

## Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraq Plot to Kill George Bush

Robert F. Teplitz

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# Taking Assassination Attempts Seriously:\* Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?

*Robert F. Teplitz* \*\*

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\* My apologies to Professor Ronald Dworkin.

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## Introduction

On June 26, 1993, the United States launched twenty-three Tomahawk cruise missiles at the main headquarters of the Iraqi Intelligence Service in downtown Baghdad.<sup>1</sup> U.S. President Bill Clinton justified the military action as a legitimate act of self-defense under Article 51 of the United Nations Charter, in response to a failed Iraqi attempt to assassinate former President George Bush.<sup>2</sup> Article 51, an exception to the general prohibition on the use of force in international affairs,<sup>3</sup> states in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."<sup>4</sup> Despite strong support within the United States and among U.S. allies, critics of the attack argued that it was an illegal use of force that did not satisfy the requirements of self-defense under international law.<sup>5</sup>

This Note analyzes the legality of the U.S. action in the context of national self-defense. Part I discusses the general prohibition of the use of force in international relations, and Part II examines the customary right of self-defense. Part III discusses the limits on national self-defense imposed by Article 51 of the U.N. Charter and presents the debate surrounding the interpretation of those limits. Part IV describes the Iraqi plot to kill President Bush and the U.S. response. Part V concludes that the U.S. action was a legitimate use of force in self-defense under both customary international law and Article 51.

## I. The General Prohibition on the Use of Force

### A. The League of Nations Scheme

Throughout history, scholars and statesmen have sought to devise schemes to abolish aggression between states and establish an international com-

1. John Lancaster & Barton Gellman, *U.S. Calls Baghdad Raid a Qualified Success*, WASH. POST, June 28, 1993, at A1.

2. See, e.g., Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 29 WEEKLY COMP. PRES. DOC. 1183 (June 28, 1993) [hereinafter War Powers Resolution Letter].

3. See discussion *infra* part I.B.

4. U.N. CHARTER art. 51.

5. See discussion *infra* part IV.D.

munity of peaceful neighbors.<sup>6</sup> Although such efforts have generally failed,<sup>7</sup> the twentieth century has seen the international community make valiant attempts to accomplish that lofty goal.<sup>8</sup> The world's "first genuine attempt to outlaw war"<sup>9</sup> was the League of Nations, an international organization created by thirty-two nations after World War I.<sup>10</sup> The members of the League agreed to:

the acceptance of obligations not to resort to war, . . . the prescription of open, just and honourable relations between nations, . . . the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and . . . the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised [sic] peoples with one another.<sup>11</sup>

The Covenant of the League attempted to substitute arbitration,<sup>12</sup> mediation,<sup>13</sup> and judicial settlement<sup>14</sup> for war. Despite its efforts, the League failed to maintain international peace and security and could not prevent the course of events that ultimately led to the start of World War

6. See generally J. EUGENE HARLEY, DOCUMENTARY TEXTBOOK ON THE UNITED NATIONS 1-28, 913-15 (1947) (tracing proposals for world peace from ancient China to twentieth-century Europe).

7. See *id.*

8. See *id.* at 915-36. Prior to World War I, twentieth-century international efforts focused on establishing legalistic mechanisms to settle disputes between nations. See generally Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, T.S. No. 392 (requiring the solution of international disputes through "the good offices" or mediation of other nations, or by submission of the dispute to an impartial International Commission of Inquiry or Permanent Court of Arbitration); Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex to the Convention, 36 Stat. 2277, T.S. No. 539 (establishing international rules of warfare) [hereinafter Hague IV Convention].

9. JAMES AVERY JOYCE, BROKEN STAR: THE STORY OF THE LEAGUE OF NATIONS (1919-1939) 124 (1978).

10. For a brief history of the birth of the League, see AMOS YODER, THE EVOLUTION OF THE UNITED NATIONS SYSTEM 8-11 (1977).

11. LEAGUE OF NATIONS COVENANT pmbl. These "four pledges" were given by sixty-one states during the League's existence from 1919-1939. JOYCE, *supra* note 9, at 50. Ten of those states left the League during that period. *Id.* The United States never joined the League of Nations, as President Woodrow Wilson and the U.S. Senate could not agree on the scope and substance of the Covenant. See YODER, *supra* note 10, at 10-11.

12. The League of Nations Covenant required members to submit international disputes to either arbitration or judicial settlement. LEAGUE OF NATIONS COVENANT art. 12, para. 1; *Id.* art. 13, para. 1. The members agreed to abide by the arbitrators' decision and refrain from resorting to war against other members who complied with the decision. *Id.* art. 13, para. 4. If neither party agreed with the decision, they could not resort to war until three months had passed. *Id.* art. 12, para. 1.

13. The Covenant required members to submit any dispute not already submitted to arbitration, see *supra* note 12, or judicial settlement, see *infra* note 14, to the Council. LEAGUE OF NATIONS COVENANT art. 15, para. 1. The Council was a League organ similar in structure to today's U.N. Security Council. LEAGUE OF NATIONS COVENANT art. 4, paras. 1-2. See *infra* text accompanying notes 184-87. The Council was supposed to try to settle the dispute. LEAGUE OF NATIONS COVENANT art. 15, paras. 3-4.

14. The Covenant envisioned that members could choose to submit disputes to the Permanent Court of International Justice for a judicial settlement. See LEAGUE OF NATIONS COVENANT arts. 12-14.

II.<sup>15</sup> Prior to the War, the Kellogg-Briand Pact had reiterated the League's goal of world peace.<sup>16</sup> The signatories to the Pact pledged to "renounce [war] as an instrument of national policy"<sup>17</sup> and settle international disputes "by pacific means" only.<sup>18</sup> In the events leading up to World War II, Japan and Italy became the first nations to violate the Pact.<sup>19</sup> The inability of the League to prevent that war led to its eventual demise.<sup>20</sup>

## B. The United Nations Scheme

As World War II drew to a close, the United States and its allies (Great Britain, France, the Soviet Union, and China) began to discuss the formation of a new world organization to replace the League of Nations.<sup>21</sup> In August 1944, their representatives met in Washington, D.C., where they drafted the "Proposals for the Establishment of a General International Organization."<sup>22</sup> At the insistence of U.S. President Franklin D. Roosevelt, the new organization was called the "United Nations," which, not coincidentally, was the collective name for the wartime alliance.<sup>23</sup> On April 25, 1945, the United Nations Conference convened in San Francisco, California, where representatives from fifty nations met to discuss the proposed draft.<sup>24</sup> After two months of debate, the delegates formally adopted the Charter of the United Nations,<sup>25</sup> which entered into force on October 24,

15. See MYRES S. McDOUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 422-24 (1961). See also *infra* note 19 and accompanying text.

16. General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact]. This international agreement is commonly called the "Kellogg-Briand Pact" after its negotiators, U.S. Secretary of State H. F. Kellogg and French Foreign Minister Aristide Briand. JOYCE, *supra* note 9, at 128-29. The agreement was negotiated outside of the auspices of the League of Nations. *Id.* at 129. The Pact was initially signed by fifteen, and eventually by thirty-six, states, including the United States. *Id.* at 128-29.

17. Kellogg-Briand Pact, *supra* note 16, art. 1.

18. *Id.* art. 2.

19. JOYCE, *supra* note 9, at 129. In 1931, Japan's colonial ambitions led to its invasion of Manchuria, the industrial heart of China. YODER, *supra* note 10, at 17. In 1934, similar ambitions led to Italy's invasion of Ethiopia. *Id.* at 20. In both cases, the League of Nations condemned the action but otherwise did nothing. See *id.* at 19-22.

20. See McDOUGAL & FELICIANO, *supra* note 15, at 423; YODER, *supra* note 10, at 23. Some scholars have attributed the death of the League to the absence of U.S. power and influence in the League's activities. See, e.g., YODER, *supra* note 10, at 23, 30. For a review of the accomplishments of the League in its short history, see *id.* at 14-16; HARLEY, *supra* note 6, at 29-30.

21. YODER, *supra* note 10, at 26-27. For a comprehensive history of the creation of the United Nations, see generally RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER* (1958).

22. U.S. DEP'T OF STATE, *DUMBARTON OAKS DOCUMENTS ON INTERNATIONAL ORGANIZATION* 5-16 (1945), reprinted in RUSSELL, *supra* note 21, at 1019-28. These proposals were referred to as the "Dumbarton Oaks Proposals" after the private estate in Washington, D.C. where the meetings were held. See generally ROBERT C. HILDERBRAND, *DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY* (1990).

23. RUSSELL, *supra* note 21, at 419.

24. YODER, *supra* note 10, at 29.

25. RUSSELL, *supra* note 21, at 932.

1945.<sup>26</sup>

The main purpose of the United Nations is to "maintain international peace and security"<sup>27</sup> so as to "save succeeding generations from the scourge of war . . . ."<sup>28</sup> Thus, in one of its first actions, the U.N. General Assembly<sup>29</sup> unanimously affirmed the so-called "Nuremberg Principles": "[T]he solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing."<sup>30</sup>

The U.N. Charter itself generally prohibits the use of force in international affairs by requiring all U.N. members to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state"<sup>31</sup> and to "settle their international disputes by peaceful means . . . ."<sup>32</sup> The use of force, or even

26. *Id.* at 948, 964.

27. U.N. CHARTER art. 1, ¶ 1.

28. U.N. CHARTER pmbl. The other purposes are to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace," *id.* art. 1, ¶ 2, to "achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion," *id.* art. 1, ¶ 3, and to "be a center for harmonizing the actions of nations in the attainment of these common ends," *id.* art. 1, ¶ 4.

29. See *infra* text accompanying notes 188-91.

30. See OFFICE OF U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION: OPINION AND JUDGMENT 50 (1947) [hereinafter Nuremberg Judgment]; G.A. Res. 95, U.N. GAOR, 1st Sess., 55th plen. mtg. at 188, U.N. Doc. A/64 (1946). Immediately after World War II, the Allies established the International Military Tribunal in Nuremberg, Germany, to try the leaders of Nazi Germany for their war crimes, crimes against peace, and crimes against humanity. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, *rectified by* Protocol of Oct. 6, 1945, 59 Stat. 1586, 3 Bevans 1286. The violation of the "laws or customs of war" were "war crimes." *Id.* art. 6. The "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing" constituted "crimes against peace." *Id.* The "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds" constituted "crimes against humanity." *Id.* The Tribunal declared the aforementioned principles regarding the use of force when it found nineteen defendants guilty of these crimes. Nuremberg Judgment, *supra*, at 50, 189-90.

31. U.N. CHARTER art. 2, ¶ 4. This provision states in full: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.*

32. U.N. CHARTER art. 2, ¶ 3. This provision states in full: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." *Id.* See also *id.* art. 33, ¶ 1 ("The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.").

the threat of such use, is thus prohibited by the Charter except in two situations: upon the authorization of the Security Council,<sup>33</sup> or in self-defense.<sup>34</sup> In order to understand the latter exception, one must first understand the right of self-defense under customary international law.<sup>35</sup>

## II. The Customary Right of Self-Defense

### A. The *Caroline* Case

Article 51 of the U.N. Charter sets forth a series of requirements for the legitimate exercise of self-defense by U.N. members.<sup>36</sup> Article 51 begins with the statement that "[n]othing in the present Charter shall impair the *inherent* right of individual . . . self-defense . . ."<sup>37</sup> Although the Charter does not define the "inherent" right of self-defense,<sup>38</sup> history provides an explanation. The resolution of a little-known international dispute between the United States and Great Britain in the mid-nineteenth century provided the standards against which self-defense is measured under customary international law.<sup>39</sup> This incident is commonly referred to as the "*Caroline* case," although diplomatic correspondence, rather than a judicial process, resolved the dispute.<sup>40</sup>

In late 1837, armed rebellions against British rule erupted throughout Canada.<sup>41</sup> Although the United States was officially neutral on the

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33. The Security Council is the U.N. organ with "the primary responsibility for the maintenance of international peace and security . . ." *Id.* art. 24, ¶ 1. See *infra* notes 184-87 and accompanying text. The Security Council may choose to respond to "any threat to the peace, breach of the peace, or act of aggression" by ordering U.N. members to take military measures. See U.N. CHARTER arts. 39, 42-43, 48.

34. U.N. CHARTER art. 51. Article 51 allows U.N. members to act in individual or collective self-defense. This Note is only concerned with individual self-defense.

35. According to the Third Restatement of U.S. Foreign Relations Law, "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). Customary international law is a source of international law. *Id.* § 102(1)(a). See also Statute of the International Court of Justice, June 26, 1945, art. 38, ¶ 1, 59 Stat. 1055, 1060, T.S. No. 993, 25 (defining "international custom" as "evidence of a general practice accepted as law"). Other sources of international law are international agreements, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1)(b) (1987), and general principles common to the major legal systems of the world, *id.* § 102(1)(b)-(c).

36. U.N. CHARTER art. 51. See discussion *infra* part III.A.

37. U.N. CHARTER art. 51 (emphasis added).

38. See Kathryn S. Elliot, Note, *The New World Order and the Right of Self-Defense in the United Nations Charter*, 15 HASTINGS INT'L & COMP. L. REV. 55, 66 (1991).

39. Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 504 (1990).

40. Samuel R. Maizel, *Intervention in Grenada*, 35 NAV. L. REV. 47, 72 n.136 (1986). The discussion of the *Caroline* incident in the text is necessarily limited to those facts most relevant to the issues at the heart of this Note. For a more detailed recitation of this fascinating story, see generally Rogoff & Collins, *supra* note 39; R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

41. In the Treaty of Paris (1763), France had given the colony of Canada to Great Britain. See Definitive Treaty of Peace Between France, Great Britain and Spain, Feb. 10, 1763, art. 4, 42 C.T.S. 279, 324. After the American Revolution, Canada remained a British colony. However, an overwhelming majority of its inhabitants were French-

issue of independence for its northern neighbor,<sup>42</sup> Americans living along the U.S.-Canada border were actively sympathetic to the rebel cause.<sup>43</sup> On December 7, 1837, the rebellion ended in Upper Canada "in an almost bloodless farce" when the British stopped the rebel force in its drive to take Toronto.<sup>44</sup> William Lyon Mackenzie, the rebel leader, then fled to Buffalo, New York, where he sought arms and American volunteers.<sup>45</sup> On December 13, 1837, Mackenzie's new recruits invaded and took possession of Navy Island, part of Upper Canada.<sup>46</sup> There the "Patriot Army" established a provisional government and prepared to invade mainland Canada.<sup>47</sup> For two weeks, additional men and arms arrived at Navy Island from New York.<sup>48</sup>

On December 29, 1837, the *Caroline*, a privately-owned U.S. steamboat, delivered men and arms from Buffalo to Navy Island.<sup>49</sup> The ship made two additional trips of the same nature that day between Schlosser, New York and Navy Island, finally docking for the night at Schlosser.<sup>50</sup> In

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speaking Roman Catholics who did not like the Protestant British loyalists. JOSEPH SCHULL, *REBELLION: THE RISING IN FRENCH CANADA 1837* 4 (1971). Thus, in 1791, Britain divided the colony along the Ottawa River into Upper Canada (roughly the present-day province of Ontario) for their British citizens and Lower Canada (roughly the present-day province of Quebec) for their French citizens. *Id.*; ALBERT B. COREY, *THE CRISIS OF 1830-1842 IN CANADIAN-AMERICAN RELATIONS* 3-5 (1941). On November 6, 1837, Lower Canadian rebels began fighting for independence from the British. SCHULL, *supra*, at 59-60. On December 5, 1837, the rebellion extended to Upper Canada. COREY, *supra*, at 29.

42. The Neutrality Act of 1818 provided for the fine and imprisonment of Americans who joined a rebellion against a foreign country or who enlisted the military assistance of Americans during an insurrection in a foreign country. See Neutrality Act of 1818, ch. 88, 3 Stat. 447, 448 (1818). President Martin Van Buren issued two proclamations calling on American citizens to obey the Act with respect to the Canadian rebellion. See Proclamation of Jan. 5, 1838, 11 Stat. 784 (1838); Proclamation of Nov. 21, 1838, 11 Stat. 785 (1838). See also Neutrality Act of 1838, ch. 31, 5 Stat. 212 (1838) (providing for the confiscation of any vessel used in military expeditions against a foreign country not at war with the United States).

43. COREY, *supra* note 41, at 28-29. Americans sympathetic to the rebels held public meetings and organized revolutionary expeditions into Canada. *Id.* at 29, 33-34.

44. SCHULL, *supra* note 41, at 131. In the words of Sir Francis B. Head, Lieutenant Governor of Upper Canada, "the ridiculous attempt of four hundred men to revolutionize a country containing nearly half a million inhabitants had been put down by the people instantly and decidedly, without the loss of a man." H.R. Doc. No. 302, 25th Cong., 2d Sess., at 3, 4 (1838) (letter from Head to British Amb. Henry Fox, Jan. 8, 1838) [hereinafter Head Letter].

45. Head Letter, *supra* note 44, at 5.

46. *Id.* Navy Island is located on the Canadian side of the Niagara River, within three miles of Niagara Falls. SCHULL, *supra* note 41, at 132.

47. COREY, *supra* note 41, at 34-35.

48. *Id.* at 35; Head Letter, *supra* note 44, at 5-6. The force totalled between 500 and 1500 men, including a small number of rebels from Upper Canada. *Id.* at 5. MacKenzie placed Rensselaer Van Rensselaer, son of the War of 1812 hero General Solomon Van Rensselaer, in command of the forces on Navy Island. COREY, *supra* note 41, at 35.

49. COREY, *supra* note 41, at 36-37; H.R. Doc. No. 302, 25th Cong., 2d Sess., at 17 (1838) (deposition of Gilman Appleby, Dec. 30, 1837) [hereinafter Appleby Deposition]. Appleby was the captain of the *Caroline* on its supply trips to Navy Island. *Id.*

50. Appleby Deposition, *supra* note 49, at 17. When the *Caroline* docked at Schlosser, there were ten crew members and officers aboard. That night, the crew



order to prevent more supply trips to the rebels, Colonel Allen McNab, the British commander whose forces were situated across the river on the Canadian mainland at Chippewa, ordered that the ship be destroyed.<sup>51</sup> Consequently, around midnight, British troops boarded the *Caroline* and attacked the passengers and crew, who abandoned the ship without resistance.<sup>52</sup> The British then set the steamboat on fire, cut her loose from the dock, and set her adrift over Niagara Falls.<sup>53</sup> Two men were killed, and two others were taken prisoner.<sup>54</sup>

The U.S. Secretary of State, John Forsyth, sent a letter of protest to

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allowed twenty-six U.S. citizens to sleep on the steamboat because the civilians had been unable to find lodgings in town. *Id.*

51. Head Letter, *supra* note 44, at 6-7. See also H.R. Doc. No. 302, 25th Cong., 2d Sess., at 62 (1838) (letter from Cpt. Andrew Drew to Col. Allen McNab, Dec. 30, 1837) [hereinafter Drew Letter].

52. Appleby Deposition, *supra* note 49, at 17-18. According to the captain of the *Caroline*.

[A]bout midnight, [I] was informed by one of the watch that several boats, filled with men, were making towards the *Caroline* from the river; and [I] immediately gave the alarm, and, before [I] was able to reach the deck, the *Caroline* was boarded by some seventy or eighty men, all of whom were armed . . . [T]hey immediately commenced a warfare, with muskets, swords, and cutlasses, upon the defenceless [sic] crew and passengers of the *Caroline*, under a fierce cry of "G-d damn them! give them no quarters! kill every man! fire, fire!" . . . [T]he *Caroline* was abandoned without resistance, and the only effort made, by either the crew or passengers, seemed to be to escape slaughter.

*Id.* The British commander of the mission viewed the events from a slightly different perspective: "[A]ll those on board the steamer who did not resist were quietly put on shore, as I thought it possible there might be some American citizen[s] on board. Those who assailed us were of course dealt with according to the usages of war." Drew Letter, *supra* note 52, at 62.

