

June 1987

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Recommended Citation

Christopher J. Greenwood, *International Law and the United States' Air Operation against Libya*, 89 W. Va. L. Rev. (1987).

Available at: <https://researchrepository.wvu.edu/wvlr/vol89/iss4/9>

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INTERNATIONAL LAW AND THE UNITED STATES' AIR OPERATION AGAINST LIBYA

CHRISTOPHER GREENWOOD*

I. INTRODUCTION**

The United States' air strike against targets in Libya in April 1986 is one of the most controversial instances of the use of force by a state in recent years. Enormously popular in the United States, the operation attracted widespread criticism in other countries, including many normally sympathetic to the United States.¹ To the United States administration, the air attack was a legitimate exercise of the right of self-defence in response to a campaign of terrorism which it claimed had been initiated against the United States by Libya.² Arab states, on the other hand, condemned it as an act of aggression, while other critics of the raid saw it as an over-reaction which exceeded the limits imposed by international law on the use of force, even if they accepted that Libya was involved in terrorism.

These arguments about the legality of the United States' action go to the heart of the debate about the extent and credibility of the international law prohibition on the use of force. Assuming that the United States did indeed have "direct, precise and irrefutable evidence"³ implicating the Libyan Government in terrorist activity against the United States, the issue focuses on whether that entitled it to use force against Libya and, if so, whether the force actually employed was within the limits set by international law. The purpose of this Article is to examine these issues. To that end, it will first be necessary, after a brief review of the facts, to discuss the argu-

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** The British spellings of words such as "labour" and "defence" have been retained to preserve the author's style. *Ed.*

¹ Even in the United Kingdom, whose government had supported the United States decision to use force and allowed the use of air fields by units participating in the attack, public opinion was largely hostile to the operation. An opinion poll published in the *Times* showed 66% of those questioned opposed to the bombing. The *Times* (London), April 17, 1986, at 1. Press opinion was more evenly divided. The normally conservative *Financial Times* described the raid as "futile, deplorable and almost certainly counter-productive" *Financial Times*, April 16, 1986, at 22, col. 1. but the *Times* and the *Economist* were more sympathetic. For a balanced appraisal, see Schumacher, *The United States and Libya*, 65 *FOREIGN AFF.* 329 (1986).

² See, e.g., The President's Address to the Nation (April 14, 1986), reprinted in *DEPARTMENT OF STATE BULL.* 1 (June 1986).

³ Statement by U.S. Ambassador Walters to the United Nations Security Council (April 15, 1986), reprinted in *DEPARTMENT OF STATE BULL.* 19 (June 1986).

ment advanced by the United States to justify the air strike: self-defence under article 51 of the United Nations Charter. Subsequently, a number of other potential justifications will be considered. Finally, an attempt will be made to answer the question: does it matter whether the operation violated international law or not?

II. THE HISTORY OF THE AIR STRIKE

A. Background

The air strike against Libya took place against the background of a number of terrorist attacks against United States nationals, embassies, and bases around the world during the course of 1985 and the early months of 1986.⁴ In the weeks immediately preceding the air operation these attacks appeared to intensify. The United States administration was particularly outraged by the bombing of a crowded discotheque in West Berlin on April 5, 1986. The discotheque was full of American soldiers, and the explosion killed two people (one of them a United States sergeant) injuring more than 200 others, including 50 American servicemen. In addition, there was evidence that other terrorist attacks on United States targets had been narrowly averted.⁵

To what extent these attacks were imputable to Libya is, of course, open to debate. The Libyan President, Colonel Qadhafi, had long engaged in rhetoric about "exporting revolution" and forcing "America to fight on a hundred fronts."⁶ Moreover, the United States Ambassador to the United Nations claimed that American intelligence had obtained irrefutable proof of Libyan involvement in the discotheque bombing as a result of intercepting communications between the Libyan People's Bureau (embassy) in East Berlin and the Libyan capital.⁷ There was also substantial evidence of Libyan terrorist activity in Europe. In 1984, the United Kingdom had broken off diplomatic relations with Libya after a British policewoman had been killed by shots fired from the Libyan People's Bureau in London.⁸ Several other European countries had expelled Libyan diplomats for alleged involvement in terrorist activities.⁹ In addition, Libya was widely suspected of involvement in the attacks on Rome and Vienna airports in December 1985, in which a large number

⁴ Twenty-three U.S. nationals were killed in terrorist attacks in 1985. Falk, *Rethinking Counterterrorism*, in *MAD DOGS* 124 (E.P. Thompson ed. 1986).

⁵ Statement by U.S. Ambassador Walters, *supra* note 3, at 20.

⁶ *Id.* at 19. The following excerpt from a Radio Tripoli broadcast the morning after the air raid is not uncharacteristic of the kind of rhetoric of which the United States complained: "The masses of these [the Arab] countries must now encircle the headquarters of the humiliated, betraying, languid governments, also the embassies, companies and bases of the United States, and kill every American, civilian or military, without mercy and ruthlessly and without any compassion pursue them everywhere." *The Economist* (London), April 19, 1986, at 21.

⁷ Statement by U.S. Ambassador Walters, *supra* note 3, at 19.

⁸ See Marston, *United Kingdom Materials in International Law*, 55 *BRIT. Y.B. INT'L L.* 459, 461-67 (1984).

⁹ Statement by U.S. Ambassador Walters, *supra* note 3, at 20.

of travellers, including some Americans, had been killed in a seemingly random fashion.

On the other hand, the Libyan Government has consistently denied responsibility for most of these incidents. Much of the evidence of alleged Libyan involvement in terrorism, as opposed to revolutionary rhetoric, is necessarily secret and thus cannot be evaluated by those, like the present writer, not privy to the secrets of the intelligence community. Nevertheless, the evidence of official Libyan involvement in terrorism was sufficiently convincing for the European Economic Community (EEC) states to agree upon a limited package of sanctions against Libya.¹⁰ At the same time the representative of Australia told the Security Council that "the Australian Government accepts that there is a substantial body of evidence of Libyan involvement in, and direction of, terrorism."¹¹ Moreover, many critics of the United States action appear to accept that at least some of the recent terrorist attacks on United States and West European targets were the work of the Libyan Government.¹² This Article is therefore based upon the assumption that the United States did indeed possess convincing evidence that Libya was directly responsible for *some* terrorist attacks against United States nationals and targets such as United States embassies and foreign bases. If that assumption proves false, the entire justification for the air strike collapses.

The United States responded in two ways. First, the administration imposed economic sanctions upon Libya. In January 1986, the President signed executive orders prohibiting trade between the United States and Libya and blocking Libyan Government property in the United States. Measures also were adopted to make it more difficult for United States nationals to travel to Libya.¹³ Second, the United States Sixth Fleet was sent to the Gulf of Sidra and adjacent waters off the Libyan coast to hold exercises. Libya claims the Gulf of Sidra as part of its internal waters which foreign warships may not enter, or foreign military aircraft fly over, without Libya's permission. The United States, in common with most other states, rejects the Libyan claim and regards most of the Gulf of Sidra as part of the High Seas.¹⁴ To assert its claim that the Gulf forms part of the High Seas, the United States, on a number of occasions, has sent warships into the area claimed by Libya. In March 1986, the Sixth Fleet held its largest exercise to date in that part of the Mediterranean, with several United States warships and aircraft penetrating the Gulf. When Libyan forces fired on some of these units, the Sixth Fleet responded, destroying Libyan shore installations and sinking a number of Libyan patrol boats.

¹⁰ *The Economist*, *supra* note 6, at 13.

¹¹ U.N. Doc. S/PV 2676, at 18 (1986).

¹² *See, e.g.*, Statement by the Rt. Hon. Neil Kinnock, MP, Leader of the British Labour Party, 95 PARL. DEB., H.C. (6th ser.) 882 (1986): "No-one needs any convincing about the criminality of Qadhafi."

¹³ The economic measures against Libya are set out in 25 INT'L LEGAL MATERIALS 173 (1986).

¹⁴ For a convincing refutation of the Libyan claim, *see* Blum, *The Gulf of Sidra Incident*, 80 AM. J. INT'L L. 668 (1986).

B. *The Conduct of the Air Strike*

The air attack was carried out on the nights of April 14 and 15, 1986, by carrier-borne aircraft from the Sixth Fleet (by then operating outside waters claimed by Libya) and F-111 aircraft based in the United Kingdom. The aircraft attacked targets in the Libyan capital, Tripoli, the city of Benghazi, and the air base at Benina. One of the aircraft was shot down and its crew of two killed. According to a White House statement:

U.S. forces struck targets that were part of Qadhafi's terrorist infrastructure—the command and control systems, intelligence, communications, logistics, and training facilities. These are sites which allow Qadhafi to perpetrate terrorist acts.

