 4.

155. 22 U.S.C. § 2753(f) (1982). An exception exists, however, for situations where the President finds that the national security requires a continuation of sales.

156. See State Department Report, *supra* note 1, at 3; Tokyo Economic Summit Statement on Terrorism, *supra* note 30 (Summit Seven countries agree, "within the framework of international law and in our own jurisdictions," to deny arms exports to states clearly involved in the support of terrorism, in order to "deny to international terrorists the . . . means to carry out their aims."); Robert B. Oakley, Acting Ambassador at Large for Counter-Terrorism, statement before Subcomm. on Security and Terrorism of Sen. Judiciary Comm., *reprinted in* DEP'T OF STATE BULL., Aug. 1986, at 5, 7 (describing decision of European Community foreign ministers not to export arms to terrorist-supporting states).

157. See, e.g., Kupperman, *supra* note 38, at 28-29; Jenkins, *supra* note 83, at 11; Pierre, *supra* note 45, at 1256.

158. See State Department Report, *supra* note 1, at 4. See also White House Statement, *supra* note 16.

159. See Export Administration Act, § 6(j), 50 U.S.C. app. § 2405(j) (1982). The threshold value was \$7 million for several years; Congress reduced it to \$1 million in 1986. Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399 (amending Export Administration Act, § 6(j)(1)).

branch must notify the designated Congressional committees before licensing the export,¹⁶⁰ a provision clearly designed to discourage the approval of such exports.¹⁶¹

The implementation of this policy, however, has been quite unsatisfying. Consider the products that were restricted for export to Syria under the antiterrorism policy of the EAA as of the end of 1986.

First, aircraft and helicopters valued at \$3 million or more.¹⁶² These could, however, be sold to scheduled Syrian airlines if assurances against military use were received.¹⁶³

Second, goods and technology subject to national security controls—high technology items with military applications—but only if sold to Syrian military organizations or for Syrian military uses, and only if valued at \$7 million or more.¹⁶⁴ Most of these items required a license for export to Syria under the EAA's national security provisions¹⁶⁵—because of the possibility of diversion to the Soviet Union—long before the United States imposed antiterrorism sanctions.¹⁶⁶

Third, certain military vehicles and machinery designed to produce military equipment.¹⁶⁷ These items were already controlled for export to many destinations, including Syria, under the “regional stability” policy,¹⁶⁸ a denial of means strategy aimed at limiting military conflicts in

The Act also states that it is the policy of the United States to use export controls to “encourage other countries” to cease rendering assistance to terrorists, *id.* § 2402(8), and authorizes the President to restrict exports of goods and technology in order to carry out that policy, *id.* § 2405(a)(1). These provisions appear to be motivated by the leverage and symbolic communication rationales.

160. *Id.* at § 6(j), 50 U.S.C. § 2405(i).

161. See Note, *Export Controls and the U.S. Effort to Combat International Terrorism*, 13 LAW & POL'Y INT'L BUS. 521 (1981).

162. 15 C.F.R. § 385.4(d)(2) (1987).

163. *Id.*

164. *Id.* The \$7 million floor was consistent with the Congressional notice requirement in effect at the time. See *supra* note 159. As of the end of 1986, the United States considered license applications for the export of such items on a case-by-case basis with reference to both the antiterrorism policy and basic national security considerations. 15 C.F.R. § 385.4(d)(2) (1987).

165. Export Administration Act, § 5, 50 U.S.C. app. § 2404 (1982).

166. Most national security controls cover exports to virtually all destinations, and the government makes decisions on the issuance of licenses in large part with reference to the danger of diversion. See Abbott, *supra* note 2, at 752-54; 15 C.F.R. § 385.4(g)(1) (1987).

167. 15 C.F.R. § 385.4(d)(1)(b), 376.16 (1987).

168. See *supra* text accompanying note 4. In addition to special licensing requirements, the regional stability policy has led to the denial of licenses for the export of goods

the Middle East and elsewhere,¹⁶⁹—limiting Libya's ability to operate in Chad, for example.¹⁷⁰

Fourth, certain crime control and detection equipment.¹⁷¹ These items, too, were already controlled for export to many destinations, including Syria, as a denial of means and symbolic communication strategy designed to promote observance of human rights.¹⁷²

And that was all. In June 1987¹⁷³ the United States extended controls to all aircraft and removed the exception for sales to scheduled airlines. It extended antiterrorism controls on goods already controlled for national security purposes to transactions under \$7 million and to those not involving a military purchase or end use and tightened the policy on licensing such exports. It, however, did not expand any other controls on exports to Syria.¹⁷⁴

Even as expanded, it appears that most of these controls—especially those based on the national security and regional stability policies, including the controls on aircraft—were designed primarily to limit conventional military capabilities, not the ability to support terrorism.¹⁷⁵

controlled for national security reasons to countries engaged in regional hostilities. *See* Abbott, *supra* note 2, at 761-62.