53. Appleby Deposition, *supra* note 49, at 18. According to one scholar, "[n]o other incident during the entire period of border troubles from 1837 to 1842 produced a comparably electrifying effect upon Americans, Canadians, and Britishers." COREY, *supra* note 41, at 37. A poem written about the incident captured the imagination of many New Yorkers:

As over the shelving rocks she broke,  
And plunged in her turbulent grave,  
The slumbering genius of freedom woke,  
Baptized in Niagara's wave,  
And sounded her warning Tocsin far,  
From Atlantic's shore to the polar star.

See Howard Jones, *Daniel Webster: The Diplomatist*, in DANIEL WEBSTER: "THE COMPLETEST MAN" 203, 204 (1990). On January 14, 1838, the rebels abandoned Navy Island. H.R. Doc. No. 302, 25th Cong., 2d Sess., at 36, 37 (1838) (letter from U.S. Attorney N.S. Benton to Secretary of State John Forsyth, Feb. 6, 1838) [hereinafter Benton Letter].

54. The two men who died had apparently been shot after they escaped from the *Caroline* and were on U.S. territory. The British troops soon released the two men who had been taken prisoner. Benton Letter, *supra* note 53, at 37. The State of New York later arrested Alexander McLeod, a British subject, for the murder of Amos Durfee, one of the American casualties. This added to the tensions between the United States and Great Britain caused by the *Caroline* incident. Jennings, *supra* note 40, at 92-93. For details on the resolution of this aspect of the crisis, see generally *id.* at 92-99; COREY, *supra* note 41, ch. 9.

Great Britain's Ambassador to the United States, Henry Fox.<sup>55</sup> In reply, Fox justified the British action as self-defense.<sup>56</sup> Daniel Webster, Forsyth's successor at the State Department, sent the British his view of the requirements for a legitimate claim of national self-defense.<sup>57</sup> According to Webster,

[i]t will be for [the British] to show a necessity of self-defence [sic], instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to shew [sic], also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence [sic], must be limited by that necessity and kept clearly within it.<sup>58</sup>

In addition, Webster called on the British to show that "admonition or remonstrance to the persons on board the *Caroline* was impracticable or would have been unavailing," and that "it would not have been enough [simply] to [have] seize[d] and detain[ed] the vessel . . . ."<sup>59</sup> Webster argued that the British action did not satisfy these four requirements: an imminent threat, a necessary action, a proportionate response, and the exhaustion of peaceful means prior to taking action.<sup>60</sup>

Lord Ashburton, a special British representative to Washington,<sup>61</sup> not only agreed with Webster's articulation of the law, but also attempted to show that the British had indeed met all of the requirements.<sup>62</sup> He also

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55. H.R. Doc. No. 302, 25th Cong., 2d Sess., at 2 (1838) (letter from Forsyth to Fox, Jan. 5, 1838). In particular, Forsyth noted that the British action, committed against American citizens and property on American territory, had caused "the most painful emotions of surprise and regret." *Id.* He also warned Fox that President Van Buren had sent American forces to the U.S.-Canadian border to repel any future attacks, and that "if [such an attack] should occur, [Van Buren] cannot be answerable for the effects of the indignation of the neighboring people of the United States." *Id.*

56. H.R. Doc. No. 302, 25th Cong., 2d Sess., at 3 (1838) (letter from Fox to Forsyth, Feb. 6, 1838). Fox argued that America's failure to enforce its neutrality laws had forced the British "to consult their own security, by pursuing and destroying the vessel of their piratical enemy, wheresoever they might find her." *Id.*

57. 1 BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE CONFIDENTIAL PRINT, PART I, SERIES C, NORTH AMERICA, 1837-1914, (Kenneth Bourne ed., 1986) [hereinafter BRITISH DOCUMENTS ON FOREIGN AFFAIRS] Document 99 at 159 (letter from Webster to Fox, April 24, 1841) [hereinafter Document 99].

58. *Id.* See also BRITISH DOCUMENTS ON FOREIGN AFFAIRS, *supra* note 57, Document 205 at 331 (letter to Ashburton, July 27, 1842) [hereinafter Document 205].

59. Document 99, *supra* note 57, at 159.

60. *Id.*

61. In 1841, Great Britain had sent Lord Ashburton to Washington to resolve several issues of contention between the two nations, including the *Caroline* incident, the McLeod case, *supra* note 54, and the location of the U.S.-Canada border. Jennings, *supra* note 40, at 88.

62. BRITISH DOCUMENTS ON FOREIGN AFFAIRS, *supra* note 57, Document 206 at 332-35 (letter from Ashburton to Webster, July 28, 1842). Lord Ashburton wrote that the only question between us is whether [the destruction of the *Caroline*] came within the limits [of self-defense]: whether, to use your words, there was 'that necessity of self-defence [sic], instant, overwhelming, leaving no choice of

apologized for the British violation of American territory.<sup>63</sup> Although Webster was not convinced by Ashburton's arguments, he accepted the British apology and expressed his satisfaction that both governments had agreed on the standard for national self-defense.<sup>64</sup>

#### B. The *Caroline* Standard as Customary International Law

Professors Rogoff and Collins state that "[t]he great significance of the *Caroline* doctrine in modern international law results from . . . an acceptance of Webster's formulation on resort to force in self-defense as authoritative customary law."<sup>65</sup> Several scholars have even argued that the *Caroline* incident established standards for evaluating the legitimacy of "anticipatory self-defense," since the British attacked the steamboat in order to *prevent* the rebels from invading Canada.<sup>66</sup> The Nuremberg Judgment<sup>67</sup> is the most commonly cited example of the acceptance of the *Caroline* standard as customary international law.<sup>68</sup>

After World War II, the Allies established the International Military Tribunal to try the leaders of Nazi Germany for their war crimes, crimes against peace, and crimes against humanity.<sup>69</sup> In its decision, the Tribunal relied on the *Caroline* standard in rejecting the defendants' argument that their actions constituted legitimate self-defense.<sup>70</sup> The Germans

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means' which preceded the destruction of the *Caroline* while moored to the shore of the United States.

*Id.* at 333. Lord Ashburton stated that the destruction of the *Caroline* was necessary because the steamboat had been "the important means and instrument by which numbers and arms were hourly increasing," and the United States had not taken steps to enforce its neutrality by cutting off the supply line. *Id.* at 333. He argued that the British had acted in response to an imminent threat, since the attackers had expected to find the ship moored at Navy Island in British waters. Thus, there had been no time for deliberation: "[T]he expedition was not planned with a premeditated purpose of attacking the enemy within the jurisdiction of the United States, but . . . the necessity of so doing arose from altered circumstances at the moment of execution." *Id.* at 334. He also maintained that the attack was not excessive, noting that the British forces had acted in the middle of the night in order to minimize casualties, and that they had sent the burning ship adrift in order to prevent injury to American citizens or property. *Id.* at 334.

63. *Id.* at 335. He added that the British should have apologized immediately after the incident occurred: "[T]his, with a frank explanation of the necessity of the case, might and probably would have prevented much of the exasperation and of the subsequent complaints and recriminations, to which it gave rise." *Id.*

64. BRITISH DOCUMENTS ON FOREIGN AFFAIRS, *supra* note 57, Document 214 at 346-47 (letter from Webster to Ashburton, August 6, 1842).

65. Rogoff & Collins, *supra* note 39, at 504.

66. See, e.g., Rogoff & Collins, *supra* note 39, at 500; Louis Rene Beres, *Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law*, 26 VAND. J. TRANSNAT'L L. 111, 124 (1993); D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 188-89 (1958).

67. See *supra* note 30.

68. See, e.g., McDUGAL & FELICIANO, *supra* note 15, at 232; BOWETT, *supra* note 66, at 142-43; Rogoff & Collins, *supra* note 39, at 504-05.

69. See *supra* note 30.

70. Nuremberg Judgment, *supra* note 30, at 36. Although neither the League of Nations Covenant nor the Kellogg-Briand Pact had explicitly provided for the right of self-defense, the signatories generally agreed that such a right was nevertheless pre-

argued that Germany's invasion of Norway in 1940 was necessary in order to prevent the Allies from occupying Norway;<sup>71</sup> essentially, they based their claim on the concept of anticipatory self-defense.<sup>72</sup> Citing Webster's formulation, the Tribunal stated: "It must be remembered that preventive action in foreign territory is justified only in case of 'an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment of deliberation.'"<sup>73</sup> The Tribunal then found that the defendants had failed to meet this standard, as it believed that Germany had actually invaded Norway in order to acquire a base from which to attack England and France.<sup>74</sup> Thus, although it found the defendants' claim groundless,<sup>75</sup> the Tribunal recognized the legitimacy of basing a claim of national self-defense on the *Caroline* standard.<sup>76</sup> According to the *Third Restatement of U.S. Foreign Relations Law*, the fact that international judicial tribunals have relied on a particular rule lends substantial weight towards determining that the rule has become international law.<sup>77</sup>

### III. Article 51 of the U.N. Charter

#### A. The Debate over the Interpretation of Article 51

Article 51 of the U.N. Charter states in full:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and

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served. See JULIUS STONE, *AGGRESSION AND WORLD ORDER* 32 (1958); SUBHAS C. KHARE, *USE OF FORCE UNDER UNITED NATIONS CHARTER* 71 (1985). As explained by U.S. Secretary of State Kellogg:

Express recognition by treaty of [the] inalienable right [of self-defense] . . . gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right of self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unscrupulous to mold events to accord with an agreed definition.

Note to the Signatory Governments, June 23, 1928, in U.S. DEP'T OF STATE, *TREATY FOR THE RENUNCIATION OF WAR: TEXT OF THE TREATY, NOTES EXCHANGED, INSTRUMENTS OF RATIFICATION AND OF ADHERENCE, AND OTHER PAPERS* 9, 57 (1933).

71. See Nuremberg Judgment, *supra* note 30, at 36.

72. See *supra* text accompanying note 66.

73. See Nuremberg Judgment, *supra* note 30, at 36 (quoting Document 99, *supra* note 57, at 159).

74. *Id.* at 38.

75. *Id.*

76. *Id.*

77. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2)(a) (1987). More recently, the International Court of Justice noted that the requirements of proportionality and necessity are "well established in customary international law." Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 94, para. 176, reprinted in 25 I.L.M. 1023, 1063, para. 176 (1986) [hereinafter *Nicaragua v. U.S.*].

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.<sup>78</sup>

Every time that a nation employs Article 51 to justify the use of force, the meaning of Article 51 becomes the subject of much debate among scholars and international actors.<sup>79</sup> The debate is over whether to interpret Article 51 in a broad or restrictive way. Those who argue for a broad reading maintain that Article 51 merely codifies the customary right of self-defense and allows states wide latitude in using force.<sup>80</sup> Those who argue for a restrictive reading respond that the language of Article 51 qualifies the customary right by placing conditions on the use of force.<sup>81</sup>

Because Article 51 states that the U.N. Charter does not "impair the *inherent* right of individual . . . self-defense,"<sup>82</sup> the proponents of the broad view argue that the framers of the Charter intended to preserve the customary right of self-defense.<sup>83</sup> They interpret "inherent right" as allowing the use of force in self-defense if the *Caroline* standard is satisfied.<sup>84</sup> Moreover, they maintain that the customary right is absolute, since the language of Article 51 clearly states that "[n]othing in the present Charter shall impair" it.<sup>85</sup>

The proponents of the restrictive view also rely on the language of Article 51 to support their arguments.<sup>86</sup> As explained by Professor Khare, "The right even though stated in terms of being 'inherent' and unimpaired has been made subject to a number of restrictions imposed by the Charter. It is not an absolute freedom of states to use force in self-defense."<sup>87</sup> In order to take action in self-defense, the "victim state" must be acting in response to an "armed attack" by the "aggressor state."<sup>88</sup> The "victim state" can act on its own "until the Security Council has taken the

78. U.N. CHARTER art. 51.

79. See, e.g., *infra* parts III.B.1-3, IV.D. One reason why the debate resurfaces every time that Article 51 is invoked is that the U.N. Charter makes no provision for its own interpretation and no other international body can issue authoritative interpretations. Elliot, *supra* note 38, at 66.

80. See *infra* notes 82-85 and accompanying text.

81. See *infra* notes 86-92 and accompanying text.

82. U.N. CHARTER art. 51 (emphasis added).

83. See, e.g., BOWETT, *supra* note 66, at 185, 187. Bowett states: "It is . . . fallacious to assume that members [of the United Nations] have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except and in so far as they have surrendered them under the Charter." *Id.* at 185. See also McDUGAL & FELICIANO, *supra* note 15, at 252-53. This view is supported by the fact that the drafters of Article 51 revised a prior draft in order to make the right of self-defense explicitly "inherent." RUSSELL, *supra* note 21, at 698.

84. See *supra* text accompanying notes 58-60.

85. See, e.g., Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 94 (1989).

86. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 294-95 (1979); PHILIP C. JESSUP, *A MODERN LAW OF NATIONS: AN INTRODUCTION* 165-66 (1952).

87. KHARE, *supra* note 70, at 129.

88. This Note will use the term "victim state" to designate the state that is claiming self-defense as the justification for its action and "aggressor state" as the state against whom the "victim state" has acted.

measures necessary" to maintain international peace and security.<sup>89</sup> The "victim state" must "immediately" report its action to the Security Council;<sup>90</sup> however, the fact that the Security Council has been so notified does not affect its power to take "at any time" any action "as it deems necessary" for international peace and security.<sup>91</sup> Thus, Article 51 seems to qualify the customary right, most significantly by requiring that the action be in response to an "armed attack."<sup>92</sup> However, the meaning and scope of this requirement is itself a source of controversy.

As with the whole of Article 51 itself, there are broad and restrictive views regarding the proper interpretation of the term "armed attack." The most restrictive view maintains that the term refers only to a direct physical invasion by one state into the territory of another and not to any other direct or indirect forms of aggression.<sup>93</sup> Critics of the restrictive view argue that it fails to address modern issues such as terrorism,<sup>94</sup> biological warfare,<sup>95</sup> and nuclear weapons.<sup>96</sup> Yet there are broader interpretations of "armed attack" which include: any aggressive event against the victim state;<sup>97</sup> a number of smaller actions that constitute a continuous campaign of attacks against the victim state;<sup>98</sup> a state allowing terrorists to launch their activities from its territory against the victim state;<sup>99</sup> an attack on nationals outside of the territory of the victim state;<sup>100</sup> and apparent preparations to attack the victim state soon.<sup>101</sup> The United States has argued for a broad reading of Article 51 on several recent occasions.<sup>102</sup>

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89. U.N. CHARTER art. 51.

90. *Id.*

91. *Id.*

92. *Id.*

93. See, e.g., JESSUP, *supra* note 86, at 166. See also *Nicaragua v. U.S.*, 1986 I.C.J. 94, paras. 194-95, 247.

94. See, e.g., Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25 (1987); Sofaer, *supra* note 86, at 94-95.

95. See, e.g., David Turndorf, Note, *The U.S. Raid on Libya: A Forceful Response to Terrorism*, 14 BROOK. J. INT'L L. 187, 219 (1988).

96. See, e.g., McDOUGAL & FELICIANO, *supra* note 15, at 238; HENKIN, *supra* note 86, at 143-44 (arguing that even though "armed attack" must be interpreted narrowly, the U.N. Charter must allow an exception for the use of anticipatory self-defense against an imminent nuclear attack).

97. See, e.g., Sofaer, *supra* note 85, at 94; Eugene V. Rostow, *The Legality of the International Use of Force by and from States*, 10 YALE J. INT'L L. 286, 287 (1985).

98. See, e.g., James P. Rowles, *Military Responses to Terrorism: Substantive and Procedural Constraints in International Law*, in *Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 307, 314 (1987).

99. See, e.g., Baker, *supra* note 94, at 38.

100. See, e.g., Turndorf, *supra* note 95, at 219-20; Sofaer, *supra* note 85, at 96.

101. Such preparations would invoke the doctrine of "anticipatory self-defense." See, e.g., BOWETT, *supra* note 66, at 188-92. Bowett argues that "[n]o state can be expected to await an initial attack which . . . may well destroy the state's capacity for further resistance and so jeopardize its very existence." *Id.* at 191-92. See also McDOUGAL & FELICIANO, *supra* note 15, at 237 ("Whether the events that precipitate the claim of self-defense constitute an actual, current attack or an imminently impending attack, the claim remains subject to the reviewing authority of the organized community.").

102. See *infra* parts III.B.1-2.

However, the United Nations has adhered to the restrictive view.<sup>103</sup>

## B. The Limits of Article 51

Despite the prohibition on the use of force in the U.N. Charter,<sup>104</sup> nations have nevertheless acted unilaterally when they have felt that it was in their national interest to do so.<sup>105</sup> They have often relied on Article 51 to argue that the act was necessary for their self-defense.<sup>106</sup> Yet the United Nations has consistently held to the restrictive interpretation of that provision.<sup>107</sup> As Professor Schachter explains:

The [Security] Council has rejected claims of self-defense in several cases (notably against states whose policies were generally disapproved). No resolution has been adopted explicitly upholding a claim of self-defense, though in a few cases a resolution or the Council's failure to act has been construed by commentators as tacit approval or toleration of the use of force in question. The Council, more often than not, has been precluded by the veto from reaching formal decision on the validity of such claims. Most of the cases were then considered by the General Assembly, which, unfettered by the veto, generally condemned the alleged self-defense action as a Charter violation. In no such case, however, has the target state accepted the [U.N.'s] decision as binding upon it.<sup>108</sup>

However, nations continue to argue for the expansion of Article 51.<sup>109</sup> The following are two examples of recent claims by the United States which have reignited the debate in the United Nations over the permissi-

103. See Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 273 (1989).

104. See *supra* part I.B.

105. See *infra* note 110 and parts III.B.1-2, IV.

106. See *infra* note 110 and parts III.B.1-2, IV.

107. See Schachter, *supra* note 103, at 263, 273.

108. *Id.* at 263-64 (citations omitted).

109. Professor Schachter has surveyed the incidents and placed them in seven categories:

- (1) the use of force to rescue political hostages believed to face imminent danger of death or injury;
- (2) the use of force against officials or installations in a foreign state believed to support terrorist acts directed against nationals of the state claiming the right of defense;
- (3) the use of force against troops, planes, vessels or installations believed to threaten imminent attack by a state with declared hostile intent;
- (4) the use of retaliatory force against a government or military force so as to deter renewed attacks on the state taking such action;
- (5) the use of force against a government that has provided arms or technical support to insurgents in a third state;
- (6) the use of force against a government that has allowed its territory to be used by military forces of a third state considered to be a threat to the state claiming self-defense;
- (7) the use of force in the name of collective defense (or counterintervention) against a government imposed by foreign forces and faced with large-scale military resistance by many of its people.

ble scope of Article 51.<sup>110</sup>

### 1. *Air Raid on Libya*

The once-friendly relationship between the United States and Libya has grown increasingly tense since Colonel Muammar Gaddafi seized power in a 1969 coup d'état.<sup>111</sup> Under Gaddafi's leadership, Libya has directed or supported many terrorist acts around the world,<sup>112</sup> particularly against American interests.<sup>113</sup> The United States initially responded only with economic and political pressures, which failed to deter the Libyan leader.<sup>114</sup> The hostility between the two countries intensified dramatically

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*Id.* at 271 (citations omitted).