In addition to the strikes at terrorist centers, the President also authorized limited defense suppression missions in order to defend our own forces engaged in this mission. Every effort was made to avoid civilian casualties and limit collateral damage and to avoid casualties to those American servicemen who are participating.¹⁵

The British Prime Minister told the House of Commons that she had given permission for the use of an American base in the United Kingdom for mounting the operation on the condition that the action was "directed against specific Libyan targets demonstrably involved in the conduct and support of terrorist activities."¹⁶

The declared object of the attack was, therefore, to reduce Libya's capacity for mounting terrorist operations by destroying specific targets forming part of the "terrorist infrastructure." Since the targets were located in residential areas, it was accepted that some civilian casualties were inevitable, but the United States claimed that steps were taken to reduce them by using the most accurate methods of bombardment available.¹⁷ One of the factors which appears to have weighed with the British Government in the decision to permit the use of the British-based F-111s was that the F-111s are capable of more accurate targetting than the carrier-borne aircraft.¹⁸ The exact number of civilian casualties is unknown, but press reports at the time spoke of a death toll of approximately 100 persons and injuries to a greater number. How many terrorists or members of the Libyan military were killed or injured is only a matter for speculation. It appears that the bombing killed Colonel Qadhafi's daughter, wounded two other members of his family, and narrowly missed hitting him. Among the properties damaged were the French, Austrian, Finnish, and Romanian embassies and the residence of the Swiss ambassador.¹⁹

It has been suggested, however, that there were at least two other objectives of the attack. First, the attack may have been designed to inflict injury upon the

¹⁵ White House Statement (April 14, 1986), reprinted in DEPARTMENT OF STATE BULL. 1 (June 1986).

¹⁶ 95 PARL. DEB. H.C., (6th ser.) 729 (1986).

¹⁷ White House Statement, *supra* note 15, at 1.

¹⁸ See statements by Prime Minister Margaret Thatcher to the House of Commons, 95 PARL. DEB., H.C. (6th ser.) 726 and 879 (1986).

¹⁹ *The Economist*, *supra* note 6, at 18-23.

civilian population of the two cities in order to undermine popular support for the Libyan policy of attacking United States targets and for the government of Colonel Qadhafi in general.²⁰ Second, it has recently been asserted in the press, both in the United States and the United Kingdom, that the principal objective of the raid was to kill Colonel Qadhafi.²¹ While the United States administration may well have hoped that one of the effects of the attack would be to reduce support for Colonel Qadhafi and his policies within Libya and that one of the casualties of the attack might be the Colonel himself, it has denied any plan to assassinate him.²² If the civilian population or the Libyan leader were primary targets of the raid, that would have considerable significance in determining whether the operation was justified in international law. The legality of the operation will therefore be considered in the light of each of these three possible objectives.

III. JUSTIFICATION OF THE AIR ATTACK AS SELF-DEFENCE

On the face of it, the use of military aircraft by one state to bomb targets in another state is a violation of the rule contained in article 2(4) of the United Nations Charter that member states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."²³ Although it has been asserted²⁴ that this provision should be read restrictively, leaving considerable scope for states to employ force in ways which are not directed "against the territorial integrity or political independence" of other states and which should not be regarded as "inconsistent with the purposes of the United Nations," the prevailing view is that article 2(4) prohibits any significant use of force by a state unless that use of force is justified by one of a limited group of exceptions contained elsewhere in the Charter or, perhaps, in customary international law.²⁵ In the present case, this conclusion is reinforced by the terms of article 3(b) of the United Nations General Assembly Resolution on the Definition of Aggression, 1974, which provides that "bombardment by the armed

²⁰ This is the viewpoint of several of the contributors to *MAD DOGS* (E.P. Thompson ed. 1986). See also *The Economist*, *supra* note 6, at 21, for the suggestion that this may have been an effect, if not a primary objective, of the raid.

²¹ See Hersh, *N.Y. Times*, Feb. 22, 1987, § 6 (Magazine), 17; Hersh, *Sunday Times* (London), Feb. 22, 1987, 1 & 11.

²² *Id.* See also Statement by Secretary of Defense Casper Weinberger (April 14, 1986), *reprinted in* DEPARTMENT OF STATE BULL. 3, 4 (June 1986).

²³ U.N. CHARTER art. 2, para. 4.

²⁴ See, e.g., J. STONE, *AGGRESSION AND WORLD ORDER* 43 (1958); J. STONE, *OF LAW AND NATIONS* 1-38 (1974).

²⁵ See, e.g., D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 11 (1958); I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 265-80 (1963); Combacau, *The Exception of Self-defence in U.N. Practice*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 9 (A. Cassese ed. 1986); and Roling, *The Ban on the Use of Force and the U.N. Charter*, *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 1 (A. Cassese ed. 1986).

forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State" constitutes a prima facie act of aggression.²⁶

If the United States was guilty of aggression in carrying out the attack, the United Kingdom also incurred international responsibility for this violation. Article 3(f) of the Definition of Aggression (1974) includes among the acts which constitute aggression, "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State."²⁷ The lawfulness of the United Kingdom's action was thus dependent upon the United States having acted lawfully.²⁸

The United States appears to have accepted the wide interpretation of article 2(4), because it sought to justify the attack on Libya as an exercise of the right of self-defence, rather than by arguing that it was not directed against the territorial integrity or political independence of Libya and was not otherwise inconsistent with the purposes of the United Nations. Both the President's address to the nation²⁹ and Ambassador Walters' speech to the Security Council³⁰ relied upon article 51 of the Charter, which provides that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.³¹

Article 51 of the Charter does not create the right of self-defence: it merely recognizes the continued existence of a right described as "inherent."³² While the limits of that right have been the subject of much debate, there appear to be three requirements which would have to be satisfied if the air strike against Libya is to fall within the scope of the right of self-defence:³³

(1) There must have been a prior international wrong, or perhaps the threat of a wrong, by Libya against the United States of such a magnitude as to justify the use of force by way of self-defence;

²⁶ G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 144, U.N. Doc. A/9631 (1974).

²⁷ *Id.*

²⁸ The representative of the United Arab Emirates made this point in the Security Council debates on the air attack, U.N. Doc. S/PV 2674, at 6 (1986).

²⁹ Address by President Reagan to the nation, *supra* note 1, at 1.

³⁰ Statement by U.S. Ambassador Walters, *supra* note 3, at 19; U.N. Doc. S/PV 2674.

³¹ U.N. CHARTER art. 51.

³² See D.W. BOWETT, *supra* note 25, at 187.

³³ *Id.* at 269. Bowett groups the requirements of self-defence somewhat differently.

(2) the use of force must have been necessary to protect the United States against that wrong; and

(3) the degree of force used must have been reasonably proportionate to the original wrong or threatened wrong.

Each of these three requirements will be considered in turn.

A. *The Requirement of a Prior Wrong*

If one assumes that the United States can substantiate its claims that Libya had organized and directed terrorist attacks like the Berlin bombing, it is clear that Libya is responsible for serious violations of international law. Article 1 of the Declaration of Friendly Relations Among States (General Assembly Resolution 2625), 1970, includes a provision that:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve the use of force.³⁴

Moreover, both the General Assembly and the Security Council have recently condemned terrorist acts as violations of international law in resolutions adopted unanimously with every indication that they were intended to reflect the current state of international law.³⁵

It is less clear, however, whether these international wrongs on the part of Libya were sufficient to give the United States the right to use force by way of self-defence. Two questions arise in this context. First, are terrorist attacks of this kind, organized and directed by a state, an international wrong of such a magnitude as to entitle other states to use force in response to them? Stated another way, are terrorist acts sufficient to trigger the operation of the right of self-defence? Second, may force be used in self-defence against an anticipated attack of this kind?

1. Do Terrorist Attacks Give Rise to a Right to Use Force in Self-Defence?

Article 51 of the Charter expressly preserves the right of self-defence only in the event that an armed attack occurs. Nevertheless, the drafting history of the Charter shows that article 51 was inserted in this form as a means of reassuring certain countries, particularly the Latin American states, that their arrangements for mutual self-defence in the event of an armed attack were not contrary to the Charter.³⁶ It has therefore been suggested that the reference to armed attack was

³⁴ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, 25 U.N. G.A.O.R. Supp. (No. 28) at 123, U.N. Doc. A/8028 (1970). See also G.A. Res. 3314, supra note 26, at art. 3(g).

³⁵ G.A. Res. 40/61, reprinted in 80 AM. J. INT'L L. 435 (1986); S.C. Res. 579, reprinted in 80 AM. J. INT'L L. 437 (1986).

