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Maureen F. Brennan

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Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law

He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.

—Thomas Paine¹

I. INTRODUCTION

A. Facts

At 10:30 in the morning on August 7, 1998, two bombs exploded within minutes of each other just outside the U.S. embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya.² The twin blasts dismembered pedestrians and incinerated passengers on three buses, killing 258 people and injuring more than 5,400 others, including the U.S. Ambassador to Kenya.³ Twelve Americans were among the dead.⁴

From the day of the explosions, U.S. officials suspected that Saudi Arabian terrorist Osama bin Laden had orchestrated the attacks. The United States said bin Laden participated in other attacks against U.S. interests, including the 1996 bombing of an American military base in Dhahran, Saudi Arabia.⁵ Officials believed he managed his terrorist operations from a training camp in Afghanistan, where he established his headquarters after his expulsion from Sudan in 1996.⁶

Based on what officials called “the strongest evidence ever obtained in a major terrorist case,”⁷ the United States struck back at bin Laden fourteen days later, on August 21. U.S. ships fired about seventy-five cruise missiles at his Afghan camp and at a Sudanese chemical plant suspected of producing chemical weapons components, which officials said bin Laden financed.⁸ In an address to the nation, President Clinton said the strikes were necessary to counter a threat to U.S. national security. Admitting that the bin Laden terrorist “network” was not sponsored by any state, Clinton outlined four reasons for the

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1. Thomas Paine, *Dissertation on First Principles of Government* (1795), reprinted in 2 *The Complete Writings of Thomas Paine*, at 588 (Philip S. Foner ed., The Citadel Press 1945).

2. See James C. McKinley, Jr., *Bombs Rip Apart 2 U.S. Embassies in Africa; Scores Killed; No Firm Motive or Suspects*, N.Y. Times, Aug. 8, 1998, at A1.

3. See *id.*; *F.B.I. Says It Has Bomb Specifics*, N.Y. Times, Sept. 6, 1998, at A14.

4. See James Bennet, *U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. Times, Aug. 21, 1998, at A1.

5. See McKinley, *supra* note 2, at A1.

6. See Karl Vick, *Sudanese Assail Clinton For Raid*, Wash. Post, Aug. 23, 1998, at A23.

7. James Risén, *U.S. Says It has Strong Evidence of Threat Justifying Retaliation*, N.Y. Times, Aug. 21, 1998, at A1.

8. See Bennet, *supra* note 4, at A1.

action: 1) overwhelming evidence showed bin Laden "played the key role in the embassy bombings"; 2) his network had been responsible for past terrorist attacks against Americans; 3) officials had "compelling information" that bin Laden was planning future attacks⁹ and 4) his organization was attempting to obtain chemical weapons.¹⁰ In a second statement, President Clinton carefully characterized the strikes as necessary to defend against the threat of "imminent" and "immediate" future attacks, and not as retribution or punishment. He also revealed that U.S. intelligence indicated that "key terrorist leaders" had planned to meet at the Afghan camp at the time of the strikes.¹¹

The Sudanese and Afghan governments immediately condemned the strikes. Sudanese officials said the strikes killed one person and injured nine, and leveled the privately-owned chemical plant which they claimed produced only pharmaceuticals, including half of Sudan's supply of prescription drugs.¹² Although Secretary of State Madeline Albright described the damage at the Afghan sites as "extensive,"¹³ Pakistani journalists visiting the area later reported that the villages surrounding the camps suffered little damage, but that villagers said those killed included three women, a child and an elderly man. The missiles failed to hit the training camp's primary building.¹⁴

The U.S. response to the terrorist bombings was a dramatic change from its past anti-terrorist strategy, which had focused on building international support through diplomatic channels and seeking the United Nations Security Council authorization of the use of force. Despite the United States' belief in an "imminent" threat of terrorist activity, Arab diplomats and officials of some U.S. Persian Gulf allies criticized the attack on Sudan in particular as "arrogant."¹⁵ Some observers criticized the United States for refusing to discuss or reveal the evidence it obtained that the Sudanese plant produced chemical weapons components.¹⁶

9. In a later address, the President said bin Laden's group was responsible for killing United States peacekeeping forces in Somalia, bombing the Egyptian embassy in Pakistan, the murder of German tourists in Egypt, planning assassinations of the Egyptian President and the Pope, and planning the bombing of six United States commercial aircraft over the Pacific. President William J. Clinton, Statement on Military Strikes Against Afghanistan and Sudan (Aug. 20, 1998), available in 1998 WL 513588.

10. President William J. Clinton, Statement on Bombing of Terrorist Camps (Aug. 20, 1998), available in 1998 WL 517836.

11. Clinton, *supra* note 9.

12. See Vick, *supra* note 6, at A23. A government statement accused the President of attempting to dodge the attention focused on a grand jury investigation of his relationship with Monica Lewinsky. *Id.*

13. See Rene Sanchez, *Albright, Cohen Defend Action Against Terrorism*, Wash. Post, Aug. 24, 1998, at A13.

14. See *U.S. Attack Did Little Harm to Afghan Villages*, San Diego Union-Tribune, Sept. 6, 1998, at A15.

15. Steven Erlanger, *Missile Strikes are Seen as New Strategy for U.S.*, N.Y. Times, Aug. 23, 1998, at A10.

16. Steven Lee Myers, *U.S. Says Iraq Aided Production of Chemical Weapons in Sudan*, N.Y.

B. Legal Issues

The care with which the President and U.S. officials characterized the justification for the missile attacks shows their concern that the actions of the United States could be perceived as a violation of international law. Because under international law, the use of military force as reprisal or punishment is prohibited,¹⁷ the White House took pains to imply conformity with two customary international legal principles: 1) the right of states to respond to an "armed attack" and 2) the right of states to act in "anticipatory self-defense."¹⁸ However, both of these customs are subject to interpretation, and scholars have debated the validity of a right of anticipatory self-defense.¹⁹

In international law, as in the law of civil law systems, custom is a binding source of law.²⁰ Custom consists of a consistent practice by nations, generally accepted as having the force of law.²¹ However, under the dualist vision maintained by most nations, international law and domestic law are two separate bodies of law. In such a dualistic system, a state's national constitution, supervening legislation, or treaties may be in conflict with customary international law. Thus, a state may be required to act in conformity with its own laws in a manner that simultaneously violates its international legal obligations.²² However, when no contrary constitutional principle, treaty or legislative act exists, U.S. scholars currently disagree about the domestic legal status of customary international law. In 1900, in a famous opinion by Justice Gray, the United States Supreme Court held in *The Paquete Habana* case that: "International law is part of our law [W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations" ²³ Accordingly, the Restatement (Third) of the Foreign Relations Law of the United States provides that "[i]nternational law . . . [is] law of the United States and supreme over the law of the several States."²⁴

Times, Aug. 25, 1998, at A1.

17. See Oscar Schachter, *International Law in Theory and Practice* 186 (1991).

18. See generally *id.* at 150-52.

19. See *id.*

20. See Statute of the International Court of Justice art. 38; Ian Brownlie, *Principles of Public International Law* 4 (1966).

21. See Statute of the International Court of Justice art. 38; Brownlie, *supra* note 20, at 4.

22. See Restatement (Third) of the Foreign Relations Law of the United States ch. 2 introductory note (1986).

23. *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 299 (1900). The case involved the validity of the seizure of a Spanish fishing vessel by a United States naval blockade during the Spanish-American War. President McKinley had proclaimed that the war would be conducted in conformity with international law, but had not specifically incorporated in his order any international legal rules governing fishing vessels. *Id.* at 712, 20 S. Ct. at 304. Thus, the court's statement regarding the status of international law in the absence of domestic authorization is essential to the facts of the case and is not merely dictum.

24. Restatement (Third) of the Foreign Relations Law of the United States § 111 (1986).

Despite this prevailing view, Professors Curtis Bradley and Jack Goldsmith have recently argued that customary international law is not U.S. law even in the absence of a conflicting U.S. statute, treaty, constitutional provision or executive order, unless and until Congress or the President explicitly incorporates the custom into U.S. law.²⁵ If the Bradley-Goldsmith argument is correct and adopted, there may be serious negative repercussions for the United States both domestically and internationally.