110. According to Professor Schachter, "The U.S. has tended to provide fuller and more sophisticated legal justifications than most other countries, probably because Congress and important sectors of public opinion are concerned about the legitimacy of American action." Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 118 (1986). In contrast, many other countries "have limited their claims to brief and general phrases of Charter terminology and their own version of the relevant facts." *Id.*

111. On December 24, 1951, Libya became an independent state after almost forty years as an Italian colony. LaVerle Berry, *Historical Setting*, in LIBYA: A COUNTRY STUDY 3, 24, 34-37 (Helen Chapin Metz ed., 1989) [hereinafter LIBYA]. Under the leadership of King Idris I, Libya was originally a federal monarchy with a pro-Western foreign policy. *Id.* at 37-38. On September 1, 1969, the military seized control of the government and abolished the monarchy. *Id.* at 42. One of the leaders of the coup, Muammar al Gaddafi, quickly consolidated power and became the effective head of state. *Id.* at 43-45. In the 1970s, Gaddafi turned Libya into a socialist *jamahiriya* ("state of the masses"), a society in which the people would govern themselves without the constraints of the modern bureaucratic state. *Id.* at 47. Gaddafi relinquished most of his official duties and assumed the title "Leader of the Revolution." *Id.* at 48-49. Despite his anti-communist beliefs, he developed a close relationship with the former Soviet Union and other Eastern European countries, *id.* at 46, primarily because of American support for Israel. Richard Stengel, *Gaddafi: Obsessed by a Ruthless, Messianic Vision*, TIME, Apr. 21, 1986, at 28, 29.

112. Under Gaddafi, Libya has declared its support of "national liberation movements" and has allegedly financed and trained numerous terrorist groups and organizations, including Palestinian radicals, Lebanese leftists, Columbia's M-19 guerrillas, the Irish Republican Army, anti-Turkish Armenians, the Sandinistas in Nicaragua, Muslim rebels in the Philippines, and left-wing extremists in Europe and Japan. Berry, *supra* note 111, at 56-57; Stengel, *Gaddafi*, *supra* note 111, at 29; MARTIN SICKER, THE MAKING OF A PARIAS STATE: THE ADVENTURIST POLITICS OF MUAMMAR QADDAFI 119 (1987). In addition, Gaddafi "turned Libya into a kind of Palm Springs for despots and terrorists," by providing sanctuary for individuals such as Idi Amin, the former dictator of Uganda; Abu Nidal, the Palestinian terrorist; and the three surviving members of the Black September guerrilla group which killed eleven Israeli athletes at the 1972 Olympic Games. Stengel, *Gaddafi*, *supra* note 111, at 29.

113. During the 1970s and 1980s, Gaddafi ordered numerous direct attacks on the United States, including the murder of two U.S. diplomats in Khartoum (1973), the attempted assassination of U.S. Secretary of State Henry Kissinger (1973), the burning of the U.S. embassy in Tripoli (1979), the firing on U.S. Navy F-14 aircraft during naval exercises in the Persian Gulf (1981), the planned assassination of U.S. President Ronald Reagan, Vice President George Bush, Secretary of State Alexander Haig, Secretary of Defense Caspar Weinberger, and U.S. Ambassador to Italy Maxwell Rabb (1981), and the hijacking of T.W.A. Flight 847 (1985). SICKER, *supra* note 112, at 113-17; Richard Stengel, *Sailing in Harm's Way*, TIME, Apr. 7, 1986, at 16.

114. Until the 1980s, the United States responded mildly to Libya's provocations. See Shawky S. Zeidan, *Government and Politics*, in LIBYA, *supra* note 111, at 173, 229. In 1981,



at the beginning of 1986, which was, ironically, the "International Year of Peace."<sup>115</sup> In January, American intelligence linked Libya to the December 27, 1985 bombings at the Rome and Vienna airports,<sup>116</sup> which killed nineteen people (including five Americans) and injured 112 people.<sup>117</sup>

In a show of force, U.S. President Ronald Reagan sent American warships on maneuvers to the Gulf of Sidra, off Libya's northern coast.<sup>118</sup> Since 1973, Gaddafi had claimed that the 300 mile-wide gulf was within the territorial waters of Libya.<sup>119</sup> Most countries rejected this claim, but only the United States directly challenged it.<sup>120</sup> Although President Jimmy Carter had ordered U.S. forces not to penetrate into the claimed territory,<sup>121</sup> President Reagan declared that the United States would regard all areas beyond twelve nautical miles from the coast as international waters, pursuant to international law.<sup>122</sup> Subsequently, on March 24, 1986, U.S. ships and planes crossed Gaddafi's so-called "line of death."<sup>123</sup> The Libyans fired six surface-to-air missiles at the U.S. forces,

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the Reagan Administration closed the Libyan diplomatic mission in the United States, expelled all Libyan diplomatic personnel from the United States, and ordered all Americans in Libya to leave that country. *Id.* at 229; SICKER, *supra* note 112, at 116-17. In 1982, the Administration barred imports of Libyan oil into the United States and exports of American technology and equipment to Libya. *Id.* at 117.

115. See G.A. Res. 40/3, U.N. GAOR, 40th Sess., 49th plen. mtg. at 1, U.N. Doc. A/RES/40/3 (1985).

116. William R. Doerner, *Slapping Back at Gaddafi*, TIME, Jan. 20, 1986, at 16, 17. Most of the evidence was classified, *id.*, but European investigators believed that the terrorists were associates of Abu Nidal, a Palestinian terrorist leader based in Libya. William E. Smith, *An Eye for an Eye*, TIME, Jan. 13, 1986, at 26. The bombings were apparently in retaliation for Israel's 1985 bombing of the headquarters of the Palestine Liberation Organization. *Id.* at 27.

117. Smith, *supra* note 116, at 26. The immediate U.S. reaction to the bombings was to freeze Libyan assets in the United States and impose other economic sanctions. Doerner, *supra* note 116, at 16. When Gaddafi remarked that the sanctions were "tantamount to a declaration of war," President Reagan replied, "I think if it ever came to a declaration of war, they'd be aware of the difference." *Id.* at 17 (quoting President Reagan).

118. *Cat and Mouse with Gaddafi*, TIME, Feb. 3, 1986, at 18. Reagan sent two aircraft carriers, together carrying about 100 supersonic aircraft, and approximately two dozen auxiliary vessels from the U.S. Sixth Fleet. *Id.*

119. *Id.* See also Jean R. Tartter, *National Security*, in LIBYA, *supra* note 111, at 239, 252. Gaddafi had claimed the Gulf of Sidra by drawing a straight line between points near the Libyan cities of Benghazi on the eastern side of the Gulf and Misratah on the western side of the gulf. *Id.* at 252. This boundary, which Gaddafi called the "line of death," is midway between the thirty-second and thirty-third parallels, 130 miles from the Libyan coast. *Cat and Mouse with Gaddafi*, *supra* note 118, at 18.

120. Zeidan, *supra* note 114, at 252. In August of 1981, Libyan warplanes fired on two U.S. Navy aircraft participating in naval exercises in the Gulf of Sidra. After the missiles missed their targets, the American pilots shot down the Libyan planes. *Id.* at 252-53.

121. *Id.* at 229.

122. *Id.* at 252. See United Nations Convention on the Law of the Sea, art. 3, U.N. Doc. A/CONF.62/122 (1982), reprinted in 21 I.L.M. 1261, 1272 (1982) ("Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.").

123. Stengel, *supra* note 113, at 17-18.

none of which hit their targets.<sup>124</sup> Once attacked, the U.S. forces sunk two Libyan vessels<sup>125</sup> and bombed a Libyan missile site.<sup>126</sup> There were no American casualties—yet.<sup>127</sup>

On April 5, 1986, U.S. intelligence officials intercepted messages from the Libyan capital, Tripoli, to the Libyan diplomatic mission in East Berlin regarding a plan to bomb locations in West Berlin known to be frequented by Americans.<sup>128</sup> Within fifteen minutes, a bomb exploded in a West Berlin nightclub.<sup>129</sup> The explosion killed two people, including an American soldier, and injured 230 others, including dozens of American soldiers.<sup>130</sup> A few hours later, another intercepted message from Tripoli offered congratulations for the successful mission.<sup>131</sup> The United States believed that these messages, specifically linking Gaddafi with the terrorist act, provided enough evidence to justify a wider response than the Gulf of Sidra operation.<sup>132</sup>

Consequently, on April 14, 1986, President Reagan ordered an air strike against five Libyan military targets, including the army compound which Gaddafi used as a command center and residence.<sup>133</sup> The strike was successful.<sup>134</sup> The United States justified the action as an act of self-

124. *Id.* at 18.

125. *Id.* at 20. Libya lost a French-built *Combattante*-class missile attack craft and a Soviet-built *Nanuchka*-class missile corvette. Zeidan, *supra* note 114, at 253.

126. Stengel, *supra* note 113, at 20-21. Navy warplanes twice launched high-speed anti-radiation missiles at a Soviet-built missile site on the Libyan coast. The attacks destroyed the radar transmitter and its replacement unit, temporarily closing down the site. *Id.* at 20. The United States justified its actions as self-defense under Article 51. See U.N. Doc. S/17938 (1986) (letter from Vernon A. Walters, U.S. Permanent Representative to the United Nations).

127. Stengel, *supra* note 113, at 20. Libyan officials later claimed that fifty-six Libyans died in the fighting. George J. Church, *Targeting Gaddafi*, *TIME*, Apr. 21, 1986, at 20.

128. *Seeking the Smoking Fuse*, *TIME*, Apr. 21, 1986, at 22.

129. *Id.*

130. *Id.*

131. *Id.*

132. Church, *supra* note 127, at 20. Libya denied any connection with the bombing. See, e.g., U.N. Doc. A/41/279, S/17986 (1986) (letter from Rajab A. Azzarouk, Chargé d'affaires of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations).

133. William R. Doerner, *In the Dead of the Night*, *TIME*, Apr. 28, 1986, at 28-29. The other targets were the military section of the Tripoli International Airport, Gaddafi's alternate command post at the Benghazi army barracks, a commando training facility near Tripoli, and Libyan fighter planes at the Benina airfield. *Id.* Reagan later denied that he had tried to kill the Libyan leader during the attack. Michael R. Gordon, *Reagan Denies Libya Raid Was Meant to Kill Qadhafi*, *N.Y. TIMES*, Apr. 19, 1986, at A5. In any event, Gaddafi was sleeping in an underground bunker at the time and survived the attack; however, an eighteen month-old baby girl, reportedly Gaddafi's adopted daughter, did not survive. George J. Church, *Hitting the Source*, *TIME*, Apr. 28, 1986, at 18.

134. Church, *supra* note 133, at 18. However, the United States lost two fighter pilots and accidentally caused civilian casualties and damage to non-military targets. Doerner, *supra* note 133, at 30. Moreover, several terrorist incidents immediately followed the air strike. See Church, *supra* note 133, at 19; Pico Iyer, *Nearly All Together Now*, *TIME*, May 5, 1986, at 28. In addition, Libya has refused to extradite two Libyans charged in connection with the 1988 bombing of Pan Am Flight 103, in which 270 people were killed. See Clinton Vows U.S. Will Pursue Justice in Pan Am Bombing, *N.Y. TIMES*, Dec. 22, 1993, at A9;

defense consistent with Article 51.<sup>135</sup> When the Security Council considered the incident on the following day, U.S. Ambassador to the United Nations Vernon Walters argued that the United States had acted in self-defense only after peaceful measures had failed to stop the Libyan attacks on the United States.<sup>136</sup> He stated that the attack was "necessary" to end Libya's "continued policy of terrorist threats and the use of force, in violation of . . . Article 2(4) of the Charter."<sup>137</sup> The attack was therefore "designed to disrupt Libya's ability to carry out terrorist acts and to deter future terrorist acts by Libya."<sup>138</sup> He also maintained that the action was "proportionate," because the attack struck military installations that were used to direct and carry out Libya's terrorism, and also because the United States attempted to avoid civilian casualties and limit collateral damage.<sup>139</sup>

On April 21, 1986, the Security Council considered a draft resolution proposed by Congo, Ghana, Madagascar, Trinidad and Tobago, and the United Arab Emirates.<sup>140</sup> The resolution condemned the U.S. action as a "violation of the Charter of the United Nations and the norms of international conduct."<sup>141</sup> The United States, Great Britain, and France vetoed the draft resolution.<sup>142</sup> At Libya's urging, the General Assembly later condemned the attack and demanded compensation for material and human losses suffered by Libya.<sup>143</sup>

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George J. Church, *Wanted: A New Hideout*, TIME, Apr. 6, 1992, at 29. See also Khadafi Proposes Handing Over Lockerbie Suspects to Egypt, AGENCE FRANCE PRESSE, June 28, 1994, available in LEXIS, News Library, Curnws file (discussing Gaddafi's proposal, which was rejected, to transfer the suspects to Egypt instead of to the United States and Great Britain).

135. See President Ronald Reagan, Address to the Nation on the United States Air Strike Against Libya, 1986 PUB. PAPERS 468, 469 (Apr. 14, 1986); U.N. Doc. S/17990 (1986) (letter from Herbert S. Okun, Acting U.S. Permanent Representative to the United Nations).

136. U.N. SCOR, 41st Sess., 2674th mtg. at 16, U.N. Doc. S/PV.2674 (1986) (statement by Vernon A. Walters, U.S. Permanent Representative to the United Nations).

137. *Id.* at 18.

138. *Id.* at 15.

139. *Id.* at 13-15.

140. See U.N. SCOR, 41st Sess., 2682d mtg. at 43, U.N. Doc. S/PV.2682 (1986).

141. U.N. Doc. S/18016/Rev.1, at 1 (1986) (revised draft resolution).

142. U.N. SCOR, 41st Sess., 2682d mtg. at 43, U.N. Doc. S/PV.2682 (1986). The result of the voting was nine votes in favor (Bulgaria, China, Congo, Ghana, Madagascar, Thailand, Trinidad and Tobago, the Soviet Union, and the United Arab Emirates), five votes opposed (Australia, Denmark, France, Great Britain, and the United States), and one abstention (Venezuela). *Id.* For a discussion of the Great Power Veto, see *infra* part III.B.3.

143. G.A. Res. 41/38, U.N. GAOR, 41st Sess., 78th plen. mtg., Supp. No. 53, at 34-35, U.N. Doc. A/RES/41/38 (1986). This resolution was adopted 79-28, with 33 abstentions. Anthony Goodman, *U.N. Assembly Condemns Last April's U.S. Attack on Libya*, Reuters, Nov. 20, 1986, available in LEXIS, News Library, Arcnws File. For the scholarly debate on the legality of the air raid, see generally Turndorf, *supra* note 95; Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAV. L. R. 49 (1988); *Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 287, 288 (remarks of Francis A. Boyle).

## 2. Invasion of Panama

For thirty years, Manuel Antonio Noriega of Panama had been an important source of U.S. intelligence regarding developments in Central America and the Caribbean.<sup>144</sup> He provided information to the United States from his days as a cadet at a Panamanian military academy up through his days as the Commander-in-Chief of the Panama Defense Force and de facto leader of Panama.<sup>145</sup> However, during the 1980s, the United States lost control of Noriega. He provided arms and intelligence to his anti-American neighbors,<sup>146</sup> helped the Colombian Medellín drug cartel smuggle cocaine into the United States,<sup>147</sup> and generally impeded the progress of democracy in Panama.<sup>148</sup> On February 4, 1988, two federal grand juries in Florida indicted Noriega on fifteen charges of international drug trafficking, racketeering, and money-laundering.<sup>149</sup> In May

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144. George J. Church, *The Devil They Knew*, TIME, Jan. 15, 1990, at 28. In addition to providing intelligence, Noriega assisted the Reagan Administration in aiding the Nicaraguan contras in their fight against the Communist Sandinista government. *Id.*; MARGARET E. SCRANTON, *THE NORIEGA YEARS: U.S.-PANAMANIAN RELATIONS, 1981-1990*, at 79-80 (1991). Noriega also occasionally assisted U.S. authorities in drug seizures and arrests. Church, *supra*, at 28; Seymour M. Hersh, *The Creation of a Thug: Our Man in Panama*, LIFE, Mar. 1990, at 81, 90, 93.

145. In 1955, the Army's 470th Military Intelligence Group recruited Noriega as a teenager to provide information on his classmates at a Peruvian military school. Hersh, *supra* note 144, at 83. In 1971, the U.S. Central Intelligence Agency also put Noriega on its payroll; ironically, Noriega was then in charge of Panamanian intelligence. SCRANTON, *supra* note 144, at 13-14. In 1986, both the Army and the C.I.A. discontinued their payments to Noriega, after having paid him a combined total of \$322,226 over thirty years. David Johnston, *U.S. Admits Payments to Noriega*, N.Y. TIMES, Jan. 19, 1991, § 1, at 14. See also *Noriega's Lawyers Say He Got Rich by Spying*, N.Y. TIMES, Oct. 24, 1994, at A22 (reporting claims by Noriega's lawyers that U.S. intelligence agencies had paid Noriega more than \$10 million to spy for the United States).

146. Noriega allegedly provided intelligence on American military activities to Cuba and supplied arms to the Sandinistas and leftist rebels in Colombia and El Salvador. Church, *supra* note 144, at 28; Hersh, *supra* note 144, at 88.

147. Church, *supra* note 144, at 28.

148. In 1984, Noriega used his power to dictate the results of the first presidential election in Panama in sixteen years. Through violence, fraud, and other electoral misconduct, Noriega's supporters ensured the election of Ardito Barletta, the candidate of the military-supported party. SCRANTON, *supra* note 144, at 75-76; Jan Knippers Black & Edmundo Flores, *Historical Setting*, in PANAMA: A COUNTRY STUDY 3, 62-64 (Sandra W. Meditz & Dennis M. Hanratty eds., 1989). However, the Panama Defense Force (P.D.F.) ousted Barletta after he called for an investigation into the murder of Dr. Hugo Spadafora, a long-time critic of Noriega. SCRANTON, *supra* note 144, at 85-87. After only eleven months in office, Barletta was succeeded by his vice-president, Eric Arturo Delvalle. *Id.* at 90. Delvalle was originally a Noriega lackey, but he later turned against Noriega after pressure from opposition leaders and the United States. *Id.* at 129. When Delvalle tried to fire Noriega from his position as head of the P.D.F. in 1989, the Noriega-controlled legislature ousted Delvalle. *Id.* at 130-31.

149. Richard Lacayo, *Noriega on Ice*, TIME, Jan. 15, 1990, at 24, 25; SCRANTON, *supra* note 144, at 128. The indictments included charges that Noriega accepted a \$4.6 million bribe from the Medellín drug cartel to protect cocaine shipments and launder the cartel's money in Panamanian banks, permitted the cartel to shift its operations to Panama after Colombia cracked down on drug trafficking, sheltered international drug smugglers in Panama, and attempted to smuggle 1.4 million pounds of marijuana into the United States after accepting a \$1.1 million bribe to do so. Lacayo, *supra*, at 24; SCRANTON, *supra* note 144, at 128.

1989, Noriega nullified the results of his country's democratic presidential elections and installed his own man in the position.<sup>150</sup> The legitimate winner and his running-mates were beaten terribly by Noriega loyalists.<sup>151</sup>

At first, the United States attempted to get rid of Noriega by imposing economic sanctions,<sup>152</sup> attempting to negotiate his resignation,<sup>153</sup> and even undertaking five covert actions against him<sup>154</sup>—all without success.<sup>155</sup> On December 15, 1989, Noriega's hand-picked legislature appointed him as head of government, with the title "Maximum Leader."<sup>156</sup> The legislature also declared that a "state of war" existed

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150. Jill Smolowe, *Panama's Would-Be President*, TIME, Jan. 1, 1990, at 30. The election pitted the pro-Noriega Coalition of National Liberation, whose candidate was Carlos Duque, a business partner of Noriega, against the anti-Noriega Civil Opposition Democratic Alliance, whose candidate was Guillermo Endara, a labor lawyer. *Id.* at 30; SCRANTON, *supra* note 144, at 159; Black & Flores, *supra* note 148, at xxxvi. After exit polls showed a landslide victory for the opposition, the P.D.F. stole the election for Duque. SCRANTON, *supra* note 144, at 162. After violently suppressing demonstrations, *see infra* note 151 and accompanying text, Noriega nullified the election in its entirety, SCRANTON, *supra* note 144, at 164, and selected a former high school classmate as provisional president. *Id.* at 169.