³⁶ The official United Kingdom commentary on the Charter states:

intended to be illustrative rather than restrictive: in other words it was to furnish an example of circumstances in which the right of self-defence existed not to reduce the scope of that right.³⁷ Moreover, it is argued that the customary law right of self-defence was not confined to cases in which an armed attack had occurred and that article 51 was not intended to curtail the customary right.³⁸

On this basis, it has sometimes been maintained that the inherent right of self-defence includes a right to use force in response to a threat to a state's fundamental rights or interests even though that threat does not itself involve force. Since the acts of which Libya was accused did involve the use of force, it is unnecessary to consider the full extent of this controversial theory in this Article. The International Court of Justice accepted, in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, that the act of one state in sending armed bands and irregulars to commit acts of violence on the territory of another state amounted to an armed attack "if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."³⁹ In his dissenting judgment, Judge Schwebel thought this approach unduly restrictive⁴⁰ but it is thought that even on the test propounded by the Court, a sustained campaign of terrorist acts, such as that of which the United States accused Libya, would constitute an armed attack upon the United States if conducted on United States territory. It is, however, necessary to consider whether terrorist attacks upon United States nationals and targets, such as United States embassies and military bases, outside the territory of the United States also would be capable of constituting an armed attack or at least a use of force sufficient to give rise to a right of self-defence.

While it has often been argued that the notion of an armed attack is confined to attacks upon the territory and, perhaps, the ships and aircraft, of a state,⁴¹ the

It was considered at the Dumbarton Oaks Conference that the right of self-defence was inherent in the proposals and did not need explicit mention in the Charter. But self-defence may be undertaken by more than one state at a time and the existence of regional organizations made this right of special importance to some states, while special treaties of defence made its explicit recognition important to others. Accordingly the right is given to individual states or to combinations of states to act until the Security Council has taken the necessary measures.

MISC. 9, 1945, CMD., No. 6666, at 9.

³⁷ Bowett, *The Use of Force to Protect Nationals Abroad*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 39, 40 (A. Cassese ed. 1986).

³⁸ *Id.* See also D.W. BOWETT, *supra* note 25, at 187-93. *But see* I. BROWNLIE, *supra* note 25, at 251-80.

³⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 14, 103 [hereinafter cited as *Activities in and against Nicaragua*].

⁴⁰ *Id.* at 332 (Schwebel, J., dissenting).

⁴¹ See, e.g., N. RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY* 11 (1985). The view was also advanced in the Security Council debates on the air attack by the representative of Ghana who said that "the fact that a national or nationals of . . . a state became victims of [terrorist] incidents could not in our view be sufficient to trigger the use of force in the name of self-defence" U.N. Doc. S/PV 2680, at 32 (1986).

better view is that an attack upon a state's nationals outside its territory also constitutes an armed attack, or at least amounts to a use of force sufficient to allow the victim state to invoke the right of self-defence.⁴² There is little doubt that customary international law in the period before 1945 recognized a right to use force in defence of nationals who were attacked abroad and there is no indication that article 51 was intended to remove that aspect of the customary right. On the contrary, article 51 refers to an armed attack upon a member state; since population is one of the attributes of statehood, an attack upon a state's population would seem to be just as much an attack upon that state as would an attack upon its territory.⁴³ There is something inherently unattractive about a view of self-defence which would allow a state to use force to protect uninhabited territory but not in defence of its nationals. State practice in protecting nationals abroad since 1945 also supports this interpretation of article 51.⁴⁴

Those who reject the idea that an attack upon a state's nationals outside its territory is an armed attack upon that state point to the danger that to allow the use of force in response to such an attack is to invite abuse. In essence, a relatively minor attack upon a group of private individuals might be used as the excuse for massive military intervention in the internal affairs of another state.⁴⁵ However, to acknowledge that a state may use force to protect its nationals outside its territory is not to give that state an unlimited right to use force. The restrictions of necessity and proportionality which form an essential part of the right of self-defence require that the state employ no more force than is reasonably necessary to rescue or protect its citizens.

In the present case, the argument that there had been an armed attack upon the United States is strengthened by the fact that one of the most important incidents, the bombing of the Berlin discotheque, was directed against United States servicemen in West Berlin. This attack was thus directed against a symbol of state sovereignty⁴⁶ and not merely against private individuals. Moreover, it took place in a city in which the United States still exercises some of the governmental functions of an occupant.⁴⁷ Even those who deny that attacks upon private citizens in foreign countries can give rise to a right of self-defence would probably accept

⁴² U.S. Ambassador Walters asked in the Security Council "if the inherent right of self-defence, specifically recognized in Article 51 of the Charter, does not include the right to protect one's nationals and one's ships, what does it protect?" U.N. Doc. S/PV 2682, at 31 (1986). See also Bowett, *supra* note 37.

⁴³ Bowett, *supra* note 37.

⁴⁴ The right of self-defence was invoked to justify the protection of nationals abroad by the United Kingdom in the Suez crisis in 1956 (although the claim is difficult to sustain on the facts), by Israel in the Entebbe incident and the United States in connection with the rescue of the *Mayaguez* and the intervention in Grenada. For other examples of state practice in this regard, see N. RONZITTI, *supra* note 41; and Bowett, *supra* note 37.

⁴⁵ I. BROWNLEE, *supra* note 25, at 301.

⁴⁶ Thus, Ronzitti would accept that this incident might trigger the right of self-defence. N. RONZITTI, *supra* note 41, at 11.

⁴⁷ See I.D. HENDRY & M.C. WOOD, *THE LEGAL STATUS OF BERLIN* (1987).

that an attack upon a state's soldiers in territory legitimately occupied by that state constitutes an armed attack upon the state itself.

2. Was the United States Entitled to Use Force in Self-Defence against Anticipated Libyan Attacks?

The notion of self-defence is essentially one of protective rather than retributive action. The use of force in response to an attack which has already terminated cannot be intended as protection against that attack.⁴⁸ In the present case, the attacks of which the United States accused Libya had taken place well before the air strike was launched and it is therefore difficult to see the air strike as self-defence against those attacks. Since the United Nations Security Council has shown a marked reluctance to treat a series of terrorist or guerrilla actions as a continuing armed attack,⁴⁹ the claim of self-defence must accordingly rest on the argument that further attacks by Libya were anticipated and that international law permits the use of force against such anticipated attacks.

Whether article 51 leaves intact a right of anticipatory self-defence is a point which has been keenly argued. Proponents of a narrow interpretation of article 51 point to the fact that the text refers only to the right of self-defence in the event of an *actual*, rather than an *anticipated*, attack. Professor Brownlie argues that the ordinary meaning of the words used precludes preventive strikes.⁵⁰ Professor Henkin urges that policy considerations also point to a narrow reading of article 51. He maintains that the framers of the Charter:

recognized the exception of self-defence in emergency, but limited to actual armed attack, which is clear, unambiguous, subject to proof and not easily open to misinterpretation or fabrication. . . . It is precisely in the age of the major deterrent that nations should not be encouraged to strike first under pretext of prevention or pre-emption.⁵¹

Nevertheless, it is suggested that there are three reasons for preferring the view of writers like Professor Bowett⁵² that the right of self-defence still embraces a right to use force in anticipation of an imminent armed attack. First, the text and the drafting history of article 51 suggest such a conclusion. Although the matter is not entirely free from doubt, it seems that customary international law still recognized a right of anticipatory self-defence in 1945.⁵³ Since article 51 was added

⁴⁸ See U.N. Doc. S/PV 2677, at 4 (1986) (remarks by the representative of Qatar in the security Council debates).

⁴⁹ For a discussion of the Security Council practice in this regard, see Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1 (1972).

⁵⁰ I. BROWNIE, *supra* note 25, at 275.

⁵¹ L. HENKIN, *HOW NATIONS BEHAVE* 141 (2nd ed. 1979).

⁵² D.W. BOWETT, *supra* note 25, at 188-192. See also Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 134-36 (1986).

⁵³ The decision of the International Military Tribunal at Nuremberg rejected the claim that Germany's invasion of Norway in 1940 was justifiable as anticipatory self-defence, but impliedly accepted

to the Charter almost as an afterthought to reassure some states that the right of self-defence was not being removed, it is unlikely that there was any intention on the part of the founding members of the United Nations to restrict the scope of this customary law right.⁵⁴ The fact that article 51 specifically provides that "nothing in the present Charter shall impair the inherent right of self-defence . . ."⁵⁵ reinforces this conclusion.