As the catalyst for analysis of these repercussions, Part II of this comment will suggest that the United States potentially violated customary international law by striking the Sudanese and Afghan targets. Part III will then outline the Bradley-Goldsmith argument, and will briefly highlight several potent counter-arguments that have been made by scholars who disagree with their position. Part IV will apply the Bradley-Goldsmith argument to the United States' possible violation of international law through the missile strikes, and will analyze the consequences for the United States both domestically and internationally, if it deems itself free under U.S. law to violate international law in this manner. The comment will conclude with a determination that Bradley's and Goldsmith's argument is inherently dangerous, and in the context of the missile strikes or analogous circumstances which are bound to arise, it could place American citizens and interests at serious risk.

II. THE U.S. MISSILE STRIKES POTENTIALLY VIOLATED INTERNATIONAL LAW

This section will first examine the nature and the required elements of the international right of self-defense, and then the particular problems posed when self-defense is claimed against terrorist acts. Lastly, this law will be applied to the facts of the U.S. missile strikes.

A. An "Inherent" Right to Self-Defense

Two different schools of thought on the origin of legal rights have helped shape the concept of self-defense. Natural law theorists, beginning with Grotius, have argued that self-preservation is an inherent right of both individuals and states and is an integral part of defining "just war."²⁶ However, the positivist view prevails today, which maintains that the right exists only as defined by positive law and the legal system.²⁷ Even scholars who regard the right as

25. See Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997) [hereinafter Bradley and Goldsmith I]; see also Curtis A. Bradley and Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L. Rev. 319 (1997) [hereinafter Bradley and Goldsmith II].

26. See D. W. Bowett, *Self-Defense in International Law* 4 (1958).

27. See, e.g., Yoram Dinstein, *War, Aggression and Self-Defence* 170-71 (1988).

"inherent" do not believe that it is "autonomous"; that is, they argue that the right is limited by legal norms and that states themselves cannot unilaterally decide when self-defense is warranted. Without such limitations, states could not be held accountable for their use of force, and the right would be subject to substantial abuse.²⁸ Yoram Dinstein, an international law professor and expert on self-defense, has argued that no state can be "the final arbiter of . . . its own acts," and that the legality of a claim of self-defense must be judged by a "competent international forum."²⁹ Likewise, the International Court of Justice has held that claims of self-defense are justiciable and the question of their legality is not solely the province of the United Nations Security Council.³⁰

It is significant that states do not deny the existence of limitations on the right of self-defense. Rather, as demonstrated by the United States in the recent attacks, they "take pains to show their conduct to be legitimate self-defense" by shaping the facts in such a way as to make them appear to fit within the legal definitions and rules.³¹

The right of self-defense as defined by positive law is intertwined with a bedrock principle of international law known as the "defensist doctrine."³² The doctrine prohibits the use of force by states in all cases, except in self-defense. This prohibition, and the right of self-defense, emanate from two distinct sources: from the rules of contemporary customary law on the one hand, and from the treaty obligations of the United Nations Charter on the other.³³ Article 51 of the Charter provides: "Nothing in the present Charter shall impair the inherent right of . . . self-defense if an armed attack occurs against a Member of the United Nations . . ."³⁴ Authorities disagree about whether the right of self-defense as defined by Article 51 is identical to the customary right, or whether the Charter modifies and supervenes that right.³⁵

In *Nicaragua v. United States*, the International Court of Justice considered the United States' claim of self-defense in an action brought by Nicaragua in response to the United States' support of the *Contra* rebels.³⁶ The United States maintained that the customary right and the Charter right of self-defense were identical, but that even if they differed, the court should not base its ruling on

28. See Schachter, *supra* note 17, at 149-50.

29. Dinstein, *supra* note 27, at 192, 193. See also Bowett, *supra* note 26, at 193.

30. Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), 1984 I.C.J. 392, 436 (Nov. 26).

31. Schachter, *supra* note 17, at 139.

32. *Id.* at 142.

33. See Dinstein, *supra* note 27, at 172; U.N. Charter art. 2, para 4 (prohibition of the use of force); *id.* at art. 51 (self-defense exception).

34. U.N. Charter art. 51.

35. Report of the International Law Commission to the General Assembly, 35 U.N. GAOR Supp. (No. 10) at 125-27, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 Y.B. Int'l. L. Comm'n 58-59, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (part 2) [hereinafter I.L.C. Rep.].

36. Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 4 (June 27).

customary law since both parties in the action were parties to the Charter.³⁷ The court disagreed. First, it held that Article 51 clearly refers to a pre-existing, customary right of self-defense, as witnessed by the language prohibiting impairment of the "inherent right" of self-defense. The court noted that "it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter."³⁸ Moreover, the court held the Charter does not supervene custom, but exists alongside the customary law, and it believed the two sources were not substantively identical. Although each source was rooted in the defensist doctrine, the customary law had evolved under the Charter's guidance.³⁹ Without explaining its reasons, the court decided the case based on customary law and not on the Charter, noting: "The differences which may exist between [the Charter and custom] are not, in the court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate"⁴⁰

Most writers agree with the court's assertion that sovereign states maintain their pre-existing rights, with some scholars reasoning that this is true because the United Nations Charter is not a *source* of rights but is only a *limitation* on them.⁴¹ Despite this view and the Charter's reference to an "inherent" right, some positivist writers believe that Article 51 completely defines and limits the right of self-defense.⁴² However, there may be a middle ground if the customary law has evolved through the practice of states, as the *Nicaragua* court suggested, to conform to the right as defined by Article 51. The *Nicaragua* decision is also important because the court stated that though the customary and treaty law could differ, custom can provide the rule of decision despite the treaty's limits.⁴³

B. Custom v. Article 51: Limitations on the Right

It is important to examine whether the customary law of self-defense and Article 51 differ because Article 51 provides that force may be used in self-defense only when an actual "armed attack" has occurred. It is unclear 1) whether the drafters of the Charter intended to limit the pre-existing right to only cases of armed attack; 2) whether "armed attack" may be interpreted in some instances as threats of "imminent" attack; or 3) whether, as the International Law Commission observed, the Charter merely "sets out to state the rule concerning a particular case," but does not purport to limit all cases of self-

37. See *id.* at 94-96.

38. *Id.* at 94.

39. See *id.* at 94-95.

40. *Id.* at 97.

41. See Bowett, *supra* note 26, at 185.

42. See *id.* at 187.

43. *Nicaragua*, 1986 I.C.J. at 95.

defense.⁴⁴ This dilemma requires us to examine the elements of the customary international law, before analyzing the various interpretations of Article 51.

Most writers believe that customary international law provides for some form of anticipatory self-defense, but it is unclear how far this right extends.⁴⁵ These writers contend that states should not be required to wait for an inevitable or imminent strike before taking defensive measures.⁴⁶ This notion emanates from the classic formulation of the customary international law of self-defense as established in *The Caroline* case of 1837. A rebel group fighting against British rule in Canada recruited sympathetic American supporters along the U.S.-Canadian border. Although U.S. officials had warned that anyone aiding the rebellion was subject to arrest, the U.S. steamer *Caroline* was used to transport men and supplies from the United States to the rebels on Navy Island in Canada. As a consequence, British forces entered American territory, set the *Caroline* on fire, and sent her plunging over Niagara Falls.⁴⁷

When the United States government protested the action, the British claimed self-defense. In response, United States Secretary of State Daniel Webster sent a diplomatic communiqué to the British arguing that a claim of self-defense requires a "necessity of self defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for [Canada] to show, also, that the local authorities . . . did nothing unreasonable or excessive . . ." ⁴⁸ International law theorists consider the Webster formulation to be the customary international law of self-defense.⁴⁹ It contains three fundamental requirements which apply to all categories of self-defense: necessity, proportionality, and immediacy.⁵⁰

1. Necessity, Proportionality and Immediacy v. Armed Reprisal

The requirement of necessity provides that the use of force must be the only available means of self-defense and no other peaceful means of redress would be effective.⁵¹ Oscar Schachter, a distinguished international law professor and advisor in the preparation of the Restatement, distinguishes between cases where an armed attack *is occurring*, and those where an armed attack has *already*

44. I.L.C. Rep., *supra* note 35, at 59; see 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, 32 (1987).

45. See Dinstein, *supra* note 27, at 172.

46. See Schachter, *supra* note 17, at 150-51. This position becomes more persuasive as modern weaponry becomes more massively destructive and more rapidly deliverable.