151. The P.D.F. and the paramilitary Dignity Battalions viciously attacked the legitimate winner and his supporters when they demonstrated against Noriega. SCRANTON, *supra* note 144, at 163. Endara's bodyguard was killed, as was the bodyguard of Guillermo ("Billy") Ford, the legitimate Second Vice President. *Id.* at 163. Endara twice landed in the hospital with head injuries. *Id.* at 163-64.

152. In 1988, the United States froze Panama's assets in the United States and suspended all U.S. economic and military aid. *Id.* at 139. President Bush extended the economic sanctions after taking office in 1989. *Id.* at 156.

153. In the latter half of 1987, Panama's consul general in New York, José I. Blandón, served as an intermediary in negotiations between Noriega and the United States. The idea was to offer Noriega a "golden parachute," allowing Noriega to keep his ill-gotten wealth if he relinquished his power. *Id.* at 118. Although Noriega had initiated the negotiations, *id.*, he rejected the final plan and fired Blandón. *Id.* at 127. Deals were also proposed to Noriega by U.S. Admiral Daniel J. Murphy (Ret.), *id.* at 121-24, and officials from the U.S. Departments of State and Defense. *See id.* at 126-27, 147-48, 149-52.

154. The Reagan and Bush Administrations authorized five covert operations in 1988 and 1989. *Id.* at 153. Little information is known about "Panama 1" and "Panama 2"; they are thought to have involved funding the Panamanian opposition's political activities and encouraging dissident officers to overthrow Noriega. *Id.* "Panama 3" was a coup plan that was abandoned after information about it leaked to the press. *Id.* at 153-55. "Panama 4" provided funds to the opposition for the 1989 Panamanian presidential election, *see supra* notes 151-52, but was also abandoned due to news leaks. *Id.* at 157-58.

"Panama 5" occurred after a domestic coup failed in October 1989. *See id.* at 185-91. Little is known about "Panama 5," but it may have been related to one of two covert U.S. actions in late 1989. In November, U.S. Federal Bureau of Investigation and Drug Enforcement Administration agents secretly raided a warehouse in Panama City, expecting to find a stockpile of explosives and terrorist devices. Upon seizing those items, the United States reportedly would have launched a military operation against Noriega. Instead, the agents found the warehouse to be empty, so the plan was aborted. *Id.* at 195. In December, Noriega evaded U.S. Special Forces attempting to seize and bring him to the United States for trial. *Id.*

155. George J. Church, *Showing Muscle*, TIME, Jan. 1, 1990, at 20, 23.

156. SCRANTON, *supra* note 144, at 197. The legislature also granted Noriega the power to overrule the civilian president, appoint government officials, direct foreign

between the United States and Panama.<sup>157</sup> On the next day, Panamanian soldiers killed an American serviceman,<sup>158</sup> wounded another,<sup>159</sup> and detained and beat a third<sup>160</sup> while threatening his wife with gang rape.<sup>161</sup> For President Bush, "That was enough."<sup>162</sup>

On December 20, 1989, 24,000 American troops invaded Panama.<sup>163</sup> American forces quickly overwhelmed Noriega's troops and took command of most of the small country.<sup>164</sup> After hiding in the Vatican embassy for eleven days,<sup>165</sup> Noriega finally surrendered to American authorities.<sup>166</sup> He was arrested, flown to the United States, and placed in a Miami jail to

affairs, and convene the legislature and cabinet—all powers he had exercised for years behind the scenes. *Id.*

157. Church, *supra* note 155, at 23.

158. SCRANTON, *supra* note 144, at 198. Members of the *Macho de Monte* ("wild hog") unit of the P.D.F. fired on an American vehicle driving through a P.D.F. checkpoint. A bullet hit Marine Lt. Robert Paz in the spine and killed him. THOMAS DONNELLY ET AL., OPERATION JUST CAUSE: THE STORMING OF PANAMA 94 (1991).

159. A bullet also grazed the ankle of another Marine officer. DONNELLY, *supra* note 158, at 94.

160. SCRANTON, *supra* note 144, at 199. After a U.S. Navy officer and his wife witnessed the killing of Lt. Paz, *see supra* note 158, the *Macho de Monte* took them to a P.D.F. office. There, a senior P.D.F. officer beat the American serviceman and threatened to kill him. SCRANTON, *supra* note 144, at 199. P.D.F. officers threw his wife against a wall, cutting her head, and threatened her with sexual abuse. DONNELLY ET AL., *supra* note 158, at 94-95.

161. Church, *supra* note 155, at 23.

162. Address to the Nation Announcing United States Military Action in Panama, 1989 PUB. PAPERS 1722, 1723 (Dec. 20, 1989) [hereinafter Panama Address].

163. Church, *supra* note 155, at 21. Immediately prior to the invasion, the democratically elected leaders of Panama—President-Elect Guillermo Endara, First Vice President-Elect Ricardo Arias Calderón, and Second Vice President-Elect Guillermo Ford—were inaugurated at a U.S. military base, where they remained for the next thirty-six hours. Smolowe, *supra* note 150, at 30.

164. Ed Magnuson, *Sowing Dragon's Teeth*, TIME, Jan. 1, 1990, at 24. For details on the fighting, *see generally* DONNELLY ET AL., *supra* note 159. During the invasion, 23 American soldiers and over 600 Panamanian soldiers were killed. George J. Church, *No Place to Run*, TIME, Jan. 8, 1990, at 38, 39. In addition, between 300 and 800 Panamanian civilians died. Ed Magnuson, *Passing the Manhood Test*, TIME, Jan. 8, 1990, at 43. Moreover, the invasion caused \$2 billion in economic damages to Panama. Church, *supra*, at 39.

165. Ed Magnuson, *A Guest Who Wore Out His Welcome*, TIME, Jan. 15, 1990, at 26. For five days, U.S. Special Forces chased Noriega and his entourage throughout Panama, unable to catch him. DONNELLY ET AL., *supra* note 158, at 105; SCRANTON, *supra* note 144, at 205. U.S. forces also surrounded foreign embassies where Noriega might have sought refuge. *Id.* After running out of places to hide, Noriega went to the *Papal Nunciature* (Vatican embassy) on December 24, 1989. *Id.* He telephoned Monsignor José Sebastián Laboa, the Vatican's Ambassador to Panama, from a Dairy Queen in Panama City requesting asylum. When Noriega reminded Laboa of Joseph and Mary's similar difficulties in finding a place to stay many Christmas Eves before, the Papal Nuncio decided that he could not refuse Noriega's request. Church, *supra* note 164, at 40. Thus, Laboa sent a car to pick up Panama's "Maximum Leader," who arrived at the embassy wearing only a t-shirt and running shorts and carrying two AK-47 rifles. DONNELLY ET AL., *supra* note 158, at 112.

166. Lacayo, *supra* note 150, at 24. Because of the Vatican's tradition of granting sanctuary to those fleeing prosecution, Laboa tried to convince Noriega to leave the embassy on his own. Magnuson, *supra* note 165, at 26. However, Noriega decided to surrender on the evening of January 3, 1990, only after a huge anti-Noriega demonstra-

await trial.<sup>167</sup> In April 1992, a jury found Noriega guilty on eight drug counts,<sup>168</sup> and he is currently serving a forty-year prison sentence.<sup>169</sup>

President Bush stated that the goals of Operation Just Cause, as the U.S. invasion was called, were "to safeguard the lives of Americans, to defend democracy in Panama, to combat drug trafficking, and to protect the integrity of the Panama Canal treaty."<sup>170</sup> As legal justification for the invasion, the United States invoked Article 51 of the U.N. Charter,<sup>171</sup> Article 21 of the Organization of American States Charter,<sup>172</sup> and Article 4 of the Panama Canal Treaty.<sup>173</sup>

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tion immediately outside the embassy made clear the potential consequences of remaining in Panama. *Id.* at 27.

167. *Id.*; DONNELLY ET AL., *supra* note 158, at 365.

168. *Go Directly to Jail*, TIME, Apr. 20, 1992, at 22.

169. *Trial Begins on Charges Noriega Ordered Killing*, ORLANDO SENTINEL, Feb. 18, 1994, at A8. *See also* U.S. v. Noriega, 808 F. Supp. 791, 803 (S.D. Fla. 1992) (holding that the Geneva Convention Relative to Treatment of Prisoners of War allowed the United States to incarcerate Noriega in a federal penitentiary, as long as the United States provided Noriega with the full benefits of the Convention during his confinement). In addition, on March 3, 1994, a Panamanian jury found Noriega guilty of ordering the murder of Moises Giroldi, the rebel army major who had led the unsuccessful October 1989 coup attempt. *See supra* note 154; *Jury Convicts Noriega*, HOUSTON CHRON., Mar. 5, 1994, at A29. Noriega was tried in absentia. *Id.*

170. Panama Address, *supra* note 162, at 1722.

171. Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama, 1989 PUB. PAPERS 1734 (Dec. 21, 1989); U.N. Doc. S/21035 (1989) (letter from Thomas Pickering, U.S. Permanent Representative to the United Nations).

172. *See* Robert Graham, *International Jurists Question Grounds for American Action*, FIN. TIMES, Dec. 22, 1989, § 1, at 6. The Organization of American States (O.A.S.) is a regional organization composed of 33 North American, Central American, South American, Latin American, and Caribbean countries. O. CARLOS STOETZER, *THE ORGANIZATION OF AMERICAN STATES* 1 (2d ed. 1993). It was established in 1948 to strengthen the peace and security of the region, solve political, legal, and economic disputes, and promote the economic, social, and cultural development of its members. *Id.* at 31; O.A.S. CHARTER art. 2. In the summer of 1989, the O.A.S. tried without success to persuade Noriega to give up his power. SCRANTON, *supra* note 144, at 168-69. Article 21 of the O.A.S. Charter, cited by the United States to justify intervention in Panama, provides: "The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof." O.A.S. CHARTER art. 21. However, on December 22, 1989, the O.A.S. condemned the U.S. invasion. *See* Resolution on Serious Events in the Republic of Panama, OEA/Series.G, CP/Res. 534 (800/89), Corr. 1 (Dec. 22, 1989). The vote was 20 in favor of condemnation and one opposed (the United States), with six abstentions. STOETZER, *supra*, at 174-75.

173. *See* U.N. SCOR, 44th Sess., 2899th mtg. at 34, U.N. Doc. S/PV.2899 (1989) (statement by Thomas Pickering, U.S. Permanent Representative to the United Nations). The 1903 Hay-Bunau-Varilla Treaty gave the United States "in perpetuity . . . the use, occupation, and control" of territory for the construction, operation, and protection of an international waterway through the isthmus of Panama. *See* Isthmian Canal Convention, Nov. 18, 1903, U.S.-Panama, art. 1, 33 Stat. 2234, 2234-35. The 1978 Panama Canal Treaty provides for the transfer of the canal to Panama at noon on December 31, 1999. *See* Panama Canal Treaty, Sept. 7, 1977, U.S.-Panama, art. 2, para. 2, art. 13, para. 1, 33 U.S.T. 47, 50, 75-76. The treaty established formal procedures for the gradual transition from American to Panamanian ownership. *See id.* arts. 3, 13. Article 4 requires the United States (as well as Panama) to protect and defend the

On December 23, 1989, in the midst of the fighting, the Security Council considered a draft resolution proposed by Algeria, Colombia, Ethiopia, Malaysia, Nepal, Senegal, and Yugoslavia.<sup>174</sup> The resolution stated that the Security Council "[s]trongly deplores" the U.S. action, called the invasion "a flagrant violation of international law and of the independence, sovereignty and territorial integrity of States," and demanded the immediate cessation of hostilities and the withdrawal of U.S. forces from Panama.<sup>175</sup> The United States, Great Britain, and France vetoed the draft resolution.<sup>176</sup> Nevertheless, six days later, the General Assembly passed a similar resolution condemning the U.S. action.<sup>177</sup>

### 3. *The Great Power Veto*

The U.N. response to American military action in both Libya<sup>178</sup> and Panama<sup>179</sup> illustrates the tension between national self-defense under international law and the so-called "Great Power Veto."<sup>180</sup> In both situations, the United States used its veto as a means to frustrate the limits on self-defense as established by Article 51 and U.N. practice.<sup>181</sup> A discernible pattern has recently emerged: the United States perceives a threat from an aggressor state, responds with unilateral military force, cites Article 51 to justify its action, and then vetoes a draft Security Council resolution condemning its action.<sup>182</sup> Thus, understanding the scope of the veto

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Canal "to meet the danger resulting from an armed attack or other actions which threaten the security of the Panama Canal or of ships transiting it." *Id.* art. 4, para. 1.

174. See U.N. SCOR, 44th Sess., 2902d mtg. at 18-20, U.N. Doc. S/PV.2902 (1989).

175. U.N. Doc. S/21048, at 1 (1989) (draft resolution).

176. See U.N. SCOR, 44th Sess., 2902d mtg. at 18-20, U.N. Doc. S/PV.2902 (1989). The result of the voting was 10 votes in favor (Algeria, Brazil, China, Colombia, Ethiopia, Malaysia, Nepal, Senegal, the Soviet Union, and Yugoslavia) and four votes opposed (Canada, France, Great Britain, and the United States), with one abstention (Finland). *Id.*

177. G.A. Res. 44/240, U.N. GAOR, 44th Sess., 88th plen. mtg., U.N. Doc. A/RES/44/240 (1989). This resolution was adopted 75-20, with 40 abstentions. *Assembly Demands Immediate Halt of United States Intervention in Panama*, U.N. CHRON., Mar. 1990, at 67. See also J. T. Nguyen, *U.N. Condemns U.S. Military Action in Panama*, U.P.I., Dec. 29, 1989, available in LEXIS, News Library, Archnews File. For the scholarly debate on the legality of the invasion, see generally Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293 (1991); Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281 (1991); Ruth Wedgwood, *The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion*, 29 COLUM. J. TRANSNAT'L L. 609 (1991).

178. See *supra* part III.B.1.

179. See *supra* part III.B.2.

180. See Schachter, *supra* note 103, at 263-64.

181. See *supra* notes 142, 176 and accompanying text.

182. The United States followed this pattern in bombing Libya, see *supra* part III.B.1., and invading Panama, see *supra* part III.B.2. The United States also vetoed Security Council resolutions condemning its invasion of Grenada and its shooting down of two Libyan reconnaissance aircraft. See U.N. Doc. S.16067/Res.1 (1983); U.N. SCOR, 41st Sess., 2491st mtg. at 197-98, U.N. Doc. S/PV.2491 (1986); U.N. Doc. S/20378 (1989); U.N. SCOR, 44th Sess., 2841st mtg. at 48, U.N. Doc. S/PV.2841 (1989). Similarly, the United States used its veto to block resolutions condemning Israel for intercepting a Libyan aircraft believed to have been transporting Palestinian terrorists and for attacking Lebanon. See U.N. Doc. S/17796/Rev.1 (1986) (revised draft resolution); U.N.



power is important because of its potential to vitiate international restrictions on the use of force in national self-defense.

The United Nations is composed of six principal organs: the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat.<sup>183</sup> The U.N. Charter gives the Security Council "primary responsibility for the maintenance of international peace and security."<sup>184</sup> The Security Council consists of fifteen members—five permanent members and ten non-permanent members.<sup>185</sup> The five permanent members are the People's Republic of China, France, Russia, the United Kingdom, and the United States.<sup>186</sup> The ten non-permanent members serve rotating

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SCOR, 41st Sess., 2655th mtg. at 114, U.N. Doc. S/PV.2655 (1986); U.N. Doc. S/20322 (1988); U.N. SCOR, 43rd Sess., 2832d mtg. at 28, U.N. Doc. S/PV.2832 (1988).

The other superpower, the former Soviet Union, followed the same pattern. *See, e.g.*, U.N. Doc. S/8761 (1968); U.N. Doc. S/8761/Add.1 (1968); U.N. SCOR, 23rd Sess., 1443rd mtg. at 29, U.N. Doc. S/PV.1443 (1968) (Soviet Union veto of draft resolution condemning its invasion of Czechoslovakia); U.N. Doc. S/13729 (1980); U.N. SCOR, 35th Sess., 2190th mtg. at 57, U.N. Doc. S/PV.2190 (1980) (Soviet Union veto of draft resolution condemning its invasion of Afghanistan).

183. U.N. CHARTER art. 7, ¶ 1.

184. *Id.* art. 24, ¶ 1. The Security Council can investigate international disputes, *id.* art. 34, call on the parties to settle the dispute by peaceful means, *id.* art. 33, ¶ 2, recommend solutions, *id.* art. 36, ¶ 1, require the parties to comply with provisional measures, *id.* art. 40, impose sanctions, *id.* art. 41, and take military action, *id.* art. 42.

185. *Id.* art. 23, ¶ 1. The Security Council originally consisted of 11 members: five permanent members and six non-permanent members. The General Assembly amended the U.N. Charter in 1963 to increase the size of the Security Council. *See* G.A. Res. 1991, U.N. GAOR, 18th Sess., 1285th plen. mtg., Supp. No. 15, at 21, U.N. Doc. A/5515 (1963) [hereinafter *Equitable Representation Resolution*]. Recent proposals to increase the size of the Security Council further have not yet been adopted. *See* Barbara Crossette, *At the U.N., a Drive for Diversity*, N.Y. TIMES, Oct. 24, 1994, at A6; Evelyn Leopold, *Russian Flag Replaces Soviet Hammer and Sickle Banner at U.N.*, Reuters, Dec. 27, 1991, at 1, available in LEXIS, News Library, Arcnews File; Masahiko Ishizuka, *Security Council Issue Cuts to Heart of Japan's Global Role*, NIKKEI WKLY., July 11, 1994, at 7.

186. U.N. CHARTER art. 23, ¶ 1. Interestingly, the language of the U.N. Charter does not accurately reflect current geopolitical reality. The Charter states that "the Republic of China" is one of the permanent members of the Security Council. U.N. CHARTER art. 23, ¶ 1. When the United Nations was established in 1945, mainland China (presently the "People's Republic of China") was one of the permanent members of the Security Council. In 1949, Communists seized control of mainland China, and the Nationalist government fled to the island of Taiwan. From 1949 until 1971, Taiwan was the official representative of "China" at the United Nations and on the Security Council. YODER, *supra* note 10, at 36. In 1971, the General Assembly voted to recognize the People's Republic of China as the official representative of China and restore its original rights and powers as a permanent member of the Security Council. *See* G.A. Res. 2758, U.N. GAOR, 26th Sess., 1976th plen. mtg., Supp. No. 29, at 2, U.N. Doc. A/8429 (1971). Yet the U.N. Charter still reads "Republic of China" because of the cumbersome amendment process. YODER, *supra* note 10, at 37. *See also* U.N. CHARTER arts. 108-109 (outlining the amendment process).

The U.N. Charter also states that "the Union of Soviet Socialist Republics" is one of the permanent members of the Security Council. U.N. CHARTER art. 23, ¶ 1. When the Soviet Union dissolved at the end of 1991, the Russian Federation inherited the former Soviet Union's position in the United Nations. Leopold, *supra* note 185, at 1. The transition was accomplished with a letter from Russian President Boris Yeltsin to U.N. Secretary-General Javier Perez de Cuellar rather than by Charter amendment because

two-year terms and are not eligible for immediate re-election.<sup>187</sup> In contrast to the Security Council, the General Assembly consists of representatives from every nation that is a member of the United Nations.<sup>188</sup> Its major functions are to discuss and propose solutions to international problems,<sup>189</sup> consider and approve the budget of the United Nations and its agencies,<sup>190</sup> and supervise the work of the Security Council and other U.N. organs.<sup>191</sup>

Each member of the Security Council has one vote.<sup>192</sup> Decisions on procedural matters require the affirmative vote of any nine members of the Council.<sup>193</sup> However, decisions on all other matters require the affirmative vote of nine members, including all of the permanent members.<sup>194</sup> This is the "Great Power Veto": a substantive proposal fails if just one of the permanent members votes against it, regardless of how many other members of the Council vote for the proposal.<sup>195</sup> The five permanent members, who had won World War II and then labored to establish an international organization to maintain the hard-fought peace, had been simply unwilling to join the United Nations without this protection.<sup>196</sup>

Yet in 1950, the United Nations instituted a procedure for resolving international crises when a veto prevents the Security Council from acting.<sup>197</sup> In such a situation, the "Uniting for Peace" Resolution requires the General Assembly to consider the matter and recommend collective measures.<sup>198</sup> However, action by the General Assembly under the Resolu-

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of fear of opening up a Pandora's Box of other large countries claiming rights to permanent membership on the Security Council. *Id.*

187. U.N. CHARTER art. 23, ¶ 2. The ten non-permanent members consist of five representatives of Africa and Asia, two from Latin America, one from Eastern Europe, and two from Western Europe and other areas. Equitable Representation Resolution, *supra* note 185, at 22.