Secondly, there is substantial support in state practice since 1945 for this interpretation of article 51. When Israel resorted to force in the 1967 Six Day War, it was condemned neither by the Security Council nor the General Assembly, despite the fact that it is difficult to analyse the Israeli action as lawful unless a right of anticipatory self-defence exists.⁵⁶ The U.S.S.R., originally one of the most prominent opponents of anticipatory self-defence, claimed that it was acting in self-defence when it intervened in Czechoslovakia in 1968 and Afghanistan in 1979.⁵⁷ In the latter case it is difficult and in the former impossible to point to an armed attack which had already occurred, so that the U.S.S.R. appears to have embraced the theory that article 51 leaves intact a right of anticipatory self-defence.⁵⁸ Even in cases in which the Security Council has condemned a use of force which the state undertaking it has claimed as anticipatory self-defence, the debates suggest that the members of the Council were rejecting not the concept of anticipatory self-defence, but the argument that the action in question fell within the limits of that concept.⁵⁹

Finally, there are strong arguments of policy and common sense in favour of an interpretation of article 51 which preserves a right of anticipatory self-defence.

that a right of anticipatory self-defence still existed. *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 205 (1947) [hereinafter cited as *Judicial Decisions*]. Similarly, the International Military Tribunal for the Far East took the view that the declaration of war by the Netherlands in anticipation of an attack by Japan did not alter the character of the war as an act of aggression by Japan. JUDGMENT, 1948, CMD. No. 6964, at 28-35. See also 2 J. B. MOORE, A DIGEST OF INTERNATIONAL LAW, § 217, at 412 (1906) (discussing the destruction of the steamer the *Caroline*).

⁵⁴ See *supra* note 36, and D. W. BOWETT, *supra* note 25, at 269.

⁵⁵ U.N. CHARTER, art. 51.

⁵⁶ A draft resolution which would have denounced Israel as the aggressor secured only four votes in the Security Council. U.N. Doc. S/PV 1360 (1967). In the General Assembly a draft resolution which would have condemned Israel was defeated by 71 votes to 22 with 27 abstentions, U.N. Doc. A/L 521 (1967), reprinted in 6 INT'L LEG. MATERIALS 840 (1967). O'Brien describes the Israeli action as a "model case for anticipatory self-defence", W.V. O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 133 (1981).

⁵⁷ See Bowett, *supra* note 37, at 52 n.8.

⁵⁸ The present writer, however, does not believe that the claim of anticipatory self-defence was in fact justified in either Czechoslovakia or Afghanistan. In the Czechoslovak case, in particular, the suggestion that an armed attack was imminent is fanciful.

⁵⁹ See, e.g., the discussion of the legality of the Israeli attack upon Iraq's nuclear reactor. U.N. Doc. S/PV 2280 (1981), reprinted in 20 INT'L LEGAL MATERIALS 963 (1981). The International Court of Justice in its decision in the *Case Concerning Activities in and against Nicaragua* expressly left open the question whether states enjoyed a right of anticipatory self-defence, *Activities in and against Nicaragua*, 1986 I.C.J., at 103.

Even if the Security Council functioned as an effective mechanism for the enforcement of collective security, it would be unrealistic to expect a state faced with an imminent armed attack to wait for that attack to be launched before resorting to force in self-defence. Given that there is no real prospect of the Security Council acting to protect the victim of an attack, the restrictive view of self-defence becomes even less realistic. Arguments in support of the need for international law to recognise a right of anticipatory self-defence are frequently discussed in the context of nuclear warfare, on the basis that a first strike, conducted in a matter of minutes, might well be decisive.⁶⁰ These arguments, if anything, are stronger in relation to terrorist attacks. Each of these attacks is usually completed before the State attacked has an opportunity to exercise its right of self-defence. The Security Council's rejection of the "accumulation of events" theory⁶¹ means that the state which is the victim of these attacks would be denied virtually any right of response if self-defence were confined to cases in which an armed attack had already commenced but had not yet terminated and did not include a right to use force to prevent a threatened terrorist attack.

However, while international law continues to permit a state to use force in anticipatory self-defence, it appears to set strict limits to that right. The traditional statement of these limits was given by United States Secretary of State Webster in his note to the British Government concerning the *Caroline* case.⁶² Webster stated that force might be used to meet a threatened attack only if the threat was "instant, overwhelming, leaving no choice of means and no moment for deliberation."⁶³ Although this test has been criticised as antiquated and "more rhetorical than substantive,"⁶⁴ it has proved remarkably durable. The International Military Tribunal at Nuremberg relied upon the *Caroline* test in deciding that the German invasion of Norway could not be justified as anticipatory self-defence.⁶⁵ More recently, in the Security Council debates on Israel's air strike against Iraq's nuclear reactor, the representatives of several states made reference to Webster's formula in support of their argument that any threat posed to Israel by the reactor was too far in the future to justify Israel in using force.⁶⁶ More recent attempts to define the limits of anticipatory self-defence do not differ significantly from the *Caroline* test.⁶⁷ Modern international law, it would appear, permits the use of force against an attack expected in the immediate future but not the use of force to mount a pre-emptive strike against a threat which is more remote.⁶⁸

⁶⁰ See, e.g., L. HENKIN, *supra* note 51, at 142.

⁶¹ See Bowett, *supra* note 49.

⁶² See 2 J.B. MOORE, *supra* note 53, § 217.

⁶³ *Id.* at 412.

⁶⁴ W.V. O'BRIEN, *supra* note 56, at 133.

⁶⁵ *Judicial Decisions*, *supra* note 53, at 207.

⁶⁶ U.N. Doc. S/PV 2280.

⁶⁷ See, e.g., W.V. O'BRIEN, *supra* note 56, at 133.

⁶⁸ Schachter, *supra* note 52, at 136.

That the Security Council applies this somewhat stringent standard in cases in which a state has resorted to force in response to terrorist or guerrilla attacks is shown by the Council's treatment of the British plea of self-defence in the Harib Fort incident in 1964.⁶⁹ In that case, the United Kingdom had bombed a fort in the Yemen which it claimed had been used as a base for mounting a series of raids into the territory of the South Arabian Federation (a British protectorate). The United Kingdom argued that these raids showed that the fort was being used for attacks on Federation territory and maintained that there was every reason to believe that such raids would continue. It therefore claimed that, seen against the background of accumulated past attacks, the bombing was a legitimate measure of anticipatory self-defence against attacks which were likely to take place at some future date. The Security Council, however, rejected this wider view of anticipatory self-defence against attacks which were not imminent and condemned the British action as an illegal reprisal.⁷⁰ The Council has taken a similar stance in relation to Israeli claims based upon the same "accumulation of events" theory.⁷¹

It would not be enough, therefore, that the United States anticipated further attacks by Libya at some unspecified future date. To remain within the limits of self-defence, as they have been interpreted by the Security Council, the air strike against Libya must have been a response to a threat of terrorist attacks against the United States which could reasonably have been described as imminent by April 14, 1986.

B. *The Requirement of Necessity*

The use of force is lawful self-defence only when it is necessary to use force.⁷² That will not be the case if the state concerned can protect itself as effectively by other means. It was on this ground that much of the criticism of the air strike against Libya was based. It was argued that the United States could have protected itself against the planned Libyan campaign by the adoption of political and economic sanctions, improved security at obvious targets like embassies and concerted action through the United Nations.⁷³

To a large extent, this criticism misses the point in an analysis of the self-defence argument. While it might be that economic measures, improved security and action through the United Nations would have provided more effective protection against Libyan terrorism in the long term, the question is whether they would have been as effective as the air strike in preventing an imminent terrorist onslaught. Opin-

⁶⁹ 19 U.N. SCOR (1106-1111th mtgs.) (1964).

⁷⁰ S.C. Res. 188, U.N. Doc. S/5649 (1964). This proposal was adopted by 9 votes to 0 with 2 abstentions.

⁷¹ See Bowett, *supra* note 49, at 7. See also *infra* Section IV, A.

⁷² See Webster's formula in the *Caroline* case, 2 J. B. MOORE, *supra* note 53, at 412; D.W. BOWETT, *supra* note 25, at 269.

⁷³ See, e.g., Statement by the Rt. Hon. Neil Kinnock, *supra* note 12, at 882.

ions differ as to the effectiveness of economic sanctions and United Nations' action, but even their most enthusiastic proponents would be unlikely to argue that such measures would work quickly enough to prevent an attack planned for the immediate future. If there was no threat of an imminent attack and the United States was merely trying to counter attacks which it considered likely to occur at some unspecified time in the future, the raid would not have been a lawful exercise of the right of self-defence anyway, for the reasons explained in the previous section.

C. *The Requirement of Proportionality*

For the use of force to constitute a lawful exercise of the right of self-defence, it is also necessary that the degree of force used should be reasonably proportionate.⁷⁴ This requirement, described by Professor Brownlie as "innate in any genuine concept of self-defence,"⁷⁵ means that it is not enough for the state which claims to be acting in self-defence to show that it has suffered an armed attack or is otherwise entitled to use force in self-defence, it must show that the degree of force which it employs is not excessive. In the case of the air strike against Libya, that prompts the question: "excessive" in relation to what? The use of force in self-defence must be proportionate to the wrongful act to which it is a response.⁷⁶ In the present case, therefore, proportionality must be assessed in relation to those threatened attacks which were believed to be imminent at the time of the raid, rather than in relation to Libyan terrorist activity, past and future, taken as a whole.