169. *See* 15 C.F.R. §§ 376.16, 385.4(g)(3) (1987). *See also id.* at § 385.4(e) (controls on export of certain chemicals used in chemical warfare).

170. Libya is subject to separate regional stability controls. *See* 15 C.F.R. §§ 385.4(g)(3), 385.7 (1987).

171. 15 C.F.R. § 385.4(d)(1)(a), 376.14 (1987). *See supra* text accompanying notes 71-72.

172. *See* 15 C.F.R. §§ 376.14; 385.4(g)(2) (1987).

173. *See supra* note 16.

174. *See* 52 Fed. Reg. 23,167 (June 18, 1987). The criteria for favorable consideration of license applications announced as part of the 1987 regulations, *see supra* note 16, only apply to transactions newly controlled by those regulations. *See id.*, adding 15 C.F.R. § 385.4(d)(4)(iii). The extension of controls on national security-controlled items to sales below \$7 million parallels a reduction from \$7 million to \$1 million in the threshold above which exporters must notify Congress of applications to export goods subject to antiterrorism controls. *See supra* note 159. Prior to the announcement of new sanctions against Syria, the government also extended to Syria existing controls on the export of certain chemicals to Iran and Iraq—based on United States opposition to prohibited use of chemical weapons—with an exception for existing contracts. 51 Fed. Reg. 20,467 (June 5, 1986) (to be codified at 15 C.F.R. § 385.4(e)). The government has since subjected additional chemicals to these controls. 52 Fed. Reg. 28,550 (July 31, 1987).

175. Terrorists would find some restricted crime control and detection equipment useful. Examples include certain weapons and protective clothing that the police customarily use and items like leg irons, handcuffs and thumbscrews—controlled as instruments of torture—that terrorists could use in the mistreatment of hostages.

That may be a very desirable goal, but for the most part it is a different goal.¹⁷⁶ The government has largely limited its national security controls, moreover, to high technology products—selected with the strategic forces of the Soviet Union in mind—that are irrelevant to most forms of terrorism whether purchased by civilian or military organizations.¹⁷⁷ In any case, as already noted, most of the antiterrorism controls—sometimes imposed with considerable fanfare—were not actually new controls; the same items were already restricted under another policy.¹⁷⁸ It is hard to avoid the conclusion that the antiterrorism export controls based on the denial of means rationale amount to far less than meets the eye.

It is probably true, however, that it would be fruitless to implement this sanctions strategy much more broadly. Even extensive product controls would have virtually no effect on many forms of support for terrorism such as moral support, financial support,¹⁷⁹ passports, and sanctuary. Even the present controls on arms exports, though they may help restrict the availability of advanced weapons, are likely to have little effect on the volume of ordinary terrorism. Terrorists can, and do, carry out most of their acts using only small arms, ordinary explosives, and similar weapons.¹⁸⁰ These items will continue to be available in licit and

176. To the extent such controls denied access to arms that terrorists might use effectively, however, the goal would be the same.

177. See Export Administration Act, § 5(d), 50 U.S.C. app. § 2404(d) (1982) (limits controls to the extent possible and consistent with national security purpose, to militarily critical technologies which, if exported, would permit a significant advance in the military system of a controlled country).

178. The Export Administration Regulations provide that the government will administer licensing requirements imposed under multiple policies in accordance with the most restrictive policy. 15 C.F.R. § 388.1.

179. Some economic sanctions do not limit access to specific products, but restrict access to foreign exchange. Examples from United States practice include § 505 of the International Security and Development Corporation Act of 1985, 22 U.S.C. § 2349aa-9 (authorizing the President to ban imports from any country that harbors or otherwise supports terrorists); *id.* at § 504, 22 U.S.C. § 2349aa-8 (authorizing a ban on imports from Libya); Export-Import Bank of Washington Act, § 2(b)(1)(B), 12 U.S.C. § 635(b)(1)(B) (authorizing denial of applications for Eximbank credits if the President determines this would be in the national interest and would clearly and importantly advance American antiterrorism policy); Trade Act of 1974, § 502(b)(7), 19 U.S.C. § 2462(b)(6) (requiring the President not to designate states supporting terrorism as beneficiary developing countries under Generalized System of Preferences). Such sanctions could affect a target country's ability to provide financial support. As with the economic warfare rationale, however, *see supra* note 122 and accompanying text, it is unlikely that this strategy can reduce the economic resources of a target state sufficiently to seriously limit its ability to finance terrorist acts.