47. See Bowett, *supra* note 26, at 58.

48. Timothy L. H. McCormack, *Self-Defense in International Law* 245 (1996).

49. Oscar Schachter has asserted that though the formulation is custom and illustrates the desire by states to limit the right of self-defense, it does not reflect state practice. Schachter, *supra* note 17, at 151.

50. See Dinstein, *supra* note 27, at 228.

51. See Schachter, *supra* note 17, at 152.

occurred, but additional attacks are expected. In the former case, the use of force always meets the requirement of necessity, but in the latter case the issue is not as clear.⁵² However, as an example of when preemptive self-defense is valid, Schachter proposes the case of an armed action to rescue hostages, where captured persons are in imminent danger.⁵³

Although customary international law and the requirement of necessity would thus seem to permit some limited form of anticipatory defense, many criticized the United States for exceeding the limit during the 1986 bombing of Libya. The United States argued that it reacted in self-defense to a series of terrorist attacks, including the bombing of a Berlin nightclub frequented by U.S. soldiers, and to prevent future attacks, which the government argued presented an imminent threat. It also argued that its action met the Webster formulation because the threat left "no moment for deliberation."⁵⁴ Yet the international community rejected the U.S. argument, noting that the United States had failed to seek a peaceful resolution or put the matter before the Security Council before launching the strike. Moreover, many maintained that there was no immediate threat, but that if the United States had convincing evidence to suspect impending attacks, it should have taken "defensive action against the expected attacks rather than bombing the capital of the threatening country."⁵⁵ The United Nations General Assembly formally censured the United States by a vote of 79 to 28, with 33 abstentions.⁵⁶

Seven years later, the United States again suffered criticism for failing to meet the necessity requirement before launching a missile strike on Baghdad, in response to a foiled Iraqi attempt to assassinate former President Bush. As with the 1986 Libyan bombing, the United States did not submit the matter to the Security Council.⁵⁷ In addition, while in 1986 the United States had argued that it had exhausted all alternative means of redress against Libya, in 1993 Kuwait had formally committed to protecting President Bush from attack. Thus in the latter case, other means of defense were available. Moreover, absolutely no evidence of any future threat against Bush or American nationals existed.⁵⁸

The second and third conditions precedent to customary self-defense, that of proportionality and immediacy, require that the response in self-defense be in proportion to the armed attack, and must be timed either to respond to an attack immediately, or to anticipate an imminent threat. Mark Baker has explained that the two conditions require that "[t]he means employed must be restricted to the removal of the danger and cease as soon as either the danger no longer exists or

52. *Id.* at 152-53.

53. *Id.* at 153.

54. See Stanimir A. Alexandrov, *Self-defense Against the Use of Force in International Law* 184-185 (1996).

55. *Id.* at 185.

56. See *id.* at 186.

57. See *id.* at 187.

58. See *id.*

the Security Council has taken effective action to control the danger."⁵⁹ Professor Jordan Paust has suggested that the "lull" of ten days between the Berlin nightclub bombing and the U.S. strike on Libya in 1986 violated the immediacy requirement because no "armed attack" was occurring by the time the United States took action. In addition, by attacking *Libya*, the United States did nothing to prevent the suspected future terrorist attack on a *U.S. embassy*.⁶⁰ Later in 1993, many in the international community claimed that in striking Baghdad, the United States failed to meet the immediacy and proportionality requirements, because 1) the missile strikes occurred two months *after* the assassination attempt against President Bush and 2) the strikes against the Iraqi intelligence headquarters did nothing to alleviate any threat or stave off an armed attack.⁶¹

The conditions of necessity, proportionality and immediacy prevent states from acting in retaliation or reprisal, which is considered a violation of international law.⁶² However, states often use anticipatory self-defense to justify their actions to prevent suspected future attacks, when otherwise their conduct would be regarded as retaliatory. Professor Paust has asserted that if an armed attack has already occurred, the state acting in self-defense has a heavy burden of establishing necessity and defeating a strong suggestion that its acts amount to retaliation for an attack that has ended.⁶³

Though some scholars assert that armed reprisals can be legitimate, they qualify this argument by requiring reprisals to be in the nature of "defensive retaliation," the prime motive of which is preventive.⁶⁴ Thus Dinstein has proposed that "[a]rmed reprisals do not qualify as legitimate self-defence if they are impelled by purely punitive, non-defensive, motives. . . . [A]rmed reprisals must be future-oriented, and not limited to a desire to punish past transgressions."⁶⁵

59. See Baker, *supra* note 44, at 47.

60. Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 Whittier L. Rev. 711, 730-31 (1986).

61. See Alexandrov, *supra* note 54, at 186-87. In both the Libya and Baghdad bombings, the United States could justify its actions under the Schultz doctrine, enunciated in 1986 during the Reagan administration by former Secretary of State George Schultz. See Paust, *supra* note 60, at 711. Schultz proclaimed in a speech at the National Defense University that:

[W]e have heard it asserted that military action to retaliate or preempt terrorism is contrary to international law. . . . [However, a] nation attacked by terrorists is permitted to use force to prevent or preempt future attacks, to seize terrorists, or to rescue its citizens when no other means is available.

George S. Schultz, *Low-Intensity Warfare: The Challenge of Ambiguity*, reprinted in 25 I.L.M. 204, 206. Schultz's formulation directly conflicts with the very heart of the customary international law of self-defense and the object of the conditions of necessity, proportionality, and immediacy.

62. See I.L.C. Rep., *supra* note 35, at 54.

63. See Paust, *supra* note 60, at 716-18, 722.

64. See Dinstein, *supra* note 27, at 208; Schachter, *supra* note 17, at 154.

65. Dinstein, *supra* note 27, at 208. Likewise, the British legal scholar D.W. Bowett wrote that reprisals are punitive in nature, whereas legitimate self-defense "operates to protect essential rights from irreparable harm in circumstances in which alternative means of protection are unavailable; its

When an armed attack has already ended, under customary law states should have to produce evidence that additional attacks are so imminent that there is no moment for deliberation and no other means to prevent them. Moreover, states should prove that the force used in self-defense is directly related to effectively and immediately eliminating the threat. The mere assertions of the defending state that future attacks will occur are not sufficient, and such assertions may amount to superficial attempts to portray the state's conduct to the international community as conforming with international custom. As Mark Baker has noted, customary international law provides that "when a state has evidence of an attack *actually being mounted*, then an armed attack may be said to have already begun."⁶⁶ This formulation would seem to require an almost inevitable, irreversible action by a belligerent state. Any justification of the defending state outside the requirements of the Caroline doctrine violates international law.

2. Article 51 and "Armed Attack"

As we have seen above, we must probe the meaning and interpretations of Article 51 with the understanding that it may represent, or at least is intertwined with, customary international law. Moreover, the International Court of Justice ruled in the *Nicaragua* decision that customary law may be applied to a case of self-defense notwithstanding the treaty obligations of Article 51.⁶⁷ The key problem in interpreting Article 51 involves the phrase "if an armed attack occurs." In the *Nicaragua* decision, the court noted that the facts of the case required it to rule only on the customary and treaty laws that apply when an attack has actually occurred, so it declined to analyze whether custom and Article 51 differ insofar as anticipatory measures are concerned.⁶⁸

Dinstein categorically states that Article 51 contains an absolute requirement that a state may not use force in self-defense if there has been no prior wrongful act of aggression against it.⁶⁹ Indeed, this is the classic positivist view, as reflected in Hans Kelsen's statement that "this Article applies only in case of an armed attack."⁷⁰ Therefore preventive measures are never allowable under

function is . . . not to take on a remedial or repressive character in order to enforce legal rights." Bowett, *supra* note 26, at 11.

66. Baker, *supra* note 44, at 45-46 (emphasis added). Baker classifies such a circumstance as fitting the Caroline doctrine and emphasizes that the doctrine represents the limit of customary international law. *Id.* Rosalyn Higgins agrees that the Webster formulation "seems still very useful in providing the required balance between allowing a state to be obliterated and encouraging abusive claims of self-defence." Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 243 (1994).

67. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 4, 95 (June 27).

68. *Id.* at 103.