The United States administration has refused to make public the details of the terrorist attacks which it claimed Libya was about to carry out.⁷⁷ While this refusal is perfectly understandable in view of the need to protect intelligence sources, it makes it impossible to determine whether the air strike satisfied the requirement of proportionality. Nevertheless, it can be noted that the test set out in the preceding paragraph is a strict one. To satisfy it, the United States would need to have had evidence that Libya was about to mount an attack upon United States nationals and targets of such ferocity that a highly destructive air strike which caused heavy casualties could reasonably be regarded as a proportionate response.

D. *Conclusions with Regard to Self-Defence*

From the foregoing discussion, it appears that the air strike against Libya would be justifiable as an exercise of the right of self-defence if, but only if, it satisfied the following conditions:

⁷⁴ D.W. BOWETT, *supra* note 25, at 269.

⁷⁵ I. BROWNLIE, *supra* note 25, at 434.

⁷⁶ *Id.*

⁷⁷ Ambassador Walters' statements to the Security Council contain only the briefest outline of the evidence which the United States claimed to possess. See statement by U.S. Ambassador Walters, *supra* note 3.

(1) that the air strike was carried out in order to prevent a Libyan campaign of terrorist attacks against United States nationals and targets, which there was good reason to believe was imminent, in the sense that the campaign was to be launched in the immediate future;

(2) that no other effective means of preventing this terrorist campaign were available to the United States in the necessarily very short period before the terrorist attacks took place; and

(3) that the air strike represented a use of force reasonably proportionate to the threat which it was designed to meet.⁷⁸

In addition, it is suggested that the raid would fall within the limits of self-defence only if, as the United States administration claimed, it was directed against specific terrorist targets which United States intelligence sources had identified.⁷⁹ If the real objective of the air attack was the civilian population of the two Libyan cities, whose morale and support for the foreign policy of the Libyan Government it was hoped to undermine, it is very difficult to see how the attack could be regarded as meeting the conditions of self-defence.⁸⁰ It would not satisfy the requirement of necessity since the effect of such an attack would be unlikely to be felt in terms of a change in Libyan foreign policy in time to prevent a terrorist attack which must already have been imminent at the time of the air strike if the first requirement of self-defence was to be satisfied.⁸¹ Such an attack would look more like an act of reprisal, undertaken as a general deterrent to future action, than a limited measure of self-defence.⁸² Moreover, it is doubtful whether an attack against the civilian population of a state, designed to spread terror, could ever be legitimate under modern international law.⁸³

Similarly, it is suggested that if the real object of the raid was to kill Colonel Qadhafi,⁸⁴ the operation would fall outside the limits of self-defence, at least if he was the only real target and the rest of the raid was intended merely to act as a cover for an attempt on his life. The assassination of a head of state or government has long been regarded as an illegitimate act of warfare.⁸⁵ More recently,

⁷⁸ For discussion of a more expansive view of self-defence, see *infra* Section V.

⁷⁹ See *supra* notes 15-17 and accompanying text.

⁸⁰ See *supra* note 20 and accompanying text.

⁸¹ See *supra* notes 62-73 and accompanying text.

⁸² The fact that an act is aimed at civilian rather than military targets is identified by Professor Bowett as one of the factors which is likely to attract Security Council condemnation of the act as an unlawful reprisal; Bowett, *supra* note 49, at 12.

⁸³ Article 51(2) of Protocol I, 1977, to the Geneva Conventions of 1949 prohibits attacks "the primary purpose of which is to spread terror among the civilian population" Protocol I, 1977, to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts, art. 51(2), 1977, CMND., No. 6927. Although the United States has decided not to ratify the Protocol, the passage quoted probably reflects customary international law.

⁸⁴ See *supra* notes 21-22 and accompanying text.

⁸⁵ 2 H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 430 (7th ed. 1952).

international agreements have accorded a special protected status to heads of state and government, which suggests that even when a head of state is personally responsible for acts of aggression, assassination would not be a legitimate response.⁸⁶ On the other hand, Colonel Qadhafi lived in a barracks which, the United States would presumably maintain, was one of the centres from which the threatened terrorist offensive was being directed. Provided that the other requirements for a lawful exercise of the right of self-defence were met, there is no reason why the barracks should not have been a legitimate target even though that would have carried the risk that Colonel Qadhafi would be one of the casualties. Only if the whole attack was mounted in order to assassinate the Colonel would the legality of the operation be questioned.

The conditions which must be met if the air attack is to be regarded as a lawful use of force in self-defence are stringent ones. While it may be that the United States Government possessed such compelling evidence of an immediate and large-scale terrorist offensive by Libya that the air strike met those conditions, there is also a distinct possibility that the evidence fell short of what was required. In particular, it may be that the evidence disclosed the likelihood of an attack but one which was insufficiently proximate, in point of time, to be regarded as imminent and thus not giving rise to a right to use force by way of anticipatory self-defence. If the United States acted in order to forestall an attack which it expected to take place at some time in, let us say, the next few months, that action would appear not to meet the criteria for a lawful exercise of the right of self-defence as they have generally been applied by the Security Council. However, since many people would regard a use of force to preempt such an attack as justifiable in political and moral terms, the next two sections of this article will examine whether there is any alternative justification for the use of force by a state which might be advanced to prevent the raid from being regarded as unlawful even if it failed to meet the orthodox view of the conditions of self-defence.

IV. ALTERNATIVE JUSTIFICATIONS FOR THE AIR STRIKE

A. *Reprisals*

Traditional international law permitted a state to use force as a reprisal for a prior wrong committed against it.⁸⁷ Whereas the purpose of self-defence was protection against an attack which was taking place or was about to take place, the purpose of reprisals was to secure retribution for a past wrong. Nevertheless, as

⁸⁶ See, e.g., Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8534.

⁸⁷ 2 H. LAUTERPACH, *supra* note 85, at 135. Sir Hersch Lauterpacht defined reprisals as "such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international . . . delinquency." *Id.* at 136. See also Tucker, *Reprisals and Self-Defense: the Customary Law*, 66 AM. J. INT'L L. 586 (1972); Taulbee & Anderson, *Reprisal Redux*, 16 CASE W. RES. J. INT'L L. 309 (1984).

a number of writers have pointed out,⁸⁸ the dividing line between self-defence and reprisals was a fine one, especially when one state employed regular forces in response to a series of attacks by irregulars. The traditional requirements for a lawful reprisal were stated in the award made by the tribunal in the *Naulilaa* arbitration;⁸⁹ (1) There must have been a prior international wrong committed by the target state against the state taking reprisals; (2) the injured state must have been unable to secure reparation by peaceful means;⁹⁰ and (3) the reprisal undertaken had to be reasonably proportionate to the initial wrong. To this list it might now be necessary to add a fourth condition, namely that the object of the reprisal should not be simply the punishment of the offending state but an attempt to put an end to a continuing wrong, to secure reparation, or perhaps, to deter repetition of the wrongful act by the offending state.⁹¹

It will be immediately apparent that it would be easier to justify the air attack against Libya as a reprisal than as self-defence. There would be no need to show that further terrorist attacks by Libya were imminent. The air attack could be presented as a response to the terrorist incidents, such as the Berlin discotheque bombing, which Libya had already committed against the United States. Moreover, proportionality could be assessed against actual, rather than anticipated, attacks and against the totality of all the recent attacks against the United States for which Libya was responsible, rather than against a single act or anticipated act.⁹²

While the United States Government itself made no attempt to justify its action as a reprisal, others certainly viewed it in this light. Lloyd Cutler, a former special counsel to President Carter, defended the United States action in these terms, asserting that:

The American attacks on Tripoli and Benghazi may be open to legitimate criticism, both as to strategic wisdom and tactical choice of urban targets, but there can be no doubt of their legality under international law.

The Government of Libya was directly responsible for a deliberate and illegal attack on American military personnel in Berlin Any nation whose armed forces are attacked by another nation in violation of the UN Charter has the legal right to take a proportionate military reprisal.⁹³

⁸⁸ See Tucker, *supra* note 87; Bowett, *supra* note 49, at 3.

⁸⁹ The *Naulilaa* Case, 2 R. Int'l. Arb. Awards 1011 (1928).

⁹⁰ This requirement features in the *Naulilaa* award but the arbitrators in that case cited no previous authority in support of this requirement and it has been doubted by Professor Bowett. Bowett, *supra* note 49, at 3 n.5.