188. U.N. CHARTER art. 9, ¶ 1.

189. *See id.* arts. 10-14.

190. *Id.* art. 17.

191. *Id.* art. 15.

192. *Id.* art. 27, ¶ 1.

193. *Id.* art. 27, ¶ 2.

194. *Id.* art. 27, ¶ 3.

195. The Security Council does not treat a permanent member's abstention from voting as a veto. SYDNEY D. BAILEY, *VOTING IN THE SECURITY COUNCIL* 69 (1969). Thus, it is possible for the Security Council to adopt a resolution without the affirmative vote of any of the permanent members. *Id.* at 73.

196. RUSSELL, *supra* note 21, at 714-15, 964. In particular, "American officials were not prepared to ask Congress and the public to commit the United States to major international actions, including the use of force, on the vote of other nations." *Id.* at 964.

197. *See* G.A. Res. 377, U.N. GAOR, 5th Sess., 302nd plen. mtg., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950).

198. *Id.* The Resolution states, in relevant part:

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommen-

tion is an inadequate substitute for action by the Security Council. Unlike the Security Council, the General Assembly depends on the voluntary cooperation of the members to carry out its recommended action.<sup>199</sup> As a result, "decisions [of the General Assembly] do not have precisely the same teeth as was intended by the founders [as] action by the Security Council."<sup>200</sup> Therefore, an American president ordering the use of force in self-defense need not worry about satisfying all of the requirements established by Article 51 and U.N. practice. He knows that he can effectively prevent the Security Council from taking any action on the issue or, more likely, condemning the United States. The veto is the final weapon to be used in the operation; condemnation by the General Assembly occurs after the operation has been initiated and is thus too late to prevent it.<sup>201</sup> Significantly, the United States did not have to exercise its veto after attacking Iraq in response to the Bush assassination attempt, because the Security Council did not consider taking any action whatsoever.<sup>202</sup>

#### IV. The Iraqi Plot to Kill George Bush

##### A. Background

###### 1. The Gulf War

On August 2, 1990, Iraq invaded Kuwait.<sup>203</sup> The invasion began only hours after Iraq withdrew from negotiations to settle a variety of financial and territorial disputes with its Persian Gulf neighbor.<sup>204</sup> President Bush

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dations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

*Id.* The Resolution also provides for the convening of emergency sessions of the General Assembly on 24 hours' notice, either by the vote of any seven (now nine) members of the Security Council or by a majority of the U.N. members. *Id.* The Security Council's referral of a matter to the General Assembly is not subject to the veto. RICHARD HISCOCKS, *THE SECURITY COUNCIL: A STUDY IN ADOLESCENCE* 291 (1973).

199. SENATE SUBCOMM. ON THE U.N. CHARTER, 83D CONG., 2D SESS., *THE PROBLEM OF THE VETO IN THE UNITED NATIONS SECURITY COUNCIL* 11 (Comm. Print 1954) [hereinafter *Senate Veto Report*]. However, Security Council decisions are only legally binding in the rare case when the Council makes them so. Schachter, *supra* note 110, at 122.

200. *Senate Veto Report*, *supra* note 199, at 11.

201. Of course, there are political costs in exercising the veto and in being condemned by the General Assembly. See Schachter, *supra* note 110, at 121-23; BAILEY, *supra* note 195, at 10.

202. See *infra* note 305 and accompanying text.

203. ARTHUR H. BLAIR, *AT WAR IN THE GULF: A CHRONOLOGY* 3 (1992). See also Lisa Beyer, *Iraq's Power Grab*, *TIME*, Aug. 13, 1990 at 16, 19. Justifying the invasion, Saddam Hussein claimed that a revolutionary group had overthrown the Emir of Kuwait and invited Iraqi intervention. *Id.* at 19.

204. Beyer, *supra* note 203, at 18-19. On August 1, 1990, Iraq and Kuwait held negotiations to discuss all of Iraq's complaints against its neighbor to the southeast. The issues discussed included Iraqi President Saddam Hussein's claims that Kuwait had depressed the price of oil through overproduction, costing Iraq \$7 billion each year, that Kuwait had stolen the Rumaila oil field along the Iraqi-Kuwaiti border, that Kuwait should forgive the billions of dollars that it had loaned to Iraq, and that all of Kuwait actually belonged to Iraq. Not surprisingly, the negotiations broke down after only two hours. *Id.* See also *RESOLUTIONS AND STATEMENTS OF THE UNITED NATIONS SECURITY*

ordered American troops and warplanes to defend Saudi Arabia, which was feared to be Iraqi President Saddam Hussein's next target.<sup>205</sup> Declaring that "[a] line has been drawn in the sand,"<sup>206</sup> Bush assumed leadership of the nearly unanimous international effort to force Iraq out of Kuwait.<sup>207</sup> The U.N. Security Council immediately condemned the invasion,<sup>208</sup> declared Iraq's annexation of Kuwait null and void,<sup>209</sup> and demanded that Iraq immediately and unconditionally withdraw its forces.<sup>210</sup> The Security Council also imposed mandatory economic sanctions on Iraq<sup>211</sup> and relied on the United States and other naval powers for enforcement of the sanctions.<sup>212</sup>

Over the next several months, as the crisis intensified,<sup>213</sup> the interna-

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COUNCIL (1946-1992): A THEMATIC GUIDE 507-08 (Karel C. Wellens ed., 1993) [hereinafter RESOLUTIONS AND STATEMENTS]; LESTER H. BRUNE, *AMERICA AND THE IRAQI CRISIS, 1990-1992: ORIGINS AND AFTERMATH* 21-42 (1993).

205. Michael Kramer, *Read My Ships*, TIME, Aug. 20, 1990, at 18, 21. In July 1968, Iraq's Baath ("Arab Socialist Resurrection") Party gained power in a coup d'état. Eric Hooglund, *Government and Politics in Iraq: A COUNTRY STUDY* 175 (Helen Chapin Metz ed., 1990). In 1979, Saddam Hussein assumed leadership of the party in his own coup. BRUNE, *supra* note 204, at 13. As Baath leader, Hussein became president of Iraq and commander-in-chief of its armed forces. Hooglund, *supra*, at 178. By invading Kuwait, Hussein controlled 20% of the world's oil; invading Saudi Arabia would have given him 60% of the world's oil and regional dominance. BRUNE, *supra* note 204, at 53.

206. *War in the Middle East: How We Went to War*, ATLANTA J. & CONST., Jan. 17, 1991, at A8 (quoting President Bush).

207. Kramer, *supra* note 205, at 21; Lisa Beyer, *The World Closes In*, TIME, Aug. 20, 1990, at 26. To the surprise of many observers, the international coalition even included most Arab states. See Jill Smolowe, *Me and My Brother Against My Cousin*, TIME, Aug. 20, 1990, at 33. See also *infra* note 214.

208. S.C. Res. 660, U.N. SCOR, 45th Sess., 2932d mtg. at 1, U.N. Doc. S/RES/660 (1990) [hereinafter Resolution 660]. This resolution was adopted on the day of the invasion by a vote of 14-0, with one abstention (Yemen). RESOLUTIONS AND STATEMENTS, *supra* note 204, at 508. For an analysis of U.N. actions during the Gulf War in the context of the right of collective self-defense under Article 51, see David R. Penna, *The Right to Self-Defense in the Post-Cold War Era: The Role of the United Nations*, 20 DENV. J. INT'L L. & POL'Y 41 (1991); Thomas K. Plofchan, Jr., *Article 51: Limits on Self-Defense?*, 13 U. MICH. J. INT'L L. 336 (1992).

209. S.C. Res. 662, U.N. SCOR, 45th Sess., 2934th mtg. at 1, U.N. Doc. S/RES/662 (1990) [hereinafter Resolution 662]. This resolution was adopted on August 9, 1990 by a vote of 15-0. RESOLUTIONS AND STATEMENTS, *supra* note 204, at 509. Hussein had declared a "comprehensive and eternal merger" with Kuwait. See Resolution 662, *supra*, at 1.

210. Resolution 660, *supra* note 208, at 1.

211. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933d mtg., at 2, U.N. Doc. S/RES/661 (1990). The Security Council prohibited all trade with (except for medical and humanitarian purposes) and the transfer of funds to Iraq and Kuwait. *Id.* This resolution was adopted on August 6, 1990 by a vote of 13-0, with two abstentions (Yemen and Cuba). RESOLUTIONS AND STATEMENTS, *supra* note 204, at 509. The United States, the European Community, and Japan also froze Kuwait's \$100 billion in foreign assets in order to keep them out of Hussein's hands. Beyer, *supra* note 207, at 29.

212. See S.C. Res. 665, U.N. SCOR, 45th Sess., 2938th mtg. at 1, U.N. Doc. S/RES/665 (1990). This resolution was adopted on August 25, 1990 by a vote of 13-0, with two abstentions (Yemen and Cuba). RESOLUTIONS AND STATEMENTS, *supra* note 204, at 511. See also Beyer, *supra* note 207, at 28.

213. The Iraqi forces plundered Kuwait and committed a number of war crimes against Kuwaiti nationals. RESOLUTIONS AND STATEMENTS, *supra* note 204, at 511. See

tional coalition against Iraq massed its forces in the Persian Gulf.<sup>214</sup> On November 29, 1990, the Security Council approved a resolution authorizing the use of force against Iraq unless Saddam Hussein withdrew from Kuwait by January 15, 1991.<sup>215</sup> Because the deadline passed without Iraqi compliance, the coalition forces began bombing military targets throughout Iraq on January 16, 1991.<sup>216</sup> The ground war began on February 23, 1991, when the international coalition invaded Iraq and Kuwait.<sup>217</sup> Incredibly, the coalition forces achieved victory within 100 hours<sup>218</sup> by

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also S.C. Res. 670, U.N. SCOR, 45th Sess., 2943d mtg. at 1, U.N. Doc. S/RES/670 (1990) (condemning those actions). In addition, Iraq held hostage thousands of foreigners who had been in Iraq and Kuwait at the time of the invasion, including over 3000 Americans. Ed Magnuson, *Saddam's Strongest Card*, TIME, Aug. 27, 1990, at 24, 24-25. The Western hostages were taken to military and civilian installations to be used as "human shields" against a military attack. *Id.*; *War in the Middle East*, *supra* note 206, at A8. The Security Council repeatedly demanded the release of all third state nationals. See S.C. Res. 664, U.N. SCOR, 45th Sess., 2937th mtg. at 1, U.N. Doc. S/RES/664 (1990); S.C. Res. 667, U.N. SCOR, 45th Sess., 2940th mtg. at 2, U.N. Doc. S/RES/667 (1990); S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg. at 2, U.N. Doc. S/RES/674 (1990).

As all of this was occurring, a variety of attempts at negotiating a peaceful resolution were failing. See Lisa Beyer, *Pausing at the Rim of the Abyss*, TIME, Sept. 10, 1990, at 20; George J. Church, *Saddam's Strategies*, TIME, Oct. 1, 1990, at 50, 51; George J. Church, *The Waiting Game*, TIME, Oct. 15, 1990, at 50, 51.

214. The coalition forces consisted of 737,000 men and women in ground units, aboard 190 vessels, and flying or maintaining 1800 aircraft. Although the coalition was composed of troops from 34 different nations, the United States provided most of the troops, ships, and aircraft. BLAIR, *supra* note 203, at 125. See also James Walsh, *A Partnership to Remember*, TIME, Mar. 11, 1991, at 49-50.

215. See S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg. at 1, U.N. Doc. S/RES/678 (1990) [hereinafter Resolution 678]. This resolution was adopted by a vote of 12-2 (Yemen and Cuba), with one abstention (China). RESOLUTIONS AND STATEMENTS, *supra* note 204, at 514. The text of the resolution actually authorized the use of "all necessary means to uphold and implement [the previous resolutions relating to the crisis] and to restore international peace and security in the area." Resolution 678, *supra*, at 1 (emphasis added). After the Security Council passed this resolution, Saddam released the hostages. Dan Goodgame, "What If We Do Nothing?", TIME, Jan. 7, 1991, at 22, 24. Following a flurry of unsuccessful last-minute diplomatic initiatives by the United States and other countries, the U.S. Congress voted to support the war resolution. See Lisa Beyer, *Last Chance to Talk*, TIME, Jan. 14, 1991, at 15, 15-16; Lisa Beyer, *Last Gasps on the Negotiation Trail*, TIME, Jan. 21, 1991, at 30, 30-31; Authorization for Use of Military Force Against Iraq Resolution, Pub. L. 102-1, 105 Stat. 3 (1991); Richard Lacayo, *A Reluctant Go-Ahead*, TIME, Jan. 21, 1991, at 32.

216. George J. Church, *So Far, So Good*, TIME, Jan. 28, 1991, at 18, 20-22. The initial targets included command-and-control centers, air bases, ballistic missile launchers, radar, facilities, and chemical and nuclear warfare factories. *Id.* at 20-21; BRUNE, *supra* note 204, at 108-09; BLAIR, *supra* note 203, at 77. By eliminating those targets first, the coalition forces destroyed Iraq's air defenses and limited the ability of Iraqi forces to withstand a ground attack. *Id.* at 77.

217. BRUNE, *supra* note 204, at 115. On February 22, 1991, President Bush gave Hussein an ultimatum: begin withdrawing from Kuwait within 24 hours or face a coalition invasion to liberate Kuwait. Hussein ignored the deadline, so the coalition forces invaded Kuwait. *Id.* at 114-15.

218. George J. Church, *The 100 Hours*, TIME, Mar. 11, 1991, at 22, 24. The quick coalition victory was contrary to Hussein's earlier prediction of "the mother of all battles" between coalition and Iraqi forces. George J. Church, *Saddam's Strategies*, *supra* note 213, at 50 (quoting Saddam Hussein). In addition, Hussein failed to fulfill his

destroying the Iraqi army<sup>219</sup> and forcing Iraq to retreat from Kuwait.<sup>220</sup> On February 27, 1991, President Bush ordered the coalition forces to suspend all offensive operations, effectively ending the war.<sup>221</sup> Within a few hours, Iraq informed the United Nations that it would comply with all of the Security Council resolutions.<sup>222</sup> Iraq formally accepted the U.N. cease-fire terms on April 5, 1991.<sup>223</sup>

## 2. "Why not just kill Saddam Hussein?"

As these events were unfolding, many commentators discussed whether or not the United States could quickly resolve the crisis by assassinating the Iraqi dictator.<sup>224</sup> One of the proponents of this so-called "common sense" solution simply asked: "[I]nstead of war, why not just kill Saddam Hus-

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promise that Iraq would make the American soldiers "swim in their own blood." Michael Kramer, *The Moments of Truth*, Jan. 21, 1991, at 22, 24 (quoting Saddam Hussein). American casualties during the war consisted of 148 combat deaths and 458 combat wounded. BRUNE, *supra* note 204, at 121. These totals were less than five percent of the lowest pre-war estimates by the U.S. Department of Defense. Church, *The 100 Hours*, *supra*, at 32.

219. In what he compared to football's "Hail Mary" play, General H. Norman Schwarzkopf, the commander-in-chief of the American military forces in the Persian Gulf, sent American, British, and French forces north into Iraq to cut off Iraq's elite Republican Guard units from the front-line Iraqi troops in Kuwait. BRUNE, *supra* note 204, at 115. This strategy succeeded in deceiving Iraq as to the main point of attack and in surrounding the Iraqi forces. Church, *The 100 Hours*, *supra* note 218, at 24; *Sayings of Stormin' Norman*, TIME, Mar. 11, 1991, at 27. The estimates of the number of Iraqis killed during the war ranged from 25,000 to 100,000. BLAIR, *supra* note 203, at 116-17. Iraq, which had the world's fourth largest army before the war, *id.* at 105, was left with only an infantry army after the war and was no longer capable of offensive operations. Church, *The 100 Hours*, *supra* note 218, at 31. However, Hussein has since begun to rebuild his armed forces. U.S. NEWS & WORLD REPORT, TRIUMPH WITHOUT VICTORY: THE UNREPORTED HISTORY OF THE PERSIAN GULF WAR 412 (1992).

220. Church, *The 100 Hours*, *supra* note 218, at 31-32. On February 25, 1991, Iraq began to withdraw from Kuwait City, which coalition forces liberated the following day. *Id.* at 30, 31.

221. Church, *The 100 Hours*, *supra* note 218, at 31.

222. BLAIR, *supra* note 203, at 116.

223. BRUNE, *supra* note 204, at 119. The Security Council set out the cease fire terms in S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991). By ratifying the peace treaty, Iraq agreed, *inter alia*, to comply with the 13 resolutions passed during the crisis; to destroy its chemical, biological, and nuclear weapons and allow U.N. inspection teams to verify such actions; to destroy missiles and missile launchers with a range of over 90 miles; and to pay reparations to Kuwait. *See id.* However, the United Nations is still trying to get Iraq to comply fully with these cease-fire terms. *See U.N., Doubting Iraq, Declines to Lift Sanctions*, N.Y. TIMES, July 12, 1995, at A7; Letter to Congressional Leaders on Iraq, 31 WEEKLY COMP. PRES. DOC. 847 (May 17, 1995).

224. *See, e.g.*, Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1990, at D1; *Crossfire* (CNN television broadcast, Oct. 22, 1990); George J. Church, *Saddam in the Cross Hairs*, TIME, Oct. 8, 1990, at 29. *See also* Chris A. Anderson, *Assassination, Lawful Homicide, and the Butcher of Baghdad*, 13 HAMLINE J. PUB. L. & POL'Y 291 (1992); Boyd M. Johnson, III, Note, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L.J. 401 (1992); Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609 (1992); Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER L. REV. 615 (1992).

sein? Few would mourn and many lives might be saved . . . ."<sup>225</sup> That might very well have been true, but both international<sup>226</sup> and domestic law<sup>227</sup> prohibit assassination. The term "assassination" does not have a generally accepted definition.<sup>228</sup> This Note adopts the following definition: "the intentional killing of a specified victim or group of victims, perpetrated for reasons related to his (her, their) public prominence and undertaken with a political purpose in view."<sup>229</sup> Ironically, the term is derived from the Arabic word *hashishiyyin* ("deviators"),<sup>230</sup> the name for the members of an eleventh-century Muslim brotherhood devoted to killing opposing religious and political leaders.<sup>231</sup>

Article 2 of the U.N. Charter, which prohibits the use of force in international affairs,<sup>232</sup> seems to forbid the assassination of individuals for political purposes.<sup>233</sup> The international rules of warfare contain more specific prohibitions. The Hague IV Convention (1907) provides that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited,"<sup>234</sup> and that "it is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army."<sup>235</sup> In 1956, the U.S. Army interpreted these provisions as applying to acts of assassination.<sup>236</sup> Protocol I of the 1949 Geneva Conventions incorporated the prohibition from the Hague IV Convention.<sup>237</sup>

225. *Crossfire* (CNN television broadcast, Oct. 22, 1990) (quoting political commentator Michael Kinsley).

226. See *infra* notes 232-37 and accompanying text.

227. See *infra* notes 238-40 and accompanying text.

228. Schmitt, *supra* note 224, at 611-12. See also Anderson, *supra* note 224, at 294 (surveying proposed definitions of the term); W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4, 8 (appendix A) (surveying dictionary definitions of the terms "assassinate" and "assassinations"). *Black's Law Dictionary* defines "assassination" as "[m]urder committed, usually, though not necessarily, for hire, without direct provocation or cause of resentment given to the murderer by the person upon whom the crime is committed; though an assassination of a public figure might be done by one acting alone for personal, social or political reasons." BLACK'S LAW DICTIONARY 114 (6th ed. 1990).