69. Dinstein, *supra* note 27, at 174-75.

70. Hans Kelsen, *Law of the United Nations* 269 (1950).

Article 51 because of the plain wording of the provision and the high risk of abuse of an anticipatory right.⁷¹

Dinstein goes on to assert that under Article 51, if "a country feels menaced by the threat of an armed attack, all that it is free to do—in keeping with the Charter—is make necessary military preparations for repulsing the hostile action should it materialize, as well as bring the matter forthwith to the attention of the Security Council"⁷² But British legal scholar D.W. Bowett disagrees, arguing that Article 51 does not restrict the pre-existing law of self-defense, but rather preserves it. He states that "armed attack" may validly include threats of "imminent danger."⁷³ Indeed, in light of modern technology and the capability of intercontinental nuclear missiles to reach targets in a matter of minutes after launch, many fear requiring a state to await a first strike that could destroy its defensive arsenals is risky and unreasonable.⁷⁴

Despite Professor Dinstein's firm view that Article 51 does not permit anticipatory measures, he concedes that an "armed attack" could actually begin before a belligerent state acts with aggression.⁷⁵ He equates an "armed attack" with an "irreversible course of action."⁷⁶ A state does not have to wait until the first nuclear missile hits or until an aggressor invades its territory before launching a defensive strike. In these situations, an action in self-defense would be "interceptive" in character, not anticipatory.⁷⁷ While permissible interceptive measures counter an "unavoidable" attack, prohibited anticipatory measures preempt an attack "which is merely foreseeable."⁷⁸

Mark Baker believes that interpreting Article 51 to include anticipatory self-defense that is not necessary, proportionate, and immediate "stretch[es]" the limits of the United Nations Charter.⁷⁹ In proposing that Article 51 should be revised to permit anticipatory responses, he notes that "though with some intellectual twisting and turning such responses may fit within [current] article 51, the fit is not close enough to avoid international condemnation and its accompanying risks."⁸⁰

C. *The Problem of Terrorism and Self-Defense*

An attack against the nationals of the victim state, which occurs outside that state's territory, and which is launched by a terrorist group not sponsored by any

71. Dinstein, *supra* note 27, at 175. As Dinstein states, "[I]s this not an appropriate case for the application of the maxim of interpretation *expressio unius est exclusio alterius*?" *Id.*

72. *Id.* at 174.

73. Bowett, *supra* note 26, at 191.

74. See Schachter, *supra* note 17, at 150.

75. Dinstein, *supra* note 27, at 179.

76. *Id.*

77. *Id.* at 180.

78. *Id.*

79. Baker, *supra* note 44, at 48.

80. *Id.*

state, poses certain analytical problems. The questions which arise include: 1) whether the attack against nationals may be regarded as an attack against the state itself, and 2) whether the victim state may use force in self-defense against a third-party state where or from which the terrorists operate.

1. Attacks on Nationals Abroad

Most authorities agree that in at least some circumstances, an attack on nationals abroad constitutes an attack on the state. Dinstein would limit this finding to only attacks on diplomatic or other official personnel, and argues that no current customary international law imputes attacks on civilians to an attack on the state.⁸¹ Bowett asserts that although the general rule is that the territorial integrity of the state outweighs the safety of nationals abroad, if there is a significant enough threat to nationals, a proportionate response to the danger may be appropriate. However, this determination involves a delicate balancing of the right of the aggressor state to maintain its territorial integrity versus the victim state's right to protect its nationals.⁸² Still others would extend the scope of an armed attack to include an attack on nationals abroad only in cases when the state where they are located is "unable or unwilling to protect them."⁸³

Clearly, an attack on U.S. embassies abroad as instrumentalities of the United States is a calculated strike designed to single out and intimidate a particular state to gain political concessions, or to carry out measures inspired by religious fervor. This is a criminal and reprehensible act. However, such an attack does not rise to the degree of an attack on the territory of the victim state. Rosalyn Higgins, a judge of the International Court of Justice, has articulately expressed the danger of imputing an attack on nationals abroad in every case to an attack against the state. She urges: "One can be sympathetic with the sentiment but note also that the language of self-defence is being invoked to cover military responses that really bear the characteristics of reprisals or retaliation."⁸⁴ If a victim state has credible evidence that future attacks will occur against nationals abroad, it should allow the host state to take action to protect them. Creating a blanket rule that nationals threatened abroad may be defended as if the state itself had been attacked risks widening the limits of permissible self-defense to a point where the possibility of abuse and unbridled use of force is unacceptably strong.

81. See Dinstein, *supra* note 27, at 187-88.

82. See Bowett, *supra* note 26, at 93-94.

83. Baker, *supra* note 44, at 38.

84. See Higgins, *supra* note 66, at 244.

2. Terrorists Operating In Third-Party States

A more complex problem arises when the terrorist group operates from a neutral, third state. The drafters of Article 51 most likely contemplated massive attacks by *states* when they included the requirement of an armed attack.⁸⁵ Indeed, both the International Court of Justice and the International Law Commission have addressed the problem of terrorists operating from a third country, and have concluded that the right of self-defense does not apply with full force in such cases.⁸⁶

In the *Nicaragua* case, the court examined the problem of attacks by "armed bands" not associated with a state's military forces. The court held that there was

no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending *by a State* of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack . . . had it been carried out by regular armed forces. But the court does *not* believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale *but also* assistance to rebels in the form of the provision of weapons or logistical or other support.⁸⁷

Thus the court did not view state assistance to armed bands as necessarily falling within the definition of armed attack. Schachter infers from the opinion that the court envisioned only "an attack by the State against which self-defense rights are asserted."⁸⁸ In a 1980 report to the United Nations General Assembly, the International Law Commission opined that self-defense may only be invoked where the "danger [was] caused by the *State* acted against and [was] represented by that *State's* use of armed force."⁸⁹ Therefore, it can be argued that a state may not take action in self-defense against terrorists operating in another state.

International law prohibits not just the active support of terrorists, but the passive acquiescence in their presence as well. Several international agreements

85. See Baker, *supra* note 44, at 42.

86. Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 4, 103-04 (June 27); I.L.C. Rep., *supra* note 35, at 34.

87. *Nicaragua*, 1986 I.C.J. at 103-04 (emphasis added). The court noted that the provision of weapons or other assistance would nonetheless be an impermissible "threat or use of force." *Id.* at 104. Oscar Schachter believes that a state's provision of weapons or transportation should be considered when evaluating the "scale and effects" of the armed attack. Schachter, *supra* note 17, at 165.

88. Schachter, *supra* note 17, at 164.

89. I.L.C. Rep., *supra* note 35, at 34 (emphasis added). The Commission added, however, that in some cases action against non-state-sponsored groups could be justified on the ground of "necessity." *Id.* at 34-52; see also Schachter, *supra* note 17, at 169-73.

provide that it is an international crime for a state to harbor, encourage, or tolerate terrorist activities within its borders. For example, Article 2(6) of the Draft Code of Offences against the Peace and Security of Mankind provides that states have a duty not to tolerate terrorist activities designed to carry out aggression in another state.⁹⁰ Likewise, the General Assembly's Declaration on Principles of International Law interpreted Article 2(4) of the United Nations Charter as requiring that "[e]very state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State."⁹¹ Schachter also reasons that customary international law imposes a duty on states to prevent terrorism from within their borders.⁹²

Although the breach of this duty amounts to a violation of international law, the victim state bears a very heavy burden in justifying an incursion into the third-party state's territory in response. First, Dinstein argues that a victim state may only have the right to use force when the third-party state "*knowingly*" allows its territory to be used to harbor terrorists.⁹³ Therefore if the third-party state is unaware of the terrorist activity, it may not be in breach of its duty toward the victim state. If, however, the third-party state has knowledge of the terrorist activity, the victim state may use force against the terrorist group or armed band, but only when an armed attack has occurred, when future attacks are expected *and* if the victim state has "demonstrated beyond reasonable doubt" that no alternative means is availing.⁹⁴ The victim state may never target the third-party state's civilian population.⁹⁵

Action taken against a third-party state violates the territorial sovereignty of a potentially innocent state. If the state is unaware of the terrorist activity, the victim state may have a duty to allow the third-party state to act first to control crime within its borders, before the victim state may justifiably take any unilateral action. Paust has called the use of force against an innocent state "highly suspect."⁹⁶ Even if the third-party state has supported or acquiesced in the group's presence, Paust says the victim state should have to meet a heavier burden of necessity and proportionality than when the initial attack was state-sponsored.⁹⁷ As with the case of attacks against nationals abroad, there is a risk

90. *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/1858, reprinted in [1951] 2 Y.B. Int'l L. Comm'n 135, U.N. Doc. A/CN.4/SER.A/1951/Add.1.