⁹¹ See Case Concerning the Air Services Agreement of 27 March 1946 between the United States of America and France, 54 I.L.R. 303 (1978) (award of the *ad hoc* arbitral tribunal). Although this case concerned counter-measures or reprisals not involving the use of force, it is unlikely that any right of armed reprisal which might still exist would be more extensive than the right to take reprisals not involving the use of force.

⁹² There is no indication in the practice regarding reprisals prior to 1945 that reprisals had to be proportionate to a single incident rather than a sequence of such incidents.

⁹³ Letter, *The Times* (London), May 31, 1986, at 9, col. 3.

This conviction that reprisals involving the use of force are lawful is somewhat surprising. It can be reconciled with the terms of article 2(4) of the United Nations Charter only if one takes the view that such reprisals are not inconsistent with the purposes of the United Nations. Yet there is every indication that while the Charter intended to leave to states the right to take measures to defend themselves, the power of retribution was reserved to the Security Council.⁹⁴ It can, of course, be argued that the failure of the Security Council to fulfil the role intended by the draftsmen of the Charter requires reinterpretation of provisions like article 2(4).⁹⁵ However, the international community, in its pronouncements on the subject in more recent years, is far from showing support for a revival of a right to take military reprisals. In fact, the international community has unambiguously rejected the idea. Thus, the United Nations General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States provides that "[s]tates have a duty to refrain from acts of reprisal involving the use of force."⁹⁶ Similarly, in its resolution on the Harib Fort incident, the Security Council condemned "reprisals as incompatible with the purposes and principles of the United Nations."⁹⁷

Nevertheless, it has been persuasively argued that the prohibition on reprisals suffers from a "credibility gap"⁹⁸ in that, while all reprisals involving the use of force are illegal in theory, in practice a state can hope to escape censure for taking reprisals provided that its action satisfies certain criteria roughly corresponding to the traditional requirements for reprisals.⁹⁹

While this argument has considerable force, it is important to notice its limitations. To say that states "get away" with reprisals is not the same as saying that

⁹⁴ The text of Article 1 of the Charter, listing the purposes of the United Nations, strongly suggests that this was the intention of the draftsman:

The purpose of the United Nations is:

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

U.N. CHARTER art. 1. In addition, even the right of self-defence in Article 51 was seen as a temporary measure, to be relied upon only until the Security Council could adopt the necessary measures.

⁹⁵ See, e.g., J. STONE, *supra* note 24, at 96. "It cannot be doubted that a total outlawry of armed reprisals, such as the drafters of the Charter intended, presupposed a degree of community cohesiveness and, with it, a capacity for collective action to suppress any resort to unlawful force which has simply not been achieved." Bowett, *supra* note 49, at 2.

⁹⁶ G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121. U.N. Doc. A/8028 (1970).

⁹⁷ S.C. Res. 188, *supra* note 70.

⁹⁸ Bowett, *supra* note 49, at 1.

⁹⁹ See also Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969).

armed reprisals have become lawful once again. For a new principle of international law permitting recourse to such reprisals to have emerged since the entry into force of the Charter, there would have to be consistent state practice in support of such a principle and clear evidence of *opinio iuris* on the part of states.¹⁰⁰ Yet, far from there being any indication of a belief on the part of states that there is a right to take reprisals, individual states generally defend their actions on other grounds, such as self-defence, and the international community as a whole has repeatedly rejected the idea that there is such a right.¹⁰¹ As Professor Schachter has put it:

When a principle is repeatedly and unanimously declared to be a basic legal rule from which no derogation is allowed, even numerous violations do not become state practice constitutive of a new rule. Contrary usage alone should not terminate a principle that states have strongly affirmed to be a condition necessary for order.¹⁰²

It is difficult, therefore, to sustain the argument that the air raid against Libya was a *lawful* reprisal. The most that could be said is that the United States' action fell within broad limits which, in the past, the international community appears to have taken into account in deciding whether or not to condemn a state for resorting to armed reprisals; in other words, the United States did no more than other states have got away with doing in the past. It is not surprising, therefore, that most of those who have sought to justify the United States' action have attempted to do so by relying on principles other than a supposed right to take reprisals.

Nevertheless, the United States' action against Libya may have important repercussions for the development of the law relating to reprisals. If the air strike does not fall within the bounds of lawful self-defence but comes to be seen as one more instance of a "tolerable" reprisal, the credibility gap which Professor Bowett identified¹⁰³ in the international law prohibition on reprisals will become still wider. The argument that constant violations will not give rise to a new rule so long as the international community constantly reiterates the importance of the old prohibition begins to lose conviction once practice and theory become utterly divorced from one another. At that point, international law must either adapt to the new reality or face the prospect that the prohibition on reprisals, and with it, perhaps, much more of the general prohibition on the use of force, will become a dead letter, devoid of practical significance.¹⁰⁴

¹⁰⁰ Barsotti, *Armed Reprisals* in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 79 (A. Cassese ed. 1986).

¹⁰¹ See *supra* notes 94-97 and accompanying text.

¹⁰² N. RONZITTI, *supra* note 41, at 131.

¹⁰³ Bowett, *supra* note 49.

¹⁰⁴ Combacau, *supra* note 25, at 32. He maintains that this has already occurred, while Professor Bowett comments that "the law on reprisals is, because of its divorce from actual practice, rapidly degenerating to a stage at which its normative character is in question." Bowett, *supra* note 49, at 2. *But see* Barsotti, *supra* note 100.

B. *Self-Help and the Enforcement of International Law*

Another ground on which one might seek to justify the action against Libya is a right of states to use force to enforce international law.¹⁰⁵ It has been argued that since the United Nations Security Council has failed to fulfil the enforcement role intended for it, states retain a right to use force in order to enforce international law in cases in which a violation of international law infringes their rights and possibly even to use force on behalf of the international community as a whole in cases in which there is no direct infringement of the state's own rights.¹⁰⁶ In the first case, the state would be using force by way of self-help. In the second, the state which employed force would be acting as a kind of vigilante, enforcing the law for the benefit of the community as a whole.

The United States' action against Libya could be presented as falling within either of these categories. It has already been shown that the United States and many other western states claim to have evidence of Libyan governmental participation in terrorist activities which would amount to serious violations of international law against a large number of states.¹⁰⁷ Since many of these violations were directed against the United States, it seems likely that if international law permits the use of force by way of self-help—outside the confines of self-defence—the United States was entitled to employ force in dealing with Libyan violations of international law. Similarly, if states are permitted to use force in order to enforce the law for the benefit of the international community as a whole, the Libyan case would probably fall within the scope of such a right.

However, there is no indication that states enjoy any general right to enforce the law by military means. In the *Corfu Channel Case*,¹⁰⁸ the United Kingdom argued that, in the absence of any international machinery for enforcing international law, it was entitled to take forcible measures to clear the Corfu Channel of mines and obtain the evidence needed for its claim against Albania regarding the mining of the channel. The International Court of Justice rejected this argument in a famous passage in which it condemned the idea that states enjoyed a licence to use force for the assertion of their rights as "the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law."¹⁰⁹ Similarly, in the Suez crisis of 1956, the claim advanced by the United Kingdom and France that the two states were entitled to use force on behalf of the international community to protect the Suez Canal was emphatically rejected by most states.¹¹⁰

¹⁰⁵ See I. BROWNIE, *supra* note 25, at 281-308.

¹⁰⁶ See, e.g., J. STONE, *supra* note 24, at 92-133.

¹⁰⁷ See *supra* notes 4-12 and 34-35 and the accompanying text.

¹⁰⁸ *Corfu Channel Case (U.K. v. Alb.)* 1949 I.C.J. 4.

¹⁰⁹ *Id.* at 35.

¹¹⁰ See R. BOWIE, *SUEZ* 1956 (1974).

It can be maintained that the defects in international organization have grown considerably worse in the years since the Corfu Channel and Suez disputes, so that the pragmatic arguments in favour of the unilateral use of force by way of self-help or law enforcement are very much stronger now than they were then. Nevertheless, there is no indication that the international community is any readier to accept those arguments today. Self-defence and reprisals are both forms of self-help. Yet, as has been shown,¹¹¹ the Security Council and the General Assembly have repeatedly rejected the idea that there is a right to take reprisals involving the use of force. The Security Council has tended to interpret the undoubted right of self-defence in a relatively restrictive fashion. If the international community denies the existence of a right to take military reprisals—even if it sometimes condones them in practice—it is difficult to see how it could accept the existence of a right to use force by way of self-help that would be wider than a doctrine of reprisals, nor is there any sign that it has done so. There is neither United Nations practice which would support the existence of such a right, nor do states appear to advance self-help as a justification for their actions.¹¹²

Moreover, the idea that states might enjoy a right to use force in the enforcement of international law for the benefit of the community, rather than in defence of their own rights, has no support in state practice or United Nations pronouncements. Even in cases such as the Suez crisis, when such a right has been advanced by the state resorting to force, it has only been a subsidiary argument, for the state's own rights were also affected.¹¹³ The thirty years since the Suez crisis have seen no persistent pattern of claims by disinterested states to act as "international policemen" and there is no reason to believe that any such claims would be accepted.¹¹⁴ The experience of vigilante action to enforce the law in a national context has seldom been a happy one and it is unlikely that international society would fare any better in this regard.