229. FRANKLIN L. FORD, *POLITICAL MURDER: FROM TYRANNICIDE TO TERRORISM* 2 (1985).

230. *Id.* at 87, 99.

231. See *id.* at 101-02.

232. U.N. CHARTER art. 2, ¶ 4.

233. Parks, *supra* note 228, at 4; Anderson, *supra* note 224, at 292.

234. Hague IV Convention, *supra* note 8, art. 22.

235. *Id.* art. 23(b).

236. DEP'T OF THE ARMY, *THE LAW OF LAND WARFARE, FIELD MANUAL* 27-10, para. 31, at 17 (1956) [hereinafter *Army Field Manual*]. The Army Field Manual interpreted these provisions as "prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'" *Id.* However, the Manual emphasized that they do not "preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere." *Id.*

237. Article 35 of Protocol I states: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, art. 35, para.

American law also forbids assassination attempts against foreign leaders. Executive Order 12,333 states: "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."<sup>238</sup> President Gerald Ford originally implemented the ban after a Senate investigation implicated U.S. officials in assassination plots against several foreign leaders.<sup>239</sup> By the time of the Persian Gulf crisis, four successive U.S. presidents had affirmed the policy.<sup>240</sup> Thus, while President Bush did acknowledge that Hussein's removal from power certainly would simplify the situation in the Middle East, he stopped short of explicitly saying that Hussein should be killed.<sup>241</sup> However, the loopholes that exist in the domestic and international assas-

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1 [hereinafter Protocol I]. Article 37 states: "It is prohibited to kill, injure or capture an adversary by resort to perfidy." *Id.* art. 37, para. 1.

In 1949, the Diplomatic Conference of Geneva adopted four international conventions on warfare: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

238. Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. § 401 (1988) [hereinafter Exec. Order No. 12,333].

239. *Wanting It Both Ways*, TIME, Apr. 28, 1986, at 20. See SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, U.S. SENATE, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS (1976). The Senate Committee found the U.S. Central Intelligence Agency directly involved in the assassination of Dominican Republic dictator Rafael Trujillo, *id.* at 191, and in several failed plots to kill Cuban dictator Fidel Castro, *id.* at 71. The original ban read: "No employee of the United States Government shall engage in, or conspire to engage in, political assassination." Exec. Order No. 11,905, 3 C.F.R. 90, 101 (1976).

240. President Jimmy Carter retained Ford's ban with a slight modification in the language, in Exec. Order No. 12,036, 3 C.F.R. 112, 129 (1978) ("No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.") President Ronald Reagan kept this language in the current Executive Order, Exec. Order No. 12,333, *supra* note 238, which was left standing by Presidents George Bush and Bill Clinton. For a comprehensive study of the current ban and its application to the Persian Gulf crisis, see generally Johnson, *supra* note 224.

241. See, e.g., Daniel Schorr, *Hypocrisy About Assassination*, WASH. POST, Feb. 3, 1991, at C7; Andrew Alexander, *Allies Ponder Saddam's Postwar Fate*, ATLANTA J. & CONST., Feb. 21, 1991, at A7; Joel Achenbach, *Doing In A Dictator*, WASH. POST, Feb. 23, 1991, at D1. As the United States was preparing for war, U.S. Secretary of Defense Dick Cheney fired Air Force Chief of Staff General Michael Dugan for publicly suggesting that the United States was planning to target Hussein and his family. Bruce van Voorst, *Ready, Aim, Fired*, TIME, Oct. 1, 1990, at 55.

In spite of Bush's statements, there are reports that the United States did in fact try to kill Hussein during the Gulf War. See Brian Duffy, *Hollow Victory*, U.S. NEWS & WORLD REP., Jan. 20, 1992, at 40, 42 ("[I]n the final hours of the war . . . two U.S. Air Force F-111F aircraft dropped specially designed 5,000-pound bombs on an Iraqi command bunker 15 miles northwest of Baghdad in a last-ditch effort to kill the Iraqi leader."); *The Last-gasp Effort to Get Saddam*, U.S. NEWS & WORLD REP., Jan. 20, 1992, at 42, 42-43 (describing in detail the U.S. attempt to kill Saddam Hussein during the war). Such attempts, if true, were obviously unsuccessful.



sination bans provided for many interesting discussions.<sup>242</sup>

### 3. *Postwar Tensions*

After the war, Hussein continued to cause problems for the international community by refusing to cooperate with U.N. efforts to inspect Iraq's nuclear facilities.<sup>243</sup> In addition, in an effort to retain power, he ordered offensives to defeat rebellions by Iraqi Shiite and Kurdish tribes.<sup>244</sup> In order to protect and assist the rebels, the United States and its allies established "no-fly" zones in northern and southern Iraq, in which they pledged to shoot down any Iraqi warplanes.<sup>245</sup>

After President Bush was defeated in his 1992 re-election bid, Hussein attempted to take advantage of the presidential transition by violating the

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242. See, e.g., Church, *supra* note 224, at 29. Johnson, *supra* note 224, lists four ways in which a U.S. president could evade the international and domestic bans and legally order the assassination of a foreign leader:

- (1) Ask Congress to declare war, in which case a foreign leader exercising command responsibility would become a legitimate target;
- (2) Construe Article 51 of the United Nations Charter to permit the assassination of a foreign leader based on either a right to self-defense or a right to respond to criminal activities;
- (3) Narrowly interpret [Executive Order 12,333] as not restricting the President as long as he does not approve specific plans for the killing of individuals; or
- (4) Overrule the order, create an exception to it, or permit the Congress to do the same.

*Id.* at 403 (citations omitted).

By the time of the Persian Gulf crisis, the Bush Administration had already reinterpreted Executive Order 12,333 as not applying in situations when the United States takes or supports actions that result in the accidental or unintended killing of a foreign leader. See David B. Ottaway & Don Oberdorfer, *Administration Alters Assassination Ban*, WASH. POST Nov. 4, 1989, at A1. See also Johnson, *supra* note 224, at 423-26 (discussing the events leading up to the reinterpretation of the domestic ban). Former Vice President Dan Quayle has recently called for the rescission of Executive Order 12,333 "so that the President would have one more option in extraordinary circumstances." DAN QUAYLE, *STANDING FIRM: A VICE-PRESIDENTIAL MEMOIR* 216 (1994). The late former president Richard Nixon has made similar statements. See *Nixon Interview* (CNN television broadcast, Jan. 15, 1992). In any event, aside from the legal obstacles, killing Hussein would have presented numerous practical problems. See, e.g., Nancy Gibbs, *A Show of Strength*, TIME, Oct. 24, 1994, at 34, 38; Michael Kramer, *The Cost of Removing Saddam*, TIME, Oct. 14, 1994, at 39.

243. RESOLUTIONS AND STATEMENTS, *supra* note 204, at 521-22, 525-27. See also *Cheat and Retreat for the Umpteenth Time*, TIME, Jan. 18, 1993, at 16. Iraq violated other provisions of the peace treaty as well. See RESOLUTIONS AND STATEMENTS, *supra* note 204, at 521-27.

244. BRUNE, *supra* note 204, at 126. After the war ended, the Kurds rebelled in northern Iraq and Iraqi Shiites rebelled in southern Iraq. TRIUMPH WITHOUT VICTORY, *supra* note 219, at 399. The Kurds are the largest non-Arab ethnic minority in Iraq and have fought for an independent homeland almost since the founding of the Republic of Iraq in 1958. Stephen Pelletiere, *The Society and Its Environment, in IRAQ: A COUNTRY STUDY* 69, 82, 84 (Helen Chapin Metz ed., 1990). Shiite Muslims constitute over half of Iraq's total population. BRUNE, *supra* note 204, at 15. In contrast, Saddam Hussein and the Baath leadership are Sunni Muslims, which constitute a minority of the total population of Iraq. *Id.*

245. BRUNE, *supra* note 204, at 127, 129.

"no-fly" zones.<sup>246</sup> In December of 1992 and January of 1993, American fighter jets shot down several Iraqi MiGs that had entered the zones.<sup>247</sup> Hussein responded by installing surface-to-air missiles to shoot down allied planes enforcing the prohibitions.<sup>248</sup> In addition, he banned U.N. inspection teams from flying into Iraq<sup>249</sup> and sent Iraqi troops into Kuwait to steal weapons and equipment.<sup>250</sup>

Consequently, the United States, Britain, and France launched air<sup>251</sup> and missile<sup>252</sup> attacks against military targets in Iraq.<sup>253</sup> The attacks continued until the final days of the Bush Administration.<sup>254</sup> Although Hussein declared a "cease-fire" in a friendly gesture towards President-elect Bill Clinton,<sup>255</sup> it was short-lived and the allied attacks continued.<sup>256</sup> Recently, Clinton has sent U.S. troops and warships to the region to discourage Hussein from his apparent intention to reinvade Kuwait.<sup>257</sup>

## B. The Assassination Attempt

A 1992 study by the U.S. Central Intelligence Agency (C.I.A.) found that, given the opportunity, Hussein "would seek revenge against those who had been involved in the decision-making in the war, . . . and that the area likely where the danger would be greatest would be in the Middle East."<sup>258</sup> His opportunity came on April 14-16, 1993, when former President Bush visited Kuwait.<sup>259</sup> Bush was accompanied by several family members, a few

246. *Iraqi Miscalculation*, TIME, Jan. 11, 1993, at 10.

247. *Id.* at 10; *Cheat and Retreat for the Umpteenth Time*, *supra* note 243, at 16; *Saddam Doesn't Get the Message*, TIME, Jan. 25, 1993, at 16-17; Jill Smolowe, *A Spanking for Saddam*, TIME, Jan. 25, 1993, at 44.

248. Smolowe, *supra* note 247, at 46.

249. *Cheat and Retreat for the Umpteenth Time*, *supra* note 243, at 16.

250. *Saddam Doesn't Get the Message*, *supra* note 247, at 16.

251. Smolowe, *supra* note 247, at 44-45.

252. *Saddam Tests the Limits of Victory*, TIME, Feb. 1, 1993, at 18.

253. The targets included surface-to-air missile sites, radar and communications facilities, and a nuclear facility. *Id.*; Smolowe, *supra* note 247, at 45-46.

254. Smolowe, *supra* note 247, at 45-46.

255. Bruce W. Nelan, *Time to Get Organized*, TIME, Feb. 1, 1993, at 49 (quoting Saddam Hussein).

256. See Mark Fineman, *U.S. Attacks North Iraq Missile Site*, L.A. TIMES, Jan. 23, 1993, at A4; *Saddam Tests the Limits of Victory*, *supra* note 252, at 18. Before taking office, Clinton stated that he would continue the Bush Administration policy towards Iraq. Thomas L. Friedman, *Clinton Affirms U.S. Policy on Iraq*, N.Y. TIMES, Jan. 15, 1993, at A1.

257. See Gibbs, *supra* note 242, at 34, 36; Richard Corliss, *Suddenly, Saddam Again*, TIME, Oct. 17, 1994, at 54.

258. *Larry King Live* (CNN television broadcast, May 10, 1993) (quoting former C.I.A. Director Robert Gates). However, according to Gates, the study "was primarily focused on those who do not have continuing Secret Service protection, not so much on . . . President [Bush]." *Id.* But see *Iraqi Cites Revenge in Plot to Kill Bush*, N.Y. TIMES, Oct. 18, 1994, at A17 (quoting Wali al-Ghazali, who had been convicted for his role in the April 1993 plot to kill Bush, as explaining that he wanted revenge against the man who had "caused harm to 14 million Iraqis" during the Gulf War, including "kill[ing] 16 people from my family . . .").

259. *Bush, on a Visit to Kuwait, Is Given a Hero's Welcome*, N.Y. TIMES, Apr. 15, 1993, at A6.

Bush Administration officials, and about fifteen Secret Service agents.<sup>260</sup> During the three-day trip, the Kuwaiti government honored Bush for his role in liberating Kuwait from Iraq during the Gulf War.<sup>261</sup> Bush was presented with the *Mubarak al-Kabeer*, the nation's highest civilian award,<sup>262</sup> as well as an honorary degree from Kuwait University.<sup>263</sup> In addition, he addressed the Kuwaiti Parliament, visited war sites, and reviewed American troops.<sup>264</sup> The trip seemed uneventful, and Bush and his entourage returned safely to the United States.

However, on the day of Bush's arrival, the Kuwaiti government foiled an assassination plot against the former president.<sup>265</sup> During and after the visit, Kuwaiti authorities arrested sixteen Iraqi and Kuwaiti suspects on charges of conspiracy to kill Bush and commit other terrorist acts.<sup>266</sup>

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260. *Kuwait Jet Carrying Bush Loses Part of Wing, Lands*, L.A. TIMES, Apr. 13, 1993, at A22.

261. *Bush, on a Visit to Kuwait, Is Given a Hero's Welcome*, *supra* note 259, at A6.

262. *Id.* The medal, which means "Mubarak the Great" in English, is named for the ruler of Kuwait from 1896-1915, who is revered for his role in Kuwait's independence. *Id.*

263. *Bush Awarded Kuwait Degree*, N.Y. TIMES, Apr. 16, 1993, at A3.

264. *Kuwait's Hero Pays a Visit*, N.Y. TIMES, Apr. 18, 1993, § 4, at 2.

265. *Background Statement on Iraqi/Bush Plot*, U.S. DEP'T OF STATE DISPATCH, July 5, 1993 [hereinafter Background Statement]. Before the visit, the Kuwaiti government had discovered evidence of an assassination plot. Yet it did not inform Bush until after he arrived in Kuwait and the plot was foiled for fear that he would cancel the trip. *Kuwait Didn't Tell Bush of Death Plot Before Visit*, HOUSTON CHRON., July 4, 1993, at A22; Douglas Jehl, *U.S. Cites Evidence in a Plot on Bush*, N.Y. TIMES, May 8, 1993, § 1, at 9. Bush may have been in the most danger before he even arrived in Kuwait. The Kuwait Airways Boeing 747 sent by the Emir to pick up the Bushes in Texas was forced to turn around and make an emergency landing in Houston because the skin of one of the wings began to peel away over Louisiana. This delayed the group's departure by one day. *Kuwait Jet Carrying Bush Loses Part of Wing, Lands*, *supra* note 260, at A22.

266. Barton Gellman & Ann Devroy, *U.S. Links Iraq to Plot to Assassinate Bush in Kuwait*, WASH. POST, May 8, 1993, at A1. The Kuwaiti trial of fourteen of the suspects (eleven Iraqis and three Kuwaitis) began on June 5, 1993. On the first day of the trial, the two defendants who had confessed to the F.B.I., see *infra* text accompanying note 273, pled guilty and testified about the plot. Jonathan C. Randal, *Iraqi Testifies He Was Hired to Kill Bush*, WASH. POST, June 6, 1993, at A29. One of the two later retracted his confession and pled not guilty. *Key Defendant Retracts Confession in Bush Assassination Plot Trial*, AGENCE FRANCE PRESSE, Mar. 5, 1994, available in LEXIS, News Library, Curnws file.

The trial lasted almost exactly one year because of several adjournments. See *Events Leading to Kuwaiti Bush Plot Trial Verdict*, Reuters, June 4, 1994, available in LEXIS, News Library, Curnws File; *Bush Assassin Trial*, NEWSDAY, Feb. 6, 1994, at 16. Finally, on June 4, 1994, the Kuwaiti State Security Court sentenced to death five Iraqis and one Kuwaiti for attempting to assassinate former President Bush. *Kuwait Sentences Six to Death for Plotting to Kill Bush*, N.Y. TIMES, June 5, 1994, § 1, at 6. The court also sentenced seven Iraqis and Kuwaitis to prison terms ranging from six months to 12 years, and acquitted one Kuwaiti. *Id.* On March 20, 1995, the Court of Cassation, Kuwait's highest appellate court, upheld two of the death sentences, commuted three other death sentences to jail terms, and acquitted one defendant sentenced to death. *Kuwait Politician Wants Security Court Abolished*, REUTERS WORLD SERV., Apr. 6, 1995, available in LEXIS, News Library, Curnws File; *Death Penalty Upheld in Bush Plot*, CHI. TRIB., Mar. 21, 1995, at 6; *Chronology of Events Related to Alleged Iraqi Plot Against Bush*, REUTERS, Mar. 20, 1995, available in LEXIS, News Library, Curnws File.

According to the Kuwaiti Ministry of Defense, the suspects had planned to make three attempts on Bush's life if necessary:

first with a remote-controlled car bomb as he arrived at Kuwait City's airport; then with a second car bomb near a theater where Bush received an honorary doctorate; and finally with a suicide attack by a man who planned to wrap himself in explosives and detonate them next to Bush.<sup>267</sup>

Moreover, Kuwait announced that the plotters were linked to the Iraqi government.<sup>268</sup>

President Clinton sent intelligence teams from the U.S. Secret Service, Federal Bureau of Investigation (F.B.I.), and C.I.A. to Kuwait to conduct an investigation.<sup>269</sup> On June 24, 1993, the F.B.I. and C.I.A. reported to President Clinton that Iraq had planned and directed the operation.<sup>270</sup> The evidence included the following:<sup>271</sup> *Forensics:* F.B.I. forensics experts determined that key components of the seized explosives were similar to devices previously recovered from Iraqi terrorist operations; those components had never appeared in the devices used by any other terrorist group;<sup>272</sup> *Suspects:* The F.B.I. interviewed all of the suspects. The two main suspects, both Iraqi nationals, told the F.B.I. that individuals associated with the Iraqi Intelligence Service had recruited them, instructed them, and provided them with the explosives. One suspect stated that he was recruited specifically to assassinate President Bush, while the other stated that he was instructed to help transport the car bomb to Kuwait University and to plant smaller bombs elsewhere in Kuwait;<sup>273</sup> *Intelligence Assessments:* During and after the Gulf War, the Iraqi government indicated that it would eventually punish President Bush for the war. The F.B.I. reported that various classified intelligence sources supported the conclusion that Iraq had ordered the assassination attempt.<sup>274</sup>

### C. The U.S. Response

The following day, President Clinton ordered a military strike against

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For details on the defendants and their bungled plot, see Mark Fineman, *Miscast Characters Accused of Plot to Kill George Bush*, L.A. TIMES, Oct. 30, 1993, at A1; Seymour M. Hersh, *A Case Not Closed*, NEW YORKER, Nov. 1, 1993, at 89-92; Inal Ersan, *Unheard Evidence Links Iraq to Bush Murder Plot*, Reuters, June 4, 1994, available in LEXIS, News Library, Curnws File.

267. Gellman & Devroy, *supra* note 266, at A1.

268. Jehl, *supra* note 265, § 1, at 9.

269. *Id.*

270. James Collins, *Striking Back*, TIME, July 5, 1993, at 20, 21.

271. The U.S. Ambassador to the United Nations, Madeleine Albright, later presented this evidence to the Security Council. See U.N. SCOR, 48th Sess., 3245th mtg. at 3-9, U.N. Doc. S/PV.3245 (1993) (speech by Madeleine Albright, U.S. Permanent Representative to the United Nations) [hereinafter Albright Speech]. For a detailed criticism of the evidence, see generally Hersh, *A Case Not Closed*, *supra* note 266.