91. G.A. Res. 2625, U.N. GAOR, 25th Sess., at 7, U.N. Doc. A/8082 (1970).

92. Schachter, *supra* note 17, at 163.

93. Dinstein, *supra* note 27, at 223 (emphasis added).

94. *Id.* at 228. Dinstein refers to defensive measures in such a situation as "extra-territorial law enforcement." He notes that some scholars classify this justification as "necessity" rather than self-defense. *Id.* at 225. It is interesting that as examples of a valid use of force in self-defense against armed bands, Dinstein cites only instances where the armed bands or terrorist groups had attacked the *territory* of the victim state, and not nationals abroad. *Id.* at 221.

95. *Id.* at 229.

96. Paust, *supra* note 60, at 723.

97. *Id.* at 721-22.

in broadening the right of self-defense to justify the use of force against non-state-sponsored terrorism. Toleration of such action increases the potential for abuse of the right of self-defense and for the indiscriminate violation of state sovereignty.

D. Application of the Law to the Sudan and Afghanistan Missile Strikes

A very strong argument can be made that the U.S. missile strikes violated customary international law. As outlined above, the law imposes a triple burden on the United States, because it attacked a non-state-sponsored terrorist group operating in the territory of a third-party state, in response to an attack against nationals abroad, after the embassy attacks were complete. The strikes probably failed to meet the requirements of the Caroline doctrine and were more in the nature of reprisal, rather than legitimate self-defense.

First, the United States did not meet the necessity requirement by showing that no alternative or peaceful means of redress existed. It did not submit the matter to the Security Council, nor alert Sudan of its evidence that the pharmaceutical plant produced chemical weapons components. It gave Sudan no opportunity to deal with the problem internally. Indeed, officials admitted that they did not know whether Sudan had knowledge that the plant might be used to produce chemical weapons.⁹⁸ If Sudan had no such knowledge, it could not be deemed to have violated its duty not to knowingly allow its territory to be used for terrorist activities. In fact, Sudan had expelled bin Laden at U.S. insistence two years prior to the attack.⁹⁹ Moreover, the United States later claimed that it foiled other embassy attacks by intercepting terrorists planning to strike U.S. interests with explosives.¹⁰⁰ Thus alternative, peaceful means and time for deliberation to prevent any future attack may have existed. Dinstein proposed that a state is limited to taking precisely this type of defensive action under Article 51 when threatened with a future attack.¹⁰¹

The United States also did not respond proportionally to the attacks or to so-called "imminent" attacks. In the attack on Libya in 1986, Professor Paust criticized the United States for striking Libyan bombers and training facilities because those targets did not seem directly related to "imminent" threats or attacks in process, but rather involved Libya's long-term capabilities.¹⁰² The same criticism applies to the Sudan and Afghanistan strikes. In addition, even if the evidence about the Sudanese pharmaceutical plant was accurate, could chemical weapons *components* be used in an "imminent" attack leaving no moment for deliberation? The same is true of the Afghan training camps.

98. See Vick, *supra* note 6, at A23.

99. See *id.*

100. See Michael Grunwald, *CIA Halted Plot to Bomb U.S. Embassy in Uganda*, Wash. Post, Sept. 25, 1998, at A27.

101. See *supra* note 72 and accompanying text.

102. See Paust, *supra* note 60, at 731.

Though the United States quickly noted that it believed a meeting of terrorist leaders occurred at the time of the strikes, the United States revealed no evidence that additional attacks were so imminent that it was forced to strike Afghan territory to prevent them. The strikes may also have not met the immediacy requirement. In 1986, the United States received criticism for waiting ten days before striking Libya. In the recent strikes the United States took action after fourteen days. This longer delay renders the strikes even more suspect as actions in reprisal than did the delay of ten days before the Libyan strikes.

The statements of U.S. officials after the strikes presented no hard evidence of additional, imminent attacks. Moreover, the United States presented no evidence to the international community that the Sudanese plant produced chemical weapons, other than a soil sample obtained months prior to the bombings. The Clinton Administration refused to elaborate on the evidence or discuss how it obtained the sample.¹⁰³ Reports that the Attorney General expressed doubts to the Administration about whether there was sufficient evidence to connect bin Laden to the bombings makes the U.S. action even more suspect.¹⁰⁴

Indeed, the President's initial statement justifying the attacks spoke more about past, *completed* terrorist action against Americans (including the embassy bombings) rather than future threats, and portrayed the missile strikes more as retaliation rather than legitimate self-defense.¹⁰⁵ Thus, the strikes do not appear to have been preventive in nature. Moreover, if the United States intentionally or recklessly targeted Afghan villages and private Sudanese business interests, killing civilians and destroying private, non-government property, the strikes violated the rule against targeting civilians. The Sudanese plant was arguably not a military target in the accepted sense if the Sudanese government was in no way connected with it.

Consequently, the United States did not meet its very heavy burden of showing beyond a reasonable doubt that attacks on two third-party states were the only means of preventing future terrorist attacks on U.S. nationals abroad by bin Laden's group.

III. THE BRADLEY-GOLDSMITH ARGUMENT: CUSTOMARY INTERNATIONAL LAW IS NOT U.S. LAW

This part will briefly outline the Bradley-Goldsmith argument that customary international law is not U.S. law. The substance of their argument has been effectively criticized elsewhere, and a detailed counterargument to their position

103. See Myers, *supra* note 16, at A1.

104. See Seymour M. Hersh, *The Missiles of August*, *The New Yorker*, Oct. 12, 1998, at 34, 36. Bin Laden later denied involvement in the attacks in an interview with ABC News. See David Stout, *Bin Laden Denies Role in Embassy Bombings*, *N.Y. Times*, Dec. 24, 1998, at A7.

105. See *supra* note 10 and accompanying text.

is beyond the scope of this comment.¹⁰⁶ After highlighting only some of the weaknesses in the Bradley-Goldsmith argument suggested by other writers, the comment will evaluate instead the consequences of their position in the context of the U.S. missile strikes and the potentially invalid claim of self-defense.

The United States Supreme Court ruled as early as 1815 on the status of customary international law as U.S. law. In *The Nereide*, the Court commented on the absence of a congressional act to apply as law in the case, and held: "Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land."¹⁰⁷ Later, in 1900, Justice Gray wrote the now famous and oft-quoted holding in *The Paquete Habana* that "[i]nternational law is part of our law."¹⁰⁸ Despite these holdings, Professors Bradley and Goldsmith argue that at the time of these cases, customary international law was applied by the courts as "general common law," which did not fall under the "Laws of the United States" of Article III of the Constitution and was not binding on the states of the union.¹⁰⁹ Likewise, it was not the supreme law of the land, and state courts determined questions of international law on their own.¹¹⁰ Moreover, they suggest that the Court in *The Paquete Habana* intended that customary international law did not bind either Congress or the President.¹¹¹

The Bradley-Goldsmith argument hinges on the Supreme Court's decision in *Erie Railroad Co. v. Tompkins* that federal courts could no longer create or apply general common law.¹¹² They argue that because the Court in *Erie* required "the federal courts to identify the sovereign source for every rule of decision," customary international law cannot be applied unless the Constitution, Congress, a state legislature, or the President has incorporated it into domestic law.¹¹³ Further, because they interpret *Erie* as a restraint on judicial lawmaking, they view any application of customary international law by federal courts as counter to that principle because they see international law as "unsettled" and "difficult to verify."¹¹⁴ Finally, though *Erie* did allow federal courts to continue to create and apply "federal common law," customary international law

106. For a well written and persuasive response to Professors Bradley and Goldsmith, see Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998); see also Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 Fordham L. Rev. 393 (1997); Ryan Goodman and Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463 (1997).

107. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

108. *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 299 (1900).

109. Bradley and Goldsmith I, *supra* note 25, at 823.

110. *Id.* at 824.

111. *Id.* at 849.

112. 304 U.S. 64, 58 S. Ct. 817 (1938).