V. A WIDER VIEW OF SELF-DEFENCE

It seems, therefore, that the United States administration was correct in assuming that if the action against Libya was to be defended as lawful in international law,

¹¹¹ See *supra* notes 94-104 and accompanying text.

¹¹² Since the Suez crisis in 1956, states have generally defended their actions by reference to the right of self-defence.

¹¹³ Thus, action on behalf of the international community was only one of a number of justifications advanced by the United Kingdom in the Suez crisis. See Statement by the Lord Chancellor, Lord Kilmuir, 199 PARL. DEB., H.L., (5th ser.) 1348-59 (1956).

¹¹⁴ One of the few occasions on which a right to act as an international policeman is sometimes claimed is in cases of humanitarian intervention. See, e.g., N. RONZITTI, *supra* note 41; Verwey, *Humanitarian Intervention in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 57 (A. Cassese ed. 1986). However, despite the extensive debate amongst writers on the subject, there is very little state practice in support of a right of humanitarian intervention, states generally seeking to justify their interventions on other grounds, such as self-defence.

it had to be on the basis of self-defence. It has been shown,¹¹⁵ however, that the right of self-defence, as generally interpreted by the Security Council, would justify the air strike only if it satisfied certain stringent conditions, whereas there might be policy arguments for holding the attack to have been lawful even if it did not meet all these conditions. In particular, there are two respects in which the air attack might fail to meet the criteria apparently adopted by the Security Council when those criteria may need to be reconsidered.

First, the United States may well have had evidence of Libyan actions which were likely to occur too far in the future to satisfy the requirement of an imminent attack.¹¹⁶ Second, the United States' action might have been regarded as a proportionate measure if balanced against the totality of recent Libyan terrorist attacks and attacks planned in the reasonably near future. However, it appears that the proportionality of the United States' action has to be assessed only against the imminent attack which it was designed to forestall, so that past attacks and attacks too far in the future to qualify as imminent have to be disregarded in making this assessment.¹¹⁷

In each case the problem stems from the Security Council's rejection of what Professor Bowett has referred to as the "accumulation of events theory."¹¹³ Under the terms of this theory, the right of a state confronted with a series of irregular or terrorist attacks, each one of which, taken in isolation, would be a relatively minor use of force but all of which emanate from the same state, to take defensive action would have to be considered in the light of the whole of these attacks, taken together. Provided that these "pinprick" attacks formed a reasonably coherent pattern and were not sporadic incidents separated by long periods of time, they would be treated, in effect, as a continuing attack upon the victim state. The consequence of adopting this approach is that there would be no need for the state which had just been the victim of these attacks to show that another attack was imminent before it could react by using force in self-defence. It would be sufficient that there was reason to believe that further attacks were likely. In addition, the proportionality of the response would be assessed against the actual and anticipated attacks taken as a whole, rather than against a single imminent threat.

The Security Council has tended to reject this kind of argument when it has been raised, for example by the United Kingdom in the Harib Fort incident¹¹⁴ and by Israel on numerous occasions.¹¹⁵ The Council's approach has been described as "somewhat unrealistic" by Bowett, who points out that "in the face of continuing guerrilla harassment, it is notoriously difficult to maintain an adequate defensive system which relies upon meeting attacks incident by incident."¹¹⁶ The difficulty is even greater when a state is faced with modern terrorist attacks rather than traditional trans-frontier raids.

¹¹⁵ See *supra* text accompanying notes 23-86.

¹¹⁶ See *supra* text accompanying notes 62-71.

If the Security Council has rejected the accumulation of events theory, there is every indication that it continues to be relied upon by states.¹¹⁷ Indeed, there are indications in some of the speeches to the Security Council by the United States representative that the United States was relying upon this approach to self-defence in the present case. After referring to the Berlin bombing, Ambassador Walters said:

In the light of this reprehensible act of violence—only the latest in an ongoing pattern of attacks by Libya—and clear evidence that Libya is planning a multitude of future attacks, the United States was compelled to exercise its right of self-defense. The United States hopes that this action will discourage Libyan terrorist attacks in the future.¹²³

Since states appear to rely upon this approach to self-defence and since it is suggested that it accords more with the reality of international relations in an age in which armed attacks are as likely to take the form of terrorist “pinprick” attacks as conventional invasions or bombardment, one must question whether the Security Council’s rejection of the accumulation of events approach still represents international law, or whether it ought to do so. It is, of course, true that article 51 of the United Nations Charter confers upon the Security Council the primary responsibility for determining whether a particular use of force falls within the scope of self-defence. However, the Security Council is not a court and it is subject to no doctrine of binding precedent. Moreover, a combination of political factors, of which the veto is only one, means that the Security Council is unable to reach a decision in many cases so that its decisions reflect only part of the picture of claims of self-defence. It is suggested that the mere fact that the Council, in the past, has tended to characterize claims of self-defence based upon an accumulation of events as reprisals and therefore as unlawful—if it was able to characterize them at all—does not preclude the possibility that the accumulation of events theory has become part of international law as a result of its continual application in practice by states. Also, it does not prevent the Security Council from adopting this theory in future cases.

Even if the accumulation of events theory has not yet come to represent the law, the claims of self-defence based upon accumulation of events reflect a trend in the development of international law to which the United States’ action against Libya has not contributed. Faced with a series of terrorist attacks, organized and directed by another state, which cannot be met incident by incident, any state which has the capacity to do so is likely to employ force if it believes that by doing so it can put a stop to these attacks. The failure of the international community to

¹¹⁷ *Id.*

¹¹⁸ Bowett, *supra* note 49, at 5.

¹¹⁹ See *supra* text accompanying notes 69-70.

¹²⁰ Bowett, *supra* note 49.

¹²¹ *Id.* at 9.

¹²² *Id.* at 10.

¹²³ Statement by U.S. Ambassador Walters, *supra* note 3, at 19.

develop any coherent alternatives to the use of force in situations of this kind makes recourse to force all the more likely. In those circumstances, it is better that international law should adapt to take account of state practice than continue to set a standard which is ignored in practice. Moreover, to embrace this somewhat wider approach to the right of self-defence is both easier and more desirable than to resurrect a right to take reprisals. Unlike a recognition of a right of military reprisal, acceptance of the accumulation of events theory involves no great volte-face on the part of international society, for there are no resounding repudiations of the theory enshrined in declarations of principle comparable to the rejections of armed reprisals.¹²⁴ In addition, while the accumulation of events approach brings self-defence and reprisals closer together, the wider view of self-defence stresses the protective, rather than the retributive, element, to a greater extent than would a doctrine of reprisals.

Finally, acceptance of the accumulation of events approach to self-defence might help to close the "credibility gap" in other areas of the law relating to the use of force. A more realistic approach to self-defence would remove the need to tolerate certain kinds of armed reprisal and allow the Security Council to adopt a stricter view in those cases where it did characterise a state's acts as reprisals rather than self-defence.

VI. THE IMPORTANCE OF DETERMINING WHETHER THE AIR ATTACK WAS LAWFUL

It has long been fashionable in certain circles to argue that when a state is faced with a threat to its fundamental national interests, international law becomes unimportant since the state will, indeed must, take whatever action is necessary to safeguard those interests whether or not that action is legitimate under international law. As Dean Acheson put it in speaking of the Cuban missile crisis:

The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept the destruction of our way of life. . . . The survival of states is not a matter of law.¹²⁵

While this "realist" approach is far from new, it continues to strike a chord with many commentators.¹²⁶ It is therefore necessary to consider whether it really matters if the United States' action against Libya was lawful.

The reasons for rejecting the approach espoused by Acheson and others who

¹²⁴ See *supra* text accompanying notes 94-97.

¹²⁵ D. Acheson; *Remarks made at the meeting concerning the Cuban Quarantine*, 57 PROC. OF THE AM. SOC'Y OF INT'L L. 14, (1963).

¹²⁶ See, e.g., Will, *The Perils of Legality*, NEWSWEEK 84 (Feb. 27, 1984) (an example of the press espousal of Acheson's views). For a more considered exposition of the 'realist' approach, see H. MORGENTHAU, *POLITICS AMONG NATIONS* (5th ed. 1973).

deny the relevance of international law in times of crisis are many and varied,¹²⁷ but three are particularly significant. First, the notion that international law has no bearing on a state's protection of its fundamental interests has not been reflected in the practice of states. The United Nations Charter, the judgment of the International Military Tribunal at the Nuremberg trials and a host of treaties, General Assembly and Security Council resolutions, and examples of state practice bear witness to the existence of rules of international law which govern the right of states to use force even in the face of a threat to their survival.¹²⁸ If governments believe that they are free to do as they please, without regard to international law, when faced with threats to their fundamental interests, they do not explain their actions in those terms.