180. See Jenkins, *Statements About Terrorism*, 463 ANNALS 11, 12-14 (1982); Wil-

illicit private markets and from alternate suppliers, including the Soviet Union.¹⁸¹

D. *Symbolic Communication*

Commentators often ignore or denigrate the symbolic uses of economic sanctions,¹⁸² but recent scholarship has emphasized their importance.¹⁸³ As noted on the bottom row of the matrix in Figure 3, sanctions can communicate a variety of messages to multiple audiences, including terrorist groups themselves, and can thereby serve important instrumental functions.¹⁸⁴ Examining these symbolic messages may help us understand some antiterrorism measures that other sanctions rationales do not fully explain. To illustrate, the remainder of this section will spell out some of the messages that the United States appears to have communicated by strengthening economic sanctions against Syria in November 1986.

First, the expansion of sanctions against Syria demonstrated to terrorist groups, including those not supported by Syria, that the United States continued to view terrorism as a serious problem. The sanctions suggested a degree of determination to oppose terrorism likely to be reflected not only in economic sanctions and other measures aimed at state support but also in measures designed to prevent terrorist acts and improve the procedures for apprehending, extraditing and prosecuting individual terrorists.¹⁸⁵ To some unmeasurable extent, therefore, sanctions like these may function to deter even independent terrorists.

Second, the expansion of sanctions communicated a variety of messages to Syria itself. Here again, they conveyed determination, commitment to the goal of opposing state supported terrorism and an inten-

kinson, *Terrorism: The International Response*, 34 *WORLD TODAY* 5 (1978).

181. See Jenkins, *supra* note 83, at 10; Kutner, *Constructive Notice: A Proposal to End International Terrorism*, 10 *COMM. L. LAW* 3, at 1, 3. On Soviet supply of weapons—including sophisticated weapons like surface-to-air missiles—see *Libyan-Sponsored Terrorism: A Dilemma for Policymakers, Hearings before Subcomm. on Security and Terrorism of the Sen. Comm. on Judiciary*, 99th Cong., 2d Sess. 77, 92 (1986) (statement of Yonah Alexander).

182. See *supra* text accompanying note 74. See Bialos & Juster, *supra* note 15, at 848-49, 852-53.

183. See D. BALDWIN, *supra* note 66, at 96-114. For a discussion of Baldwin's work, see Abbott, *supra* note 19.

184. See D. BALDWIN, *supra* note 66, at 96-114.

185. For a review of recent United States measures of this type, see Address of Robert B. Oakley, *supra* note 32.

tion to take action in support of that goal.¹⁸⁶ An action like the imposition of sanctions conveys these messages more credibly than mere words because it demonstrates that the United States is willing to bear costs¹⁸⁷ and to accept risks¹⁸⁸ in pursuit of its goals. By imposing sanctions, after all, the United States loses gains from trade, acquires a reputation as an unreliable supplier,¹⁸⁹ and incurs the risk that Syria will cause harm to hostages held by terrorist groups it supports, sabotage the Middle East peace process or use force against Israel or respond in other damaging ways. Sanctions can also communicate a threat of military action. The embargo of Libya was clearly designed to convey such a threat;¹⁹⁰ the sanctions against Syria, in contrast, were not.¹⁹¹

Communicating these messages of commitment and action entails clear dangers, of course. One danger is that the United States may have no way of making good on its commitments, so that it comes to look foolish.¹⁹² Another danger is that the United States will feel forced to escalate, perhaps to otherwise undesirable military action, to avoid looking foolish. Both of these dangers are real in the Syrian situation, as they were with Libya.

In fact, however, the Syria sanctions seem to have been designed to minimize the need for further coercive measures by conveying certain psychological messages to Syria. American officials, including the President, went out of their way to characterize the sanctions as demonstrating that the support of terrorism was causing Syria to become isolated,

186. See D. BALDWIN, *supra* note 66, at 102-08. See also State Department Report, *supra* note 1, at 1-2 (economic sanctions "demonstrate our resolve," "demonstrate United States determination to oppose another nation's support of terrorism," and "demonstrate that we support our policies with actions as well as words."). This report is one of the best available summaries of the symbolic uses of sanctions.