113. Bradley and Goldsmith I, *supra* note 25, at 852-53.

114. *Id.* at 854-55.

is not part of that law because it is not authorized by a domestic source.¹¹⁵ They contend that despite the nineteenth century decisions of the Supreme Court, the notion that customary international law is self-executing U.S. law is in fact the "modern" position, and courts which have applied the nineteenth century rules have not correctly evaluated the status of international law after *Erie*.¹¹⁶

Bradley and Goldsmith also assert that applying customary international law in U.S. courts in the absence of domestic authorization of the custom is contrary to fundamental principles of American democracy. They support this view by noting that nations may be bound by customary international law even when they have not expressly consented to the custom.¹¹⁷ They also state that the application of international law by U.S. courts offends the concept of separation of powers, since the foreign affairs power is the exclusive province of the federal political branches.¹¹⁸ Moreover, they perceive the so-called modern position as in conflict with federalism because when there has been no "affirmative political branch action," it would preempt an area of traditional state concern.¹¹⁹

Professor Harold Hongju Koh has effectively discussed the weaknesses in the Bradley-Goldsmith argument. Koh notes that *Erie* claimed the federal courts could not create common law tort rules because Congress lacked the power to make common law rules in states.¹²⁰ He argues that the *Erie* decision should not apply to customary international law since federal courts *do* have international lawmaking power because of the Constitution's grant to Congress of authority to "define and punish . . . Offences against the Law of Nations."¹²¹ In addition, *Erie* expressly stated that its rule did not extend to matters governed by the Constitution.¹²² Bradley's and Goldsmith's view that the *Erie* rule extends to customary international law is thus wrong because the Constitution vests the foreign affairs power in both the Executive and Congress.¹²³ Similarly, Koh argues that *Erie* was concerned with limiting the ability of the federal judiciary to interfere with areas traditionally governed by states, such as tort law, and not areas delegated to the federal government. He notes that on the same day that *Erie* was decided, the Court in a separate decision preserved the federal common

115. *Id.* at 856.

116. *Id.* at 835-36.

117. *Id.* at 857.

118. *Id.* at 861.

119. *Id.* at 862-63.

120. Koh, *supra* note 106, at 1831.

121. U.S. Const. art. I, § 8, cl. 10; *id.*

122. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938).

123. U.S. Const. art. I, § 8, cl. 3, 10-15 (congressional power to regulate international commerce; define offenses against international law; declare war; raise, support and regulate the armed forces; and mobilize a militia to repel invasions); art. II, § 2, cl. 1-2 (the President is commander-in-chief; and has authority to make treaties and appoint ambassadors with the advice and consent of the Senate).

law power of courts in certain areas of "uniquely federal concern," which Koh believes includes the law of nations.¹²⁴

However, the biggest problem for the Bradley-Goldsmith argument lies in the Supreme Court's 1964 decision in *Banco Nacional de Cuba v. Sabbatino*.¹²⁵ In that case, the Court discussed an article by Professor Philip Jessup that appeared shortly after the *Erie* decision.¹²⁶ Jessup argued that the *Erie* language on which Bradley and Goldsmith rely was dictum and should not apply to international law. He maintained that the Court in *Erie* did not anticipate the consequences of excluding international law from federal common law.¹²⁷ The *Sabbatino* court was considering whether *Erie* should apply to the domestic act of state doctrine, and stated: "[Jessup] cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine."¹²⁸ Despite this clear approval of Professor Jessup's argument, Bradley and Goldsmith deny that the Court adopted the modern position because, unlike the act of state doctrine, customary international law lacks a constitutional foundation.¹²⁹

Koh also cites several cases since *Sabbatino* that apply international law as federal common law.¹³⁰ He points out that if treaties and statutes on international matters may be interpreted by federal courts, then the Bradley-Goldsmith position would promote an incoherence in U.S. law in the international context if customary international law may only be interpreted by state courts.¹³¹ Koh also notes that despite the Bradley-Goldsmith view that the modern position offends the separation of powers, the executive branch has encouraged federal courts to apply international law principles and has firmly supported the view that international law is federal law.¹³² In response to Bradley's and Goldsmith's claims about federalism, Koh notes that the Supreme Court in *United States v. Curtiss-Wright Export Corp.*¹³³ indicated that the foreign affairs power was not a power reserved to the states, but was dedicated to the federal government as a part of national sovereignty.¹³⁴ Finally, in attacking Bradley's and Goldsmith's arguments about democracy, Koh points out: "Every court in the United States—including the state courts that Bradley and Goldsmith champion—applies law that was not made by its own polity whenever the court's

124. Koh, *supra* note 106, at 1831-32 & n.42 (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S. Ct. 803, 811 (1938)).

125. 376 U.S. 398, 84 S. Ct. 923 (1964).

126. *Id.* at 425, 84 S. Ct. at 939; see Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740 (1939).

127. Jessup, *supra* note 126, at 743.

128. *Sabbatino*, 376 U.S. at 425, 84 S. Ct. at 939.

129. Bradley and Goldsmith I, *supra* note 25, at 859.

130. Koh, *supra* note 106, at 1834-35.

131. *Id.* at 1838.

132. *Id.* at 1842-43.

133. 299 U.S. 304, 57 S. Ct. 216 (1936).

134. Koh, *supra* note 106, at 1846-47.

own choice-of-law principles so direct."¹³⁵ Koh goes on to reason that Bradley's and Goldsmith's concerns about the usurpation of American democracy are unfounded because the United States has been the foremost participant in the formation of customary international law for most of the twentieth century.¹³⁶

Another aspect of the Bradley-Goldsmith argument reflects confusion about the nature of custom. Bradley and Goldsmith argue that it is dangerous to allow judges to interpret and apply customary international law since it is "difficult to verify."¹³⁷ But in civil law systems, custom is a source of law, and must be applied by judges when there is no applicable legislation.¹³⁸ The definition of custom under the Louisiana Civil Code as a long-repeated practice recognized as binding law is compatible with that of customary international law.¹³⁹ Louisiana courts have been able to interpret and apply custom without conflicting with U.S. constitutional or democratic principles and without exceeding their judicial authority. Bradley's and Goldsmith's fear of the so-called "unsettled" nature of customary international law is unfounded, and in fact, the consequence of their position puts the United States at risk.

IV. CONSEQUENCES OF THE BRADLEY-GOLDSMITH ARGUMENT

While the Bradley-Goldsmith argument that customary international law is not self-executing U.S. law has been shown to be constitutionally unsound, this part will assume their position is correct, and will examine its potential consequences in light of the missile attacks. This discussion could be viewed as a counterargument to Professors Bradley and Goldsmith on policy grounds, and could explain why even if the *Erie* case theoretically changed the domestic role of customary international law, courts are generally reluctant to blindly apply the *Erie* doctrine in the field of foreign affairs.

A. Preliminary Matters

Bradley's and Goldsmith's revisionist attack on the so-called "modern" position contains a major flaw, namely their preoccupation with what they call the "new" customary international law. They argue that the content of customary international law has evolved from traditionally focusing on relations among nations, to governing human rights and a nation's "treatment of its own citizens."¹⁴⁰ Although many of the human rights principles that Bradley and Goldsmith are concerned about may not yet have evolved into binding

135. *Id.* at 1852-53.

136. *Id.* at 1853-54.

137. Bradley and Goldsmith I, *supra* note 25, at 855.

138. *See* La. Civ. Code art. 1.

139. La. Civ. Code art. 3.

140. Bradley and Goldsmith I, *supra* note 25, at 842.

custom,¹⁴¹ they fear that this so-called "new" customary law may conflict with U.S. domestic law.¹⁴² Moreover, they assert without authority that "the federal political branches appear to have incorporated into federal law most if not all of traditional [customary international law] that is likely to come up in domestic litigation."¹⁴³ Their distaste for the notion that "new" customary international law may be undemocratically applied to the states of the United States causes Bradley and Goldsmith to overlook the consequences of their argument for U.S. citizens abroad. They also overlook that part of the "traditional" customary international law that may not be incorporated into U.S. law.