272. See *Background Statement*, *supra* note 265; Albright Speech, *supra* note 271, at 4.

273. See Albright Speech, *supra* note 271, at 5-6.

274. See *id.* at 6.

Baghdad.<sup>275</sup> After reviewing a list of potential targets with his advisors, the president personally selected the *Mukhabarat*, the Iraqi Intelligence Service.<sup>276</sup> This was the "low end" military option presented to him, attractive because it was thought to satisfy even the narrowest legal test of self-defense under Article 51.<sup>277</sup> This option was attractive for other reasons as well: the *Mukhabarat* was the agency believed to have plotted President Bush's assassination,<sup>278</sup> its attack posed little risk of heavy civilian casualties,<sup>279</sup> and its destruction would deter Iraq both in terms of psychology and operations.<sup>280</sup> For both legal and practical reasons, the Administration did not seriously consider the idea of trying to kill or harm Hussein himself.<sup>281</sup>

Thus, on Saturday, June 26, 1993, at approximately 4:22 p.m. Eastern Standard Time (E.S.T.), U.S. warships in the Persian Gulf and Red Sea fired twenty-three Tomahawk cruise missiles at the headquarters of the *Mukhabarat*, in downtown Baghdad.<sup>282</sup> The missiles landed at about six p.m. E.S.T., early Sunday morning in Baghdad.<sup>283</sup> Twenty of the cruise missiles landed inside the compound, destroying the communications and computer centers in the "operations wing"<sup>284</sup> and nearly destroying the "leadership wing."<sup>285</sup> The remaining three missiles struck surrounding residential neighborhoods, destroying three houses, killing eight people,

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275. Hersh, *A Case Not Closed*, *supra* note 266, at 80. Initially, the Clinton Administration had indicated that it was reluctant to take any action before the conclusion of the Kuwaiti trial. R. Jeffrey Smith, *U.S. Links Iraq to Bush Plot*, WASH. POST, June 10, 1993, at A25. However, after the U.S. action, a State Department spokesman explained: "[The United States] looked upon this attack on the United States and substantiated the nature of the threat to the United States and responded accordingly. That's a separate question from the guilt or innocence of individual parties in Kuwait." *State Department Regular Briefing*, Fed. News Serv., June 28, 1993 (quoting U.S. State Department spokesman Mike McCurry), available in LEXIS, News Library, Arcnws File. But see John G. McCarthy, *The United States Should Prosecute Those Who Conspired to Assassinate Former President Bush in Kuwait*, 16 FORDHAM INT'L L.J. 1330 (1993) (arguing that the United States should have extradited the suspects and tried them in the United States).

276. John M. Broder, *Hussein Directed Plot to Kill Bush*, U.S. SAYS, L.A. TIMES, June 29, 1993, at A1. The *Mukhabarat* is both the security arm and the domestic and foreign intelligence apparatus of Saddam Hussein's governing *Baath* Party. Elaine Sciolino, *Clinton Overstates Impact of Raid, His Aides Warn*, N.Y. TIMES, June 29, 1993, at A6.

277. Lancaster & Gellman, *supra* note 1, at A1.

278. Sciolino, *supra* note 276, at A6.

279. Broder, *supra* note 276, at A1.

280. *Id.*

281. *Id.* See discussion *supra* part IV.A.2.

282. Lancaster & Gellman, *supra* note 1, at A1. The U.S.S. Chancellorsville launched nine missiles from its position in the Persian Gulf, while the U.S.S. Peterson launched 14 missiles from its position in the Red Sea. Collins, *supra* note 270, at 21.

283. Gwen Ifill, *U.S. Fires Missiles at Baghdad, Citing April Plot to Kill Bush*, N.Y. TIMES, June 27, 1993, § 1, at 1.

284. Sciolino, *supra* note 276, at A6.

285. Lancaster & Gellman, *supra* note 1, at A1. Four of those twenty missiles missed their targets but landed inside the compound. *Id.* The attack did not target or destroy the other intelligence services used by Saddam Hussein: the Military Intelligence Agency, the State Internal Security, and Special Security. Thus, U.S. officials conceded that the main impact of the attack was to disrupt domestic rather than foreign operations. Sciolino, *supra* note 276, at A6.

and wounding at least twelve people.<sup>286</sup> President Clinton later expressed his regret for the civilian casualties but emphasized that the attack had been timed to minimize casualties among workers inside the compound.<sup>287</sup>

In a televised address from the Oval Office that same evening, President Clinton told the nation that American investigators had found "compelling evidence" of an Iraqi plot to assassinate former President Bush.<sup>288</sup> He described the plot as

no impulsive or random act. It was an elaborate plan devised by the Iraqi Government and directed against a former President of the United States because of actions he took as President. As such, the Iraqi attack against President Bush was an attack against our country and against all Americans.<sup>289</sup>

Throughout the speech, Clinton strongly implied that Saddam Hussein was personally responsible for the attempt on Bush's life.<sup>290</sup> In his report to Congress, Clinton explained that he had ordered the military action "in the exercise of our inherent right of self-defense as recognized in Article 51 of the United Nations Charter and pursuant to my constitutional authority with respect to the conduct of foreign relations and as Com-

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286. *Id.* The casualties included beloved Iraqi artist Layla Attar. Lara Marlowe, *Broken Spirits*, TIME, July 12, 1993, at 46.

287. Lancaster & Gellman, *supra* note 1, at A13. The missiles hit between 2:00-2:05 a.m. local time, when the facility was expected to be largely deserted. *Id.* President Clinton also stressed that "we were trying to avoid killing civilians while still expressing our convictions about an Iraqi plan . . . to blow up a bomb that had a 400-yard radius in the middle of downtown Kuwait City, which would have killed hundreds and hundreds of civilians." *Id.* (quoting President Clinton). However, an unnamed source cited in *The Washington Post* (a "person with advance knowledge of the strike") disputed the Administration's asserted concern about civilian casualties, maintaining that

target planners knew the houses in surrounding residential neighborhoods were more likely to be occupied in the hours when most people sleep . . . . [T]he decision to shoot at night . . . was based on the low-flying Tomahawk[missiles'] vulnerability to ground fire when there is enough light for air defense gunners to aim.

*Id.* (quoting an unnamed source).

288. President William Clinton, Address to the Nation on the Strike on Iraqi Intelligence Headquarters, 29 WEEKLY COMP. PRES. DOC. 1180, 1181 (June 26, 1993) [hereinafter Clinton Speech].

289. *Id.* at 1181.

290. *See id.* At a news conference several days later, the President refused to specifically accuse Hussein, stating only that "the evidence clearly indicates that the bombing operation was authorized by the Iraqi government, . . . [and American] analysts have no experience of such an operation of that magnitude being authorized other than at the highest levels." *News Conference with U.S. President Bill Clinton and Argentine President Carlos Menem*, Fed. News Serv., June 29, 1993, available in LEXIS, News Library, Arcnws File (quoting President Clinton). Making the same point as the President, a "senior U.S. official" stated: "It is inconceivable that an operation like this, conducted by Iraqi intelligence, could have been done without Saddam Hussein [ordering it], because that is not the way the Iraqi intelligence system and the Iraqi government operate. You can assume it." Broder, *supra* note 276, at A1 (quoting an unnamed source).

mander in Chief . . . ."<sup>291</sup> On Capitol Hill, the U.S. action generally received bipartisan support.<sup>292</sup> In addition, public-opinion polls showed that Clinton's overall job approval rating had jumped eleven percentage points after the air strike,<sup>293</sup> and that 66% of Americans supported his decision.<sup>294</sup>

#### D. The Security Council's Reaction

In accordance with Article 51 of the U.N. Charter, the United States reported its action to the U.N. Security Council immediately after the attack.<sup>295</sup> The U.S. Ambassador to the United Nations, Madeleine Albright, addressed an emergency session of the Security Council on Sunday, June 27, 1993, stating: "I come to the Council today to brief you on a grave and urgent matter—an attempt to murder a President of the United States by the intelligence service of the Government of Iraq, a member of the United Nations."<sup>296</sup> She presented the evidence linking Iraq to the assassination attempt,<sup>297</sup> and stated that the United States had responded "as we are entitled to do under Article 51 of the United Nations Charter . . . ."<sup>298</sup> Albright also emphasized that the United States was not asking the Security Council to endorse the missile attack or take any other action.<sup>299</sup>

Iraq's Ambassador to the United Nations, Nizar Hamdoon, denied any Iraqi role in the "alleged" assassination attempt.<sup>300</sup> He stated that "that story was completely fabricated by the Kuwaiti regime for well-known purposes relating to its policy toward Iraq and with a view to damaging and harming [Iraq]."<sup>301</sup> He accused the United States of trying, convicting, and sentencing Iraq without evidence,<sup>302</sup> thus violating international law and its responsibility as a permanent member of the Security Coun-

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291. War Powers Resolution Letter, *supra* note 3, at 1183. See also U.N. Doc. S/26003 (1993) (letter from Madeleine Albright, U.S. Permanent Representative to the United Nations) [hereinafter Albright Letter].

292. Gaylord Shaw, *Hit on Iraqi Center Successful, U.S. Says, But Civilians Killed*, NEWS-DAY, June 28, 1993, at 3. See also *Remarks By Congressional Leadership Following Their Meeting With President Clinton*, Reuter Transcript Rep., June 30, 1993, available in LEXIS, News Library, Arcnws File. But see Lancaster & Gellman, *supra* note 1, at A1, A13 (quoting Rep. Ronald Dellums (D-CA)).

293. Lori Santos, *Clinton Won't Point Finger at Saddam*, U.P.I., June 30, 1993, available in LEXIS, News Library, Arcnws File.

294. *Clinton: Iraqi Intelligence Crippled*, ST. LOUIS POST-DISPATCH, June 29, 1993, at A8 (citing a USA Today-CNN Gallup poll). Interestingly, 54% of those polled also believed that the attack would increase the risk of terrorism in the United States, and 53% favored assassinating Saddam Hussein. *Id.*

295. U.N. CHARTER art. 51. See Albright Letter, *supra* note 291.

296. Albright Speech, *supra* note 271, at 3.

297. See *supra* text accompanying notes 272-74.

298. Albright Speech, *supra* note 271, at 6.

299. *Id.* at 3.

300. See U.N. Doc. S/PV.3245, at 9-13 (1993) (speech by Nizar Hamdoon, Iraqi Permanent Representative to the United Nations).

301. *Id.* at 11.

302. *Id.*

cil.<sup>303</sup> Therefore, Hamdoun urged the Security Council to condemn the U.S. action.<sup>304</sup> The Security Council ignored his request; instead of passing judgment on the incident, the body just acknowledged the U.S. explanation and evidence.<sup>305</sup>

## V. Analysis of the U.S. Response

Realistically, the Security Council could not have satisfied the Iraqi ambassador's demands, as the United States could have simply exercised its veto over any adverse resolution.<sup>306</sup> Yet the United States did not even have to do that, as the Security Council did little more than hear its arguments and adjourn.<sup>307</sup> The General Assembly also took no action. Thus, the United Nations appears to have failed in its duty to scrutinize the U.S. action to determine whether it really was a legitimate act of self-defense. The United Nations apparently forgot the declaration by the Nuremberg

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303. *Id.* at 12.

304. *Id.* at 13.

305. Stanley Meisler, *U.N. Reaction Mild as U.S. Explains Raid*, L.A. TIMES, June 28, 1993, at A1. See also U.N. Doc. S/PV.3245, at 25 (1993) (statement by Yañez Barnuevo, Spanish Permanent Representative to the United Nations and then-President of the Security Council); Stephen Robinson, *U.N. Support for Raid on Baghdad*, Daily Telegraph, June 28, 1993, at 1, available in LEXIS, News Library, Arcnws File.

Inside and outside of the United Nations, world public opinion divided along expected lines. America's European allies unanimously supported the U.S. attack. See Craig R. Whitney, *European Allies Are Giving Strong Backing to U.S. Raid*, N.Y. TIMES, June 28, 1993, at A7. See also U.N. Doc. S/PV.3245, at 13-15 (1993) (statement by Jean-Bernard Merimee, French Permanent Representative to the United Nations); *id.* at 21-22 (statement by Sir David Hannay, British Permanent Representative to the United Nations). Russia, Japan, and South Korea also backed the action. See *id.* at 16 (statement by Yoshio Hatano, Japanese Permanent Representative to the United Nations); *id.* at 22-23 (statement by Yuli Vorontsov, Russian Permanent Representative to the United Nations); Paul Holmes, *Concern in China, Misgivings in Europe*, Reuters, June 28, 1993, available in LEXIS, News Library, Arcnws File.

Most Arab countries criticized the strike, charging that American inaction towards the plight of Bosnian Muslims and Palestinians living under Israeli occupation provided evidence of "double standards." *Arab Nations See a Double Standard*, L.A. TIMES, June 28, 1993, at A8. Kuwait and Turkey were the only Islamic states publicly supporting the United States. Konstantin Eggert & Maksin Yusin, *U.S. Strike on Baghdad Draws Mixed Reviews*, Current Digest of Post-Soviet Press, July 28, 1993, at 13, available in LEXIS, News Library, Arcnws File. China also criticized the attack, the only permanent member of the Security Council to do so. Holmes, *supra*. See also U.N. Doc. S/PV.3245, at 21 (1993) (statement by Li Zhaoxing, Chinese Permanent Representative to the United Nations).

A few days after the emergency Security Council meeting, U.N. Secretary-General Boutros Boutros-Ghali refused to reveal his opinion on whether or not the U.S. action was justified under Article 51. He first replied, "You have to ask this question to the American administration." When pressed further, he simply stated, "I will not give you an answer." *Boutros-Ghali Steers Clear of Iraq Controversy*, Reuters, July 1, 1993 (quoting Boutros-Ghali), available in LEXIS, News Library, Arcnws File.

306. See *supra* part III.B.3. Interestingly, the three Islamic countries on the Security Council (Pakistan, Morocco, and Djibouti) acknowledged their concern but did not defend Iraq. Robinson, *supra* note 305, at 1. See also U.N. Doc. S/PV.3245, at 16-17 (statement by Jose Eduardo Barbosa, Cape Verde Deputy Permanent Representative to the United Nations).

307. See discussion *supra* text accompanying note 305.



Tribunal that "whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."<sup>308</sup> This part of the Note will investigate whether or not the U.S. missile attack on Baghdad was justified as an act of national self-defense under international law.<sup>309</sup>

#### A. Under Customary International Law

In the first step of the analysis, the U.S. response must be measured against the standards of customary international law.<sup>310</sup> During the *Caroline* incident,<sup>311</sup> U.S. Secretary of State Daniel Webster outlined the requirements necessary for a valid claim of self-defense under customary international law.<sup>312</sup> First, there must be an imminent threat, a threat which is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."<sup>313</sup> Second, the response must be necessary to protect against that threat.<sup>314</sup> Third, the response must be proportionate to the threat; it must be "limited by that necessity and kept clearly within it" and cannot be "unreasonable or excessive . . . ."<sup>315</sup> Finally, the victim state must have taken the self-defensive action as a last resort. It must have tried to resolve the crisis through peaceful means or at least show that such an attempt "was impracticable" or "would have been unavailing . . . ."<sup>316</sup> These four requirements will be considered in turn.

##### 1. Imminent Threat

The hardest question is whether the assassination attempt against former President Bush constituted an imminent threat to the United States. First, was it a threat to the United States at all? In his address to the nation, President Clinton argued that it was a threat against the United States and all Americans.<sup>317</sup> According to Clinton, the attempt was such a threat

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308. Nuremberg Judgment, *supra* note 30, at 38.

309. For the purpose of analyzing the legality of the U.S. action, this Note assumes that the U.S. account of the assassination attempt, *see supra* part IV.B, is true and accurate.

310. The author agrees with those who argue that the U.N. Charter modifies, but does not completely supersede, customary international law. *See* discussion *supra* part III.A. The language of the Charter seems to compel this conclusion. Article 51 states in part that "[n]othing in the present Charter shall impair the *inherent* right of individual . . . self-defense if an armed attack occurs against a Member of the United Nations . . . ." U.N. CHARTER art. 51 (emphasis added). Thus, the proper framework for analyzing the legality of a claim of national self-defense seems to be the following: analyze the action according to customary international law (as expressed in the four-part *Caroline* standard, *see supra* text accompanying note 60), and then consider what is essentially the fifth condition for the use of force in self-defense, the Charter's requirement of an "armed attack."

311. *See* discussion *supra* part II.A.

312. Document 99, *supra* note 57, at 159.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. Clinton Speech, *supra* note 288, at 1181. In fact, he called it "an *attack* against our country and against all Americans." *Id.* (emphasis added). *See also* Albright Speech,

because it was "directed against a former President of the United States because of actions he took as President," particularly in leading the international coalition that defeated Iraq in the Gulf War.<sup>318</sup> President Clinton was correct. An assassination or attempted assassination against a current head of state poses a threat to his or her entire nation. It has a variety of potential effects, each of which is destabilizing: changes in the nation's leadership,<sup>319</sup> shifts in national policy,<sup>320</sup> systemic changes in the nation's political system,<sup>321</sup> social or economic revolution,<sup>322</sup> changes in the personal behavior patterns of political leaders,<sup>323</sup> and a rise in the general anxiety level of the populace.<sup>324</sup>

The international community was certainly concerned about those possibilities when it established rules of warfare which are generally assumed to prohibit assassination.<sup>325</sup> Moreover, the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents specifically addresses the topic of assassination, the only major multilateral treaty to do so.<sup>326</sup> The Convention requires the signatory states to criminalize the murder of and other violent actions against "internationally protected persons."<sup>327</sup> The cate-

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*supra* note 271 ("[E]very member here today would regard an assassination attempt against its former head of state as an attack against itself . . .").

318. Clinton Speech, *supra* note 288, at 1181.

319. MURRAY C. HAVENS ET AL., *THE POLITICS OF ASSASSINATION* 37 (1970).

320. *Id.* at 38. The authors explain:

Policy may change because the victim was its most eminent and vocal supporter and there are few left to give it the energetic support it needs. But policy may also change because the assassination represents in the minds of the survivors a discrediting of the old policy. It may change as well when the succeeding regime uses the assassination as an excuse to embark on new policies that the victim himself would have endorsed had he lived. Indeed, his assassination may provide the moral authority without which his goals could not have been achieved at all.

*Id.*

321. *Id.* at 38. Such systemic changes might include the abolition of political parties, the restriction of civil liberties, and the promotion of new ideologies. *Id.*

322. *Id.* at 39.

323. *Id.* at 34.

324. Murray Edelman & Rita James Simon, *Presidential Assassinations: Their Meaning and Impact on American Society*, in *ASSASSINATIONS AND THE POLITICAL ORDER* 455, 461 (William J. Crotty ed., 1971).

325. See Hague IV Convention, *supra* note 8, art. 23(b); Protocol I, *supra* note 237, art. 37. See also U.N. CHARTER art. 4, ¶ 2.

326. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter New York Convention]. Both Iraq and the United States are signatories to the Convention. See New York Convention, *supra*, 28 U.S.T. at 2043, 1035 U.N.T.S. at 209 (signature of Iraq); New York Convention, *supra*, 28 U.S.T. at 2069, 1035 U.N.T.S. at 225 (signature of the United States).

The Charter of the Organization of African Unity (O.A.U.) also condemns the use of political assassination by O.A.U. members. O.A.U. CHARTER art. 3, ¶ 5. Yet, as one scholar remarked, "the ongoing violence that plagues the African continent suggests that the provision is more hortatory than substantive." Schmitt, *supra* note 224, at 618.

327. New York Convention, *supra* note 326, art. 2, ¶¶ 1-2. The New York Convention only requires the signatory states to enact domestic legislation criminalizing such

gory of protected individuals includes heads of state and their families, but only when they are in a foreign state.<sup>328</sup> Thus, if the assassination attempt had occurred while Bush was still president, Iraq clearly would have violated the spirit of this Convention. A distinction should not be made merely because the attempt was made after Bush left office; the spirit of the Convention was violated, and many of the same destabilizing effects could still have occurred.<sup>329</sup>

The plot to kill former President Bush was therefore a threat to the United States, but was that threat "instant, overwhelming, leaving no choice of means, and no moment for deliberation"?<sup>330</sup> On first thought, one might respond in the negative. After all, the Kuwaiti government foiled the plot before Bush was in any danger of harm.<sup>331</sup> Kuwaiti authorities arrested sixteen suspects<sup>332</sup> and left their fates to the legal system.<sup>333</sup> The plot was thus unsuccessful. However, nothing prevented Iraq from directing a second—possibly successful—attempt on Bush's life.<sup>334</sup> Thus, the possibility of another assassination plot was "hanging threateningly over [Bush's] head"<sup>335</sup> and was therefore imminent. By attacking the Iraqi Intelligence Service, the United States hoped to prevent and deter future attempts to kill Bush.<sup>336</sup>

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action; it does not treat acts such as assassination as a violation of international law. Schmitt, *supra* note 224, at 619.