187. See D. BALDWIN, *supra* note 66, at 107. See also State Department Report, *supra* note 1, at 1-2 (sanctions "demonstrate that we . . . are prepared to incur costs in our battle against international terrorism," and "show that we are prepared to accept economic losses, if necessary.")

188. See D. BALDWIN, *supra* note 66, at 112.

189. See *supra* notes 141-44 and accompanying text; State Department Report, *supra* note 1, at 2.

190. See Bialos & Juster, *supra* note 15, at 848-49, 852-53.

191. See *infra* text accompanying note 201.

192. Baldwin sees a similar effect in the League of Nations sanctions against Mussolini's Italy. One goal of the sanctions was to demonstrate to Hitler the League's ability and will to stand up to aggression. Britain and France, however, were unwilling to go to war even with Italy, and they clearly communicated this lack of resolve by the manner in which they implemented sanctions. As a result, the League sanctions did not deter Hitler, and they have been subject to ridicule ever since. See D. BALDWIN, *supra* note 66, at 156-58.

rejected by the "international community of nations" and by the "civilized world."¹⁹³ The government explicitly linked the sanctions, in this regard, to recent European diplomatic sanctions. The American sanctions themselves included a reduction in the staff of the American embassy and a suspension of high level diplomatic meetings.¹⁹⁴ Syria, the White House said, could play an important role in a key region of the world, but it could not expect to be accepted "as a responsible power or [treated] as one as long as it continues to use terrorism as an instrument of its foreign policy."¹⁹⁵ The United States designed these sanctions, in short, to apply political and moral pressure as well as economic pressure¹⁹⁶ and to play on the concern for reputation that keeps most states from supporting terrorists in the first place.¹⁹⁷

As suggested previously, some of the new Syria sanctions were relatively weak. The United States did not order its firms to terminate operations in Syria, for example, as it had earlier done with Libya.¹⁹⁸ Instead, it advised its oil firms that further Syrian oil operations would be "inappropriate."¹⁹⁹ The moderation of the sanctions communicated still other messages to Syria, inconsistent to some degree with the basic messages of opposition and commitment. The use of moderate sanctions seems to have allowed the United States "to make a commitment, but not too much of a commitment," and to "deter and reassure simultaneously," as economic sanctions are peculiarly suited to do.²⁰⁰

After the message of restraint that the United States conveyed, albeit not explicitly, was an acknowledgment of Syria's power and influence in the Middle East. By imposing only moderate sanctions, the United States made clear that it did not want to provoke a military or political reaction that might be worse than Syria's support of terrorism.²⁰¹ The sanctions also conveyed a desire to maintain some lines of communication

193. White House Statement, *supra* note 16.

194. *See id.*

195. *Id.*

196. *See* D. BALDWIN, *supra* note 66, at 134-36. Economic sanctions that convey a threat of military action, similarly, exert influence through the sanctioning state's military power base, not through economic pressure.

197. *See supra* note 78 and accompanying text.

198. *See* Bialos & Juster, *supra* note 15, at 812-14 (discussing ban on contract performance), 824-25 (discussing hardship exceptions).

199. White House Statement, *supra* note 16.

200. *See* D. BALDWIN, *supra* note 66, at 102-05.

201. The Iran hostage crisis was a similar situation. Baldwin believes that the United States designed the sanctions imposed against Iran to communicate moderation as well as resolve, so as to ensure the release of the hostages. *Id.* at 251-52.

or some possibility of cooperation for mutual interests.²⁰² By limiting itself to economic sanctions and by keeping them moderate, the United States demonstrated that in spite of the Libya bombing a few months earlier,²⁰³ it was not trigger-happy; it would act with restraint, relying on peaceful measures as long as possible.²⁰⁴ American officials generally went out of their way to distinguish Syria from Libya, which they treated as a special, extreme case.²⁰⁵ The sanctions and related diplomatic measures conveyed a subtle mix of messages to Syria that may have had the effect the United States desired: as this article was written, Syria had closed the Damascus office of the Abu Nidal terrorist group and had made efforts for the release of Western hostages held in Lebanon; the United States had responded by proposing discussions on a variety of Middle East issues.²⁰⁶

Third, the Syria sanctions conveyed messages to other states. The sanctions conveyed the basic message of commitment and determination indirectly to all other terrorist-supporting states, including the Soviet Union, and they sent an implicit message of support to all states working to suppress terrorism.²⁰⁷ The United States almost certainly imposed only moderate sanctions on Syria to reassure the European allies and

202. See State Department Report, *supra* note 1, at 3 ("In stark contrast to Libya, we have been able on occasion to use our relationships with [other countries on the terrorism list, including Syria] to the benefit of U.S. interests").