Of course, it is possible that governments attempt to justify their actions by reference to international law either because they are not aware of the inherent limitations of that law, or because they feel cynically obliged to dress up their actions in terms of a legal system which, in times of crisis, they ignore in practice. The first of these explanations—which amounts to saying that governments are unaware of a truth that has been vouchsafed only to a few realist commentators upon international affairs—seems most implausible. The second explanation, that states refer to international law only by way of justification after the event and pay little or no heed to it in asking decisions on matters of fundamental importance, has rather more of the ring of truth about it. Only the naive would imagine that all states habitually take legal considerations into account before deciding to use force. However, the fact that some states have on occasion referred to international law only by way of cynical justification after force has been employed does not mean that all, or even a majority of states behave in that way. There is abundant evidence, for example, that legal considerations played an important part in the deliberations of the United States administration in the Cuban missile crisis, notwithstanding Acheson's views.¹²⁹

First, even if international law is sometimes employed merely to rationalize and defend decisions taken for purely pragmatic reasons, that does not purge it of all significance. The fact that states feel the need to justify their actions by reference to international law reflects an awareness that there is a price to pay in terms of international support and prestige if a state is seen to ignore the basic norms of the international legal system.¹³⁰ Legal considerations may well influence the attitude of other states towards a particular use of force. In a democratic country, the government may well be unable to command public support for its actions if it is perceived to be acting with a total disregard for international law. In addi-

¹²⁷ For a critique of the realist viewpoint based upon a standpoint somewhat different from that of the present writer, see F. BOYLE, *WORLD POLITICS THROUGH INTERNATIONAL LAW* (1985).

¹²⁸ See *supra* text cited in parts III, IV, and V of this Article.

¹²⁹ See A. CHAYES, *THE CUBAN MISSILE CRISIS* (1974).

¹³⁰ Schachter, *supra* note 52, at 123.

tion, even a cynical use of international law may rebound upon the state which employs it, since that state may later find that it is trapped by its own explanation of its reasons for acting.¹³¹

Second, if states are less than scrupulous in their observance of the rules of international law regarding the use of force, it would be going too far to say that those rules, *as a whole*, have become a dead letter. The basic core of the prohibition in article 2(4), that force is no longer a legitimate instrument of national policy or a "continuation of politics by other means"¹³² continues to command overwhelming support in the international community.¹³³ This results in states being prepared to condemn another state for employing force in a dispute, even though they would take that state's part in relation to the underlying dispute.¹³⁴ If some aspects of the rules on the use of force appear Utopian, it is worth remembering that the main prohibition on the aggressive use of force is the product not of academic debate but of the experience of two world wars.

Finally, the realist approach to the use of force appears to assume that a state can treat rules of international law with contempt without undermining respect for its own domestic legal order. One does not have to accept the monist view that international law and national law are parts of the same legal system to wonder whether this assumption is justified. Disregard for the law has a tendency to become a habit. If individuals acting collectively as a state ignore some of the rules which regulate their action, why should not individuals acting as individuals, or as other collective groups such as ethnic minorities, religious groups, or regional secessionists not start to do the same. As Lloyd Cutler put it, in considering the argument that the United States should care less about whether its actions were lawful and more about whether those actions were justifiable in pragmatic terms:

[I]t does matter whether our actions comply with international law. It matters precisely because we are a practising democracy with both philosophical and geopolitical reasons to encourage the democratic aspirations of all peoples. Democracy cannot flourish in a lawless climate; it depends on widely accepted principles of international law for its survival.¹³⁵

It may not be easy to determine whether the United States' action against Libya complied with international law but it is important to attempt to do so. Whether

¹³¹ *Id.* Thus the argument advanced by the British and French governments that they had intervened at Suez to protect a vital international asset from the dangers created by the fighting between Israel and Egypt (an argument of doubtful validity and one which was hard to sustain on the facts) rebounded on both countries when a ceasefire was concluded between Israel and Egypt which left Israel's forces far from the Canal.

¹³² A paraphrase of Clausewitz's famous comment that "war is nothing but the continuation of politics with the admixture of other means" K. VON CLAUSEWITZ, *VOM KRIEGE* 888 (memorial ed., 1952).

¹³³ Schachter, *supra* note 52, at 119-46.

¹³⁴ Thus, a number of states which supported Argentina's claim to the Falkland Islands (Islas Malvinas) condemned the Argentine invasion of the islands in April 1982 as a breach of Article 2(4) of the United Nations Charter.

¹³⁵ Cutler, *The Right to Intervene*, 64 *FOREIGN AFF.* 96 (1985).

one likes it or not, there is a legal dimension to a state's activity, particularly the activity of a state as important as the United States. The question of whether that activity can be accommodated within the framework of the existing rules of international law is of considerable importance. If it cannot be so accommodated, it may have a significant effect upon the evolution of those rules, for example in the development of the law of self-defence, and in any event it will be quoted as a precedent by other states in the future. If it can be accommodated within the existing framework, it may have the effect of reinforcing that framework. In either event, it has an effect upon the law which cannot safely be ignored.

VII. CONCLUSION

Without having access to all the information regarding Libyan involvement in terrorism which was available to the United States, and presumably also to the British government, it is impossible to say whether the air attack upon Libya was lawful or not. Like so many earlier cases in which a state has resorted to the use of regular forces in response to a series of irregular attacks, the operation falls near the uncertain border between lawful self-defence and reprisals which are unlawful but may be condoned in practice.¹³⁶

For the operation to fall within the limits of the right of self-defence as they have generally been interpreted by the Security Council, the United States would have needed to possess information which not merely implicated Libya in past terrorist attacks upon the United States and suggested the likelihood of further such attacks but gave good reason to believe that a Libyan attack upon United States nationals or targets such as United States bases, was imminent. In addition, this imminent attack would need to have been on such a scale that the air attack against the two Libyan cities with all the attendant loss of life could reasonably be regarded as proportionate to it. Finally, to qualify as legitimate self-defence, the use of force would have to have been necessary, in the sense that no effective alternative existed for preventing that imminent attack.¹³⁷

It must, however, be questioned whether this strict test for the exercise of the right of self-defence, which takes no account of the background of terrorist acts, remains realistic today. In practice, many states seem to adopt a wider approach to self-defence which takes account of the accumulation of events and assesses the proportionality of a state's response to terrorist attacks against the totality of those attacks, rather than treating each incident separately.¹³⁸ Judged according to that standard, there is a much greater chance that the air attack against Libya would be regarded as lawful (assuming always that the United States had the necessary evidence that the Libyan Government was responsible for terrorist attacks against United States targets). Even if this wider approach to self-defence does not repre-

¹³⁶ See Bowett, *supra* note 49; Tucker, *supra* note 87.

¹³⁷ See *supra* text accompanying notes 24-86.

¹³⁸ See *supra* text accompanying notes 115-124.

sent the current state of international law—and this is open to argument—it probably reflects the direction in which the law of self-defence is evolving. For, in the absence of any effective community sanctions against state-sponsored terrorism, actions like the Libyan air strike will surely become more frequent. If such operations are to be accommodated within the framework of international law, it is suggested that the approach which allows the accumulation of events to be taken into account in self-defence offers a more satisfactory way of achieving this result than any revival of rights of self-help or reprisals which potentially, are much wider.

The Security Council debates on the air attack contribute little in this regard. Acrimonious and (because the United States felt that it could not reveal the evidence it claimed to possess of Libyan plans for future terrorist attacks) ill-informed, the debates produced little of legal significance. A draft resolution which would have condemned the United States' action secured nine votes in favour (Bulgaria, China, Congo, Ghana, Madagascar, Thailand, Trinidad and Tobago, U.S.S.R., United Arab Emirates) to five against (Australia, Denmark, France, United Kingdom, United States) with one abstention (Venezuela).¹³⁹ The resolution therefore failed to be adopted because of the negative votes of three permanent members of the Council.

The debates did not reflect the stark choice which confronts the international community in the aftermath of the air attack and the earlier terrorist incidents. Unless international law on the use of force is to become even more remote from the practice of states than is already the case, the international community must either grasp the problem of finding alternative methods of combatting terrorism organized by states or adapt its rules on the use of force to accommodate the inevitable defensive measures which those states most threatened by such terrorism will take. Sadly, there is no sign that the international community is facing up to that choice.

¹³⁹ U.N. Doc. S/PV 2682 at 43.