One reason why the Bradley-Goldsmith argument is so dangerous in light of the U.S. actions in Sudan and Afghanistan is because there is arguably no contrary U.S. legislative act or constitutional principle in conflict with the custom of self-defense.¹⁴⁴ The United States, however, urged that its actions were supported in domestic law by the Anti-Terrorism and Effective Death Penalty Act of 1996.¹⁴⁵ Officials pointed to language which is contained not in the codified law but in the congressional findings to the Act: "[T]he President

141. Bradley and Goldsmith contend that the "new" customary human rights law is developing into binding custom without meeting the traditional requirement that it first reflect a repeated state practice. Rather, they assert that it evolves first through treaty language and United Nations resolutions, and that states subsequently shape their practices to conform to those sources to purposefully create custom. Bradley and Goldsmith II, *supra* note 25, at 328 & n.55. However if, as Bradley and Goldsmith assert, these "customs" do "not reflect the actual practice of states," *id.* at 328, then clearly they do not have the force of law. See Brownlie, *supra* note 20, at 4.

142. Bradley and Goldsmith II, *supra* note 25, at 328-29.

143. *Id.* at 354.

144. In *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 2 (1942) the Supreme Court noted that "[B]y the reference in the 15th Article of War to 'offenders or offenses that . . . by the law of war may be triable by such military commissions,' Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war . . ." *Id.* at 30, 63 S. Ct. 11-12. The Articles of War have been replaced by the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (1998) ("UCMJ"). Assuming the customary international law of self-defense is part of the "law of war," it could be argued that Congress has incorporated the custom against those persons covered by the UCMJ. The relevant section of the UCMJ provides in pertinent part: "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal . . ." 10 U.S.C. § 818 (1998). It would seem that only military personnel would be subject to this provision and to prosecution in the United States for a violation of the laws of war. Thus executive branch officials, including civilian national security or defense advisors, or agents of the Central Intelligence Agency, would not be subject to this provision. Jordan Paust has postulated that even civilians would be subject to the laws of war, not only in military tribunals but also in the federal district courts. Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 Tex. L. Rev. 6, 10-28 (1971). However, Paust's reasoning is not clear and neither of these conclusions seem logically compelled given the plain language of the statute. Even if Professor Paust is correct, there are serious crimes not covered by the customary laws of war that the United States would certainly wish to have prohibited.

145. See Eugene Robinson and Dana Priest, *Reports of U.S. Strikes' Destruction Vary*, Wash. Post, Aug. 22, 1998, at A1; Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18, 22 and 28 U.S.C.).

should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens"¹⁴⁶ Even if the quoted findings have the force of law (which they do not), a traditional canon of statutory interpretation would prevent the President and executive branch from relying on them if the missile strikes violated international law.¹⁴⁷

In 1804, the Supreme Court held in *The Charming Betsy* case that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"¹⁴⁸ Thus, the Executive could not rely on the antiterrorism statute as authorizing a violation of international law unless that is the only possible interpretation of Congress' will. Clearly that is not the case here, for one can read the quoted language as only permitting a use of force justified under customary international law. Even Bradley and Goldsmith concede, although their attack on the modern position may mean that the *Charming Betsy* canon is groundless, that "if the canon is . . . designed to ensure that courts do not involve the political branches in unintended international controversy," the judiciary may validly apply it.¹⁴⁹

Further, the United Nations Charter and Article 51 may likewise not be a domestic constraint on the executive branch. The U.S. courts have distinguished between treaties that are "self-executing" and those that are "non-self-executing." Non-self-executing treaties are not "thought to be capable of operating as supreme federal law of their own effect."¹⁵⁰ Rather, these treaties require domestic enabling legislation to give them the force of law.¹⁵¹ At least some, if not all, of the articles of the United Nations Charter are considered by the United States to be non-self-executing.¹⁵² However, as we have seen above, even if the Charter had the status of U.S. law, it is unclear whether Article 51

146. Anti-Terrorism and Effective Death Penalty Act of 1996 § 324, 22 U.S.C. 2377 note.

147. See Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 Am. J. Int'l L. 746, 752 (1992).

148. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

149. Bradley and Goldsmith I, *supra* note 25, at 872. The War Powers Resolution, which permits the President to mobilize armed forces when there is "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces," would presumably also be subject to the *Charming Betsy* canon such that the President could not mobilize troops under an invalid claim of self-defense. See War Powers Resolution § 2, 50 U.S.C. § 1541 (1998).

150. Jordan J. Paust, *International Law as Law of the United States* 51 (1996). Paust criticizes this judicial concept as conflicting with the constitutional mandate that U.S. "Treaties . . . shall be the supreme Law of the Land" U.S. Const. art VI, § 2.

151. See Paust, *supra* note 150, at 55.

152. See, e.g., *Frolova v. U.S.S.R.*, 761 F.2d 370 (7th Cir. 1985). In holding that Articles 55 and 56 of the United Nations Charter were non-self-executing, the court noted that whether a treaty is self-executing is a matter for judicial determination. *Id.* at 373. Consequently, a treaty's U.S. domestic status will never be determined unless litigation arises. Moreover, the *Frolova* court stated that treaty articles "phrased in broad generalities, suggesting that they are declarations of principles" indicate non-self-executing status. *Id.* at 374.

would serve as a restraint on custom or whether it preserves the "inherent" custom that pre-existed the Charter. Moreover, many argue that the customary right of anticipatory self-defense is not contained within Article 51.¹⁵³

This part of the comment will examine the negative consequences of the Bradley-Goldsmith argument in both the domestic and the international contexts. First, the argument would clearly render the executive branch able to violate international law freely, and would erode basic constitutional precepts through our illegal conduct abroad. Moreover, U.S. federal courts would be *bound* not to apply customary international law. Second, and perhaps most seriously in light of the missile attacks, the argument has several international consequences. The argument encourages other nations not to incorporate international law in their own domestic law and puts U.S. citizens abroad at risk. In addition, the United States risks eroding the custom of valid self-defense and invites violations of our own sovereignty.

B. Domestic Consequences

1. The Executive Can Freely Violate International Law

If customary international law is not U.S. law without an enabling act of Congress, then no domestic legal restraint on the President or other members of the executive branch existed to prevent a violation of international law through the missile strikes. Some writers have maintained, even prior to the Bradley-Goldsmith argument, that the President is not bound by customary international law. Louis Henkin, reporter to the Restatement of the Foreign Relations Law of the United States, has argued that "the President, as the principal organ of the United States in foreign affairs, may make decisions within his constitutional authority that put the United States in violation of international law."¹⁵⁴ However, even Professor Henkin concedes this is not true in all cases, including some circumstances when the President uses force in retaliation: "[T]o the extent that international law forbids such measures when they violate important human rights, the President ought not to be free to take those measures."¹⁵⁵ Therefore if the President uses force in an illegal reprisal to destroy non-military targets or recklessly kill civilians, he would have been bound by customary international law under the "modern" position that Bradley and Goldsmith attack.

153. See *supra* notes 67-80 and accompanying text.

154. Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1568 (1984). Michael Glennon takes an opposing view, arguing that when Congress is silent, a "[p]residential violation of customary international law represents violation of federal common law, and the courts have not hesitated to strike down such action." Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U. L. Rev. 321, 363 (1985). If international custom is not federal common law as Bradley and Goldsmith suggest, this argument fails.

155. Henkin, *supra* note 154, at 1569 n.44.

If international custom does not constrain presidential acts, then through our conduct abroad we risk eroding basic human rights precepts, such as the unalienable rights of life and liberty, expressed not only in human rights instruments and custom, but also in the Constitution. The Executive could disregard customs that are not expressly incorporated in U.S. law but which protect against abuse of other states' rights. The United States could freely violate the spirit of the Constitution by disregarding the basic human rights of non-U.S. nationals, which we hold valuable for our own citizens. For example, if the President could, without domestic legal constraint, order law enforcement officials to kidnap, torture or murder non-citizens extraterritorially, or destroy foreign property under a perverted interpretation of the customary right of self-defense, we risk chipping away at the basic natural law ideals that the founders of our republic so explicitly preserved in the Constitution.