203. See *supra* note 14.

204. The White House statement imposing the sanctions reviewed earlier economic sanctions against Syria and depicted the new sanctions as additional steps in an orderly progression. It also linked them explicitly to European Community sanctions imposed a few days before, which were even more moderate. The statement did, however, say that additional steps would be taken if necessary. See White House Statement, *supra* note 16.

205. See State Department Report, *supra* note 1, at 3 ("Libya is an exceptional case. There are major qualitative differences between our relationship with Libya and other countries on the terrorism list. We have normal diplomatic relations with Syria. . ."). The Western allies have also singled out Libya, at the behest of the United States. See Tokyo Economic Summit Statement on Terrorism, *supra* note 30.

206. See N.Y. Times, June 26, 1987, at 5, col. 5. Several European countries had begun to renew such discussions even earlier; N. Y. TIMES, Mar. 31, 1987, at 2, col. 1.

207. See State Department Report, *supra* note 1, at 1 ("Economic sanctions may be used . . . to strengthen the resolve of others, such as neighboring countries or U.S. allies, in dealing with governments that support terrorism."). The sanctions are somewhat analogous to the United States embargo of Cuba, which was designed in part to warn the Soviet Union and its allies of American opposition to Communism in the Western Hemisphere, to reassure and demonstrate support for non-Communist rulers in the hemisphere, and, by analogy to the messages conveyed to terrorist groups, to communicate opposition and determination to Communist revolutionary groups in Latin America. See D. BALDWIN, *supra* note 66, at 176-78.

other states concerned by the use of military force against Libya²⁰⁸ and to demonstrate continued American commitment to the use of peaceful measures and proportionality.²⁰⁹ Most broadly, the sanctions helped to focus the continued attention of all states, indeed all people, on the problem of terrorism.²¹⁰

Finally, the United States seems to have designed the Syria sanctions to communicate several specific and important messages to its allies in Europe, Japan and elsewhere. First, the sanctions demonstrate continuing American leadership on the issue of terrorism.²¹¹ American officials have long felt that unilateral measures, like these sanctions and the Libya embargo, focus attention on the problem and encourage others to follow the American lead.²¹² They view the Tokyo Summit declaration on terrorism²¹³ and other instances of cooperation as products, at least in part, of American leadership.²¹⁴

More specifically, as the State Department declared, unilateral sanctions serve "to refute criticisms that we ask our allies to make sacrifices

208. "Nothing has so vehemently separated America from Europe since 1945." *ECONOMIST*, April 26, 1986, at 13.

209. See State Department Report, *supra* note 1, at 2 ("[The use of economic sanctions] serves to refute criticisms . . . that we are unwilling to try 'peaceful measures' before taking other steps;" "Measures that appear unnecessarily harsh or inappropriate can undermine our credibility with the targeted country as well as with friendly countries whose support we seek.")

210. By analogy, Baldwin observes that the League of Nations sanctions against Italy "began to sensitize the Western democracies to the need to oppose aggression and may have made it easier to arouse public support in subsequent years." See D. BALDWIN, *supra* note 66, at 160.

211. The United States made the exercise of leadership much more explicit, however, in imposing the Libyan embargo. See, e.g., National Emergency with Respect to Libya, *supra* note 91 ("The United States . . . calls upon other nations to join with us in isolating the terrorists and their supporters. We must demonstrate . . . that the international community considers such actions intolerable . . . [E]ach nation must bear its fair share of the vital effort against the politics of terror. I call upon every nation to do so now.")

212. See State Department Report, *supra* note 1, at 1 ("[Imposing costly sanctions] helps us to encourage others to follow our example and make the required trade and financial sacrifices.") For an argument that the bombing of Libya also had the aim, and effect, of catalyzing allied action, see Zilian, *The U.S. Raid on Libya—and NATO*, 30 *ORBIS* 499 (1986).

213. The statement both condemned terrorism and explicitly named Libya as a sponsoring state, a major aim of United States policy. See Tokyo Economic Summit Declaration on Terrorism, *supra* note 30.