328. New York Convention, *supra* note 326, art. 1, ¶ 1(a).

329. The fact that former presidents and their families are protected by the U.S. Secret Service and that threats against them receive special criminal treatment evidences a similar concern by U.S. domestic law. See 18 U.S.C. § 879 (1988).

330. Document 99, *supra* note 57, at 159.

331. See *supra* note 265 and accompanying text.

332. See *supra* note 266 and accompanying text.

333. See *id.*

334. Bush's Houston neighbors were certainly concerned about the possibility of a second assassination attempt, even after the U.S. missile attack on Baghdad. See Bill Hewitt, *Having a Great Time, Thanks, PEOPLE*, July 19, 1993, at 38, 40.

335. WEBSTER'S NEW COLLEGIATE DICTIONARY 568 (1979) (defining "imminent").

336. See Clinton Speech, *supra* note 288, at 1182. Although some readers may choose to view this justification as one of "anticipatory self-defense," see *supra* note 66 and accompanying text, they should recognize that such a justification by its terms presupposes that no actual attack against the victim state had yet occurred. See Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1638 (1984). As discussed *infra* parts V.B.1-2., an attack had in fact occurred.

Other readers may view the American action not as self-defense at all, but as a reprisal. Like actions taken in self-defense, reprisals are a form of national self-help; unlike actions taken in self-defense, reprisals are illegal under international law. See U.N. CHARTER art. 2, ¶ 4 (proscribing "the threat or use of force"); *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States*, G.A. Res. 2624, U.N. GAOR, 25th Sess., Supp. No. 28, at 122, U.N. Doc. A/8028 (1970) ("States have a duty to refrain from acts of reprisal involving the use of force."). The difference between self-defense and reprisals is in their purpose:

Self-defense is permissible for the purpose of protecting the security of the state and the essential rights—in particular the rights of territorial integrity and political independence—upon which that security depends. In contrast, reprisals are punitive in character: they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future.

## 2. *Necessity*

The second consideration under customary international law is whether the U.S. action was necessary to protect against the threat.<sup>337</sup> Because the threat was imminent, the United States needed to act quickly to remove it. Once the United States had compelling evidence of Iraq's involvement in the assassination plot, President Clinton ordered immediate action. By directly targeting the Iraqi agency believed to have plotted the assassination attempt,<sup>338</sup> Clinton reduced the possibility of a second attempt on Bush's life before the United States could publicize the details of Iraq's plan to kill the former president. Moreover, the military action was necessary partly because history had shown that diplomacy and other non-military means would likely fail to induce Hussein to change his behavior.<sup>339</sup> President Clinton also argued that the attack was necessary "to protect our sovereignty; to send a message to those who engage in state-sponsored terrorism; to deter future violence against our people; and to affirm the expectation of civilized behavior among nations."<sup>340</sup>

## 3. *Proportionality*

The requirement of proportionality "is linked closely to necessity in requiring that a use of force in self-defense must not exceed in manner or aim the necessity provoking it."<sup>341</sup> The United States rightfully argued that the attack was proportional to the threat.<sup>342</sup> Actually, a perfectly proportionate response would have been an attempt to kill Saddam Hus-

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But, coming after the event and when the harm has already been inflicted, reprisals cannot be characterized as a means of protection.

Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972). See also HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 112 (1992). As stated in the text, the U.S. action was an act of self-defense since the threat to Bush and the United States was ongoing. Yet admittedly there is a fine line between self-defense and reprisals in a situation such as this, since "the dividing line between protection and retribution becomes more and more obscure as one moves away from the particular incident and examines the whole context in which the two or more acts of violence have occurred." Bowett, *supra*, at 3. As Bowett explains:

Indeed, within the whole context of a continuing state of antagonism between states, with recurring acts of violence, an act of reprisal may be regarded as being at the same time both a form of punishment and the best form of protection for the future, since it may act as a deterrent against future acts of violence by the other party.

*Id.* See also William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT'L L. 421, 476 (1990) (arguing that the right of self-defense should include both on-the-spot reactions and defensive reprisals to terrorist attacks). But see John Quigley, *Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters*, HASTINGS INT'L & COMP. L. REV. 241 (1994) (arguing that the U.S. action constituted an illegal act of reprisal).

337. Document 99, *supra* note 57, at 159.

338. See *supra* text accompanying notes 275-78.

339. See *infra* part V.A.4.

340. Clinton Speech, *supra* note 288, at 1181.

341. Rogoff & Collins, *supra* note 39, at 498.

342. See Clinton Speech, *supra* note 288, at 1181; Albright Speech, *supra* note 271, at 5.

sein,<sup>343</sup> but such action would violate both domestic and international law.<sup>344</sup> Instead, President Clinton chose a "firm and commensurate response,"<sup>345</sup> specifically rejecting the broader use of military force.<sup>346</sup> The target selected, the Iraqi Intelligence Service, had been directly involved with planning and directing the assassination plot.<sup>347</sup> Since the threat was imminent and a military response was necessary only to the extent that Iraq had the means to order and direct a future attempt, the United States properly limited the scope of its response. In addition, Clinton claimed that he timed the attack so as to minimize the number of civilian casualties.<sup>348</sup>

#### 4. *Exhaustion of Peaceful Means*

The final consideration under the *Caroline* standard is whether the action was taken as a last resort in protecting against the threat.<sup>349</sup> Webster stated that this condition is satisfied if the victim state attempted to resolve the crisis through peaceful means, or if the victim state could later show that such an attempt was impracticable or unlikely to succeed.<sup>350</sup> President Clinton emphasized his judgment that other alternatives would have been futile: "Based on the Government of Iraq's pattern of disregard for international law, I concluded that there was not reasonable prospect that new diplomatic initiatives or economic measures could influence the current Government of Iraq to cease planning future attacks against the United States."<sup>351</sup> Ambassador Albright made the same point in her presentation to the Security Council.<sup>352</sup> Since Iraq was still refusing to comply fully with the terms of the two-year old Gulf War cease-fire,<sup>353</sup> the United States could reasonably assume that a peaceful attempt to reduce the imminent threat would fail. In addition, Iraq initially denied any involvement in the plan.<sup>354</sup> Therefore, the U.S. response satisfies the standard

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343. Cf. Paul D. Wolfowitz, *Clinton's First Year*, FOREIGN AFF., Jan./Feb. 1994, at 28, 35 (stating that the military effect of the U.S. attack "was negligible, hardly proportionate to the enormity of what the Iraqis [had] tried to do."). But cf. *Court Sentences Man to 40 Years for Trying to Kill the President*, N.Y. TIMES, June 30, 1995, at A10 (reporting that Judge Charles Richey of the Federal District Court for the District of Columbia sentenced Francisco Martin Duran to 40 years in prison after Duran was convicted of the attempted assassination of President Clinton and related crimes).

344. See *supra* part IV.A.2.

345. Clinton Speech, *supra* note 288, at 1182.

346. Lancaster & Gellman, *supra* note 1, at A1.

347. See Sciolino, *supra* note 276, at A6.

348. See *supra* note 287 and accompanying text.

349. Document 99, *supra* note 57, at 159.

350. *Id.*

351. War Powers Resolution Letter, *supra* note 2, at 1183. See also Clinton Speech, *supra* note 288, at 1181 ("The world has repeatedly made clear what Iraq must do to return to the community of nations. And Iraq has repeatedly refused.").

352. See Albright Speech, *supra* note 271, at 6. See also Albright Letter, *supra* note 291.

353. See *supra* note 223 and part IV.A.3.

354. Hersh, *supra* note 266, at 90.

under customary international law for the legitimate use of force in self-defense.

#### B. Under Article 51: "Armed Attack"

The second step in the analysis is to consider further the legitimacy of the U.S. response to the extent that Article 51 modifies customary international law.<sup>355</sup> Article 51 states that the U.N. Charter does not impair "the inherent right of individual or collective self-defense *if an armed attack occurs against a Member . . .*"<sup>356</sup> Thus, the Charter essentially adds a fifth condition to the use of force in self-defense—a victim state's retaliatory action must be in response to an imminent threat, necessary, taken after the exhaustion of peaceful means, proportionate, and, finally, pursuant to an armed attack.<sup>357</sup> Thus, the key question is whether the Iraqi attempt to kill former President Bush constituted an "armed attack" on the United States.

The U.N. Charter does not define the term "armed attack."<sup>358</sup> The United Nations has consistently interpreted the term to mean only a direct physical invasion by one state into the territory of another.<sup>359</sup> Using this interpretation of Article 51, one could argue that the unsuccessful Iraqi plot to kill Bush while he was visiting Kuwait did not rise to the level of an armed attack. Yet there are three different responses to such an argument. First, the Iraqi plot did constitute an armed attack consistent with the restrictive interpretation of Article 51.<sup>360</sup> Second, the plot constituted an armed attack consistent with a broad interpretation of Article 51.<sup>361</sup> Finally, even if the plot did not constitute an armed attack, the U.S. response was nevertheless legitimate.<sup>362</sup>

##### 1. *The Restrictive Interpretation*

Article 51 provides for the right of self-defense "if an armed attack occurs against a Member of the United Nations . . ."<sup>363</sup> The proponents of the restrictive view have used this language to argue that the right of self-defense is only triggered upon a full-scale invasion into the territory of the victim state.<sup>364</sup> However, such a linguistic argument fails on its own terms; while the Charter's language requires an "armed attack," it does not require a "direct armed attack."<sup>365</sup> Thus, the drafters of Article 51 appear

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355. See discussion *supra* part III.A.

356. U.N. CHARTER art. 51 (emphasis added).

357. However, recall that some scholars do not believe that an "armed attack" is a prerequisite to the legitimate use of force in self-defense. See, e.g., Sofaer, *supra* note 85, at 94. The author agrees with those who argue for a broad interpretation of "armed attack." See *supra* text accompanying notes 95-102.

358. See Elliot, *supra* note 38, at 66.

359. See Schachter, *supra* note 103, at 263-64.

360. See discussion *infra* part V.B.1.

361. See discussion *infra* part V.B.2.

362. See discussion *infra* part V.B.3.

363. U.N. CHARTER art. 51.

364. See, e.g., JESSUP, *supra* note 86, at 166.

365. Baker, *supra* note 94, at 41.

to have "intended to cover all modes of attack as long as it was armed."<sup>366</sup> Under this reasoning, the Iraqi attempt to kill former President Bush certainly qualifies as an "armed attack." The suspects entered Kuwait with the intention of detonating three bombs,<sup>367</sup> one of which had a lethal radius of 400 yards,<sup>368</sup> in order to accomplish their objective. The explosion of any one of these bombs could have killed not only Bush but also hundreds of civilians.<sup>369</sup> The fact that the attack occurred in Kuwait does not affect the nature of this attack on the United States;<sup>370</sup> it shows only that Iraq violated the sovereignty of two countries, rather than just one.

## 2. *The Broad Interpretation*

Furthermore, a restrictive interpretation of "armed attack" may have included most forms of international aggression when the Charter was adopted in 1946, but it is neither politically nor technologically realistic today. In the 1990s, an "armed attack" can be accomplished through a variety of means other than a traditional land invasion. Such other means include nuclear weapons, biological and chemical agents, and acts of terrorism.<sup>371</sup> Unless the United Nations takes a more contemporary view of the event that triggers a justified use of force in self-defense, nations may simply decide that international law cannot deal competently with this issue. Yet the international community cannot afford the dangerous consequences of that possibility, in which nations would use military force against any threat to their national self-interest, regardless of whether or not the threat arguably rises to the level of an "armed attack" in the modern sense. In order to maintain control over the use of force, the United Nations must adapt the standard for self-defense to a changing world.

The United Nations can do so on its own terms. It could interpret the requirement of an "armed attack," which is not authoritatively defined, as coterminous with "aggression," which is so defined.<sup>372</sup> In 1975, the U.N. General Assembly adopted a formal "Definition of Aggression."<sup>373</sup> The Assembly was

[c]onvinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful inter-

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366. *Id.*

367. *See supra* text accompanying note 267.

368. Albright Speech, *supra* note 271, at 4.

369. *Id.*

370. *See discussion supra* part V.A.1.

371. *See supra* notes 94-96 and accompanying text.

372. *See* John Lawrence Hargrove, *The Nicaragua Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135, 139 n.15 (1987); Turndorf, *supra* note 95, at 197-99, 218-19.

373. *Resolution on the Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc. A/9631 (1975).

ests of, and the rendering of assistance to, the victim . . . .<sup>374</sup>

The General Assembly defined "aggression" as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."<sup>375</sup> The Definition also provides that the first use of armed force in violation of the Charter is *prima facie* evidence of an act of aggression.<sup>376</sup>

The Definition lists a variety of state actions qualifying as acts of aggression against another state, including: invading, occupying, or annexing the territory of another state;<sup>377</sup> using any kind of weapon to attack the territory of another state;<sup>378</sup> blockading the ports or coasts of another state;<sup>379</sup> attacking the armed forces of another state;<sup>380</sup> using armed forces in another state beyond the scope of a prior agreement between the two states;<sup>381</sup> allowing its territory to be used by a third state to commit acts of aggression against another state;<sup>382</sup> and sending armed groups to attack another state.<sup>383</sup> The Definition explains that this list is not exhaustive.<sup>384</sup>

By using this broad Definition, the United Nations could find that the Iraqi attempt to kill former President Bush was an "armed attack" triggering the right of self-defense. The attempt meets the basic definition of "aggression," since it was the use of "armed force" against the "sovereignty . . . of another State . . . or in any other manner inconsistent with the Charter."<sup>385</sup> Specifically, the attempt was inconsistent with the prohibition on the use of force contained in Article 2.<sup>386</sup> Even though the plot did not succeed, it would still be "aggression" under the broad Definition since Article 2 prohibits not only the use of force but also the threat of such use.<sup>387</sup> Moreover, an assassination attempt like that against former President Bush is described in the last example cited in the Definition: "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another

374. *Resolution on the Definition of Aggression*, Annex, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975) [hereinafter *Definition of Aggression*].

375. *Id.* art. 1.

376. *Id.* art. 2. However, the Security Council may "conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity." *Id.*

377. *Id.* art. 3(a).

378. *Id.* art. 3(b). This provision presumably refers to attacks that a state can launch against the territory of another state without actually invading, such as air, missile, and nuclear attacks.

379. *Id.* art. 3(c).

380. *Id.* art. 3(d).

381. *Id.* art. 3(e).

382. *Id.* art. 3(f).

383. *Id.* art. 3(g).

384. *Id.* art. 4.

385. *Id.* art. 1.

386. U.N. CHARTER art. 2, ¶ 4.

387. *Id.* See also BOWETT, *supra* note 66, at 191.



State . . . ."<sup>388</sup> Thus, the application of the Definition of Aggression to Article 51 would justify the U.S. response as legitimate self-defense.

### 3. "Proportionate Counter-measures"

The Definition of Aggression also states:

The first use of armed force by a state in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.<sup>389</sup>

In other words, even if the U.S. action did not satisfy all of the conditions for legitimate self-defense and was itself an act of aggression, it may nevertheless be legal under international law. The International Court of Justice recently followed a similar approach in the context of collective self-defense. In a suit brought by Nicaragua against the United States, the Court held that the conduct of the United States in "training, arming, equipping, financing and supplying the Contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and around Nicaragua" violated the Charter's prohibition on the use of force.<sup>390</sup> The Court rejected the U.S. self-defense argument that Nicaragua's provision of arms<sup>391</sup> and logistical support to the rebels in El Salvador<sup>392</sup> and military incursions into Honduran and Costa Rican territory<sup>393</sup> constituted an "armed attack."<sup>394</sup> The Court added that even if such actions by Nicaragua had risen to the level of an armed attack, they would have justified a response only by the victim states, not by the United States.<sup>395</sup>

In the course of its decision, the Court acknowledged that activities which do not constitute an armed attack may nevertheless "constitute a breach of the principle of the non-use of force . . . that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack."<sup>396</sup> The Court suggested that such lesser uses of force may justify "proportionate counter-measures" by the victim state.<sup>397</sup> This reasoning

388. *Definition of Aggression*, *supra* note 374, art. 3(g).

389. *Id.* art. 2.

390. *Nicaragua v. U.S.*, 1986 I.C.J. 94, paras. 238, 292, 25 I.L.M. at 1078, 1089-90. *See also* Paul Lewis, *World Court Supports Nicaragua After U.S. Rejected Judges' Role*, N.Y. TIMES, June 28, 1986, § 1, at 1. The United States rejected this decision. *Id.* The United States had argued earlier that only the U.N. Security Council had jurisdiction to decide cases involving ongoing armed conflicts. *See* Counter-Memorial of the United States of America (*Nicar. v. U.S.*), 1984 I.C.J. Pleadings 1, 221 (Aug. 17).

391. *Nicaragua v. U.S.*, 1986 I.C.J. 94, paras. 195, 247, 25 I.L.M. at 1068, 1079-80.

392. *Id.* paras. 194-95, 247, 25 I.L.M. at 1068, 1079-80.

393. *Id.* paras. 164, 231, 238, 25 I.L.M. at 1060, 1076, 1078.

394. *Id.* paras. 160, 238, 249, 25 I.L.M. at 1059, 1078, 1080.

395. *Id.* para. 249, 25 I.L.M. at 1080.

396. *Id.* para. 247, 25 I.L.M. at 1079-80.

397. *Id.* para. 249, 25 I.L.M. at 1080. *See also* Sofaer, *supra* note 85, at 94; Hargrove, *supra* note 372, at 138. The Court stated:

clearly applies to the case at hand. Even if the Iraqi plot to kill former President Bush was not an "armed attack" in the sense of creating a right of self-defense under Article 51, it was a breach of the general prohibition on the use of force declared by Article 2(4). Thus, even if the United States would not have been permitted to respond with force in self-defense, it was nevertheless justified in responding with "proportionate counter-measures."<sup>398</sup> Since the U.S. missile attack on the Iraqi Intelligence Service was a "proportionate counter-measure,"<sup>399</sup> the attack was legal under international law.

## Conclusion

The U.S. missile attack on Baghdad was legal under international law. The response satisfied the requirements for the legitimate use of force in self-defense under customary international law, since the U.S. action was necessary, in response to an imminent threat, proportionate, and taken after the exhaustion of peaceful means. The U.S. action also satisfied the additional condition imposed by Article 51 of the U.N. Charter, which requires that the action be taken in response to an "armed attack." Even if the U.S. action did not satisfy these conditions, it was legal nonetheless as a "proportionate counter-measure." The United Nations must expand its notion of what constitutes justified self-defensive action, or else it will lose its authority in this area through increasing use of the Great Power Veto. Yet the United States did not have to exercise its veto in this case, unlike after its actions against Libya and Panama. The fact that the United Nations did not even consider condemning the U.S. response may have been a tacit acknowledgement by the organization that the United States did not violate international law in forcefully responding to the Iraqi plot to kill George Bush.

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While an armed attack would give rise to an entitlement to collective self-defence [sic], a use of force of a lesser degree of gravity cannot . . . produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, *could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts*, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.

Nicaragua v. U.S., 1986 I.C.J. 94, para. 249, 25 I.L.M. at 1080, (emphasis added). The Court found it unnecessary to decide whether the victim state's "proportionate counter-measures" may include the use of force. *See id.* para. 210, 25 I.L.M. at 1071. However, a victim state's counter-measure that includes the use of force would seem to be proportionate to an attack that involved force.

398. Nicaragua v. U.S., 1986 I.C.J. 94, para. 210, 25 I.L.M. at 1071.

399. *See* discussion *supra* part V.A.3.