214. See State Department Report, *supra* note 1, at 1, 3 ("[Libyan embargo] may have contributed to our recent success in obtaining multilateral cooperation, albeit limited, on sanctions and other measures.")

while we continue to profit from commercial relations with countries supporting terrorism."²¹⁵ The criticisms referred to occurred during the Siberian pipeline episode, when the United States continued to sell grain to the Soviet Union while asking its allies to forego industrial exports.²¹⁶

The United States intended the Syrian sanctions, like the Libya embargo, to demonstrate that it plans to be more restrained in its use of extraterritorial trade controls, another lesson learned from the pipeline case.²¹⁷ Finally, the Syrian sanctions sent a powerful message of support to England, which had just convicted Nizar Hindawi of complicity in the attempted *El Al* bombing²¹⁸ and persuaded the European Community to adopt diplomatic sanctions against Syria.²¹⁹ England, of course, had provided a base for the bombing of Libya;²²⁰ here the United States repaid the favor.

V. CONCLUSION

The foregoing analysis has suggested when economic sanctions may be appropriate measures for dealing with state involvement in international terrorism and has outlined the functions that sanctions can perform in that regard. The difficult questions of effectiveness and cost—in general and in regard to the antiterrorism sanctions actually imposed by the United States—have not been fully answered here.

One could give complete answers to those questions, if at all, only after detailed study of particular cases.²²¹ It would also be necessary to compare other available measures, including diplomatic responses, covert action, military force and inaction. Often economic sanctions that seem ineffective or unduly costly when examined in isolation appear more reasonable when compared to the other alternatives.²²²

215. *Id.* at 1 ("Openly acknowledging that the United States also will suffer from sanctions helps us to encourage others to follow our example . . .").

216. See D. BALDWIN, *supra* note 66, at 280.

217. See State Department Report, *supra* note 1, at 2-3 (pipeline sanctions demonstrated that extraterritorial controls cause friction with friendly countries; United States has attempted to moderate extraterritorial reach, where appropriate, as with Libya embargo).

218. See N.Y. Times, Oct. 25, 1986, at A4, col. 1.

219. See White House Statement, *supra* note 16 (linking American sanctions to European Community action).

220. See N.Y. Times, April 16, 1986, at A14, col. 1.

221. For a number of exemplary case studies, see generally D. BALDWIN, *supra* note 66.

222. See Bialos & Juster, *supra* note 15, at 849-52 (analyzing options to Libya embargo).


The preliminary analysis in this Article suggests, however, that when one considers all their functions, economic sanctions can play a valuable role, at least at the margin, in a national strategy against international terrorism. At the same time, their effects will frequently be small, especially in the short run, while their costs and risks are likely to be substantial. Economic sanctions alone are no cure for international terrorism.

APPENDIX

Economic Sanctions and International Terrorism

Figure 1

STATE INVOLVEMENT IN TERRORISM



| | | |
|---|--|---|
| <p><u>No significant state involvement:</u></p> <p>independent terrorist groups</p> | <p><u>State "support" of terrorists:</u></p> <p>toleration or acquiescence</p> <p>sanctuary</p> <p>encouragement</p> <p>training passports arms intelligence logistics</p> | <p><u>State "sponsorship" of terrorism:</u></p> <p>incitement, recruitment, organization;</p> <p>direction of terrorist acts;</p> <p>direct participation</p> |
|---|--|---|

Economic Sanctions and International Terrorism

Figure 2

RATIONALES OR STRATEGIES OF ECONOMIC SANCTIONS

A. Economic warfare:

withhold gains from trade: embargo; civilian "bottleneck" items

B. Imposing costs:

deter,
exact price:
restrict transactions giving leverage

C. Denial of means:

deny inputs for wrongdoing:
strategic embargo

D. Symbolic communication:

convey commitment,
willingness to incur costs,
moderation:
restrict appropriate transactions

A & C — designed to influence capabilities

B & D — designed to influence intentions and will

Economic Sanctions and International Terrorism

Figure 3

| | | | |
|------------------------|---|--|--|
| Economic warfare | X | | Libya embargo? |
| Imposing costs | X | | Libya embargo; restrictions on aircraft exports, oil imports, air transportation; Bonn Declaration |
| Denial of means | indirect effect on access to arms | restrictions on arms sales; controls under Export Administration Act | |
| Symbolic communication | Syria sanctions: --- varied messages to multiple audiences --- | | |
| | Independent terrorist groups | State support for terrorists | State sponsorship of terrorism |