2. *U.S. Courts Are Bound Not To Apply Customary International Law*

Bradley and Goldsmith contend that the consequences of their position have been over-dramatized by the proponents of the "modern" position. They argue that under their view, "the federal political branches, rather than the federal courts, would have the primary role in deciding when and how the United States carried out its international obligations and when and how these norms created enforceable rights in U.S. courts."¹⁵⁶ However, this contention is too simplistic and assumes that Congress will anticipate international problems, will not abdicate its responsibility, and will specifically decide in advance of controversy whether the United States will comply with customary international law. This is impossible and it is unrealistic to expect that Congress will consistently, or even often, act with expediency in the absence of crisis. If Bradley and Goldsmith are correct, until Congress acts, courts would be *required* to approve a U.S. violation of international law even when Congress would not so intend. What negative consequences would arise from a rule that customary international law should be applied to decide cases in the face of congressional silence? One should remember that customary international law has two components: first, a consistent and widespread practice by states, and second, the acceptance of the custom by the international community as legally binding.¹⁵⁷

In addition to the impracticality of their argument, Bradley and Goldsmith overlook the potential negative consequences to the United States when the United States itself might seek to rely on customary international law in U.S. courts. First of all, it is a fundamental principle of American government and the separation of powers that the judicial branch judges the constitutionality of

156. Bradley and Goldsmith I, *supra* note 25, at 871.

157. See Restatement (Third) of the Foreign Relations Law of the United States § 102 (1986); Brownlie, *supra* note 20, at 4-7.

acts of the other branches of government.¹⁵⁸ Furthermore, because the Constitution grants Congress the power to regulate international commerce, to define and punish offenses against international law, to raise and support the armed forces, to declare war, and to mobilize a militia to repel invasions, it is clear that the President does not have exclusive power in the field of foreign affairs.¹⁵⁹ But if customary international law is not U.S. law, then any time a custom has not been expressly incorporated, the judiciary will be unable to keep the foreign affairs conduct of the executive branch in check.

Moreover, if the United States acted by striking non-military targets in Sudan and Afghanistan, not in self-defense, but to intimidate bin Laden and his supporters, then the United States could be accused itself of fighting terrorism with terrorism. Such action, especially if the Executive intended it for terrorist purposes, would erode the very rules against terrorism that the United States stands for promoting. Just because our motives to eliminate terror may be valid, that does not mean the methods we chose to control it are automatically justified.¹⁶⁰ The Justice Department is charged with the responsibility of prosecuting "anyone who promotes, aids and abets, or participates in terrorism, even when the perpetrator or aider and abettor is a governmental agent."¹⁶¹ Thus if the Attorney General were to conclude under American anti-terrorism laws that the U.S. strikes amounted to terrorist conduct, she would be obliged to prosecute members of the executive branch and military who carried out the action, unless they received some form of immunity. Given reports of the Attorney General's doubts about the sufficiency of the evidence connecting bin Laden to the recent embassy attacks, this possibility may not be so far-fetched.¹⁶²

But suppose, for the sake of argument, that the executive branch could identify a developing or established (but unincorporated) international custom that provides for an expanded right of anticipatory self-defense in cases of terrorist attacks. Under the Bradley-Goldsmith argument, the Executive would not be able to rely on that position in a U.S. court to defend its actions. A U.S. court would not be competent to apply or interpret that legal rule and would not recognize that defense. If the actions contravened existing U.S. law, even though they were in compliance with the new custom, courts would actually be required to condemn the U.S. conduct. Unless that new custom had been specifically incorporated into U.S. law, the Bradley-Goldsmith position would give it no domestic legal significance. Thus the Bradley-Goldsmith view on the domestic legal status of custom could hinder not only the separation of powers, but also potentially valid international policies of the executive branch.

158. See Christopher L. Blakesley, *Terrorism, Drugs, International Law, and the Protection of Human Liberty* 60 (1992).

159. See U.S. Const. art I, § 8, cl. 3, 10-15.

160. See generally Blakesley, *supra* note 158, at 54-58.

161. *Id.* at 60.

162. See Hersh, *supra* note 104, at 36.

Suppose further that the armed forces of a foreign nation attacked U.S. interests in that nation's territory, perhaps a U.S. factory or manufacturing plant. The foreign nation could potentially claim that the action was in self-defense, or otherwise required by crucial national interests, because the plant was polluting the environment and putting the state's nationals at risk. If that claim was an exorbitant claim in violation of the customary law of self-defense or some other customary law, the United States would not be able to attack the claim in U.S. courts to obtain relief if the Bradley-Goldsmith position were adopted, since it prohibits the application of unincorporated customary international law by U.S. courts.¹⁶³ There are also new international customs developing unrelated to self-defense, including those that would prohibit arbitrary and prolonged detentions and expropriation of property.¹⁶⁴ The United States would likewise not be able to rely on these customs for relief in U.S. courts. In short, the Bradley and Goldsmith argument would not simply deny to foreign nationals the right to rely on customary international law in U.S. courts, but would prohibit the United States and U.S. nationals from doing so as well.

Because Congress is usually slow to incorporate customary international law into U.S. domestic law, and often fails completely to do so, U.S. courts ought to be able to validly rely on international custom to decide cases, in order to avoid these negative consequences of the Bradley-Goldsmith position.

C. *International Consequences*

By far the most serious implications of the Bradley-Goldsmith argument are those repercussions that could befall the United States in the international arena. First, if the Bradley-Goldsmith argument were adopted, U.S. courts would be required not to enforce our international obligations. This would demonstrate that the United States, through its judiciary, is not committed to enforcing its international obligations sufficiently to apply international law in its courts. This position would undermine our credibility, encourage other nations where U.S. citizens reside or where U.S. corporations do business to follow suit, and decline to apply customary international law as domestic law to the United States' detriment. It would also erode the customary international law itself. Similarly, if a foreign nation imprisoned U.S. nationals or permanent residents based on an invalid claim of self-defense or another reason inconsistent with international law, the United States government would have no workable basis to protest or to protect the U.S. national. Thus, a charge of "blasphemy" or membership in an "outlawed" group, or even simply one's American citizenship, could lead to arrest and detention. The United States government would be without legal

163. In his extensive work on the domestic status of international law, Jordan Paust notes that a state which violates international law might waive immunity under section 1605(a)(1) of the Foreign Sovereign Immunities Act. Paust, *supra* note 150, at 211.

164. *See id.* at 8; Bradley and Goldsmith I, *supra* note 25, at 841.

argument to challenge the conduct or even to protest in that nation's courts. An invalid claim of self-defense would be unassailable. The State Department is obliged to protect U.S. citizens abroad, but in such a situation it would be unable to do so if it could not rely on customary international law.

A more serious problem arises internationally if the Executive would be under no domestic legal constraint to conform to international law. If the U.S. missile attacks proved to have violated international law, the Bradley-Goldsmith argument would allow the Executive to erode U.S. security. A violation of the territorial integrity of other nations invites others to do the same to us or our allies. It is a reckless practice, which undermines national and international security. Abraham Sofaer, the former legal advisor to the State Department, noted this danger when he commented on whether the United States could legally abduct terrorists in foreign states. He asked: "[H]ow would we feel if some foreign nation—let us take the United Kingdom—came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia . . . because we refused through the normal channels . . . to extradite that individual?"¹⁶⁵ The United States should examine its actions in striking Sudan and Afghanistan and ask the same question with respect to a missile strike. If we allow the Executive to pervert or abuse the custom of self-defense, we open ourselves to similar action by other states or groups against U.S. interests. If the mere abduction of a non-state-sponsored terrorist from the territory of a third-party state is so offensive, then surely using cruise missiles to attack non-military targets on the territory of an innocent state is even more reprehensible.

The United States thus risks eroding the very international custom that protects U.S. interests, the custom limiting the use of force in self-defense. Because an international custom results from a repeated practice by states, recognized as having the force of law, the United States' own repeated perversions of the custom governing self-defense could subvert the custom and prompt other nations to act similarly. We risk establishing a precedent that we

165. Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary on S. 1373, S. 1429 and S. 1508, 99th Cong. 63 (1985) (statement of Hon. Abraham D. Sofaer, Legal Advisor to the United States Department of State). The United States may have contributed to the erosion of the customary international law against extraterritorial abduction in 1990, when U.S. agents kidnapped a Mexican national to bring him to the United States to stand trial for murder. See *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S. Ct. 2188 (1992). The United States later agreed, in November 1994, not to engage further in such "grab and snatch" operations. However, in 1995, President Clinton signed Presidential Decision Directive 39, which authorizes U.S. agents to kidnap terrorists from countries that refuse to extradite them to stand trial in the United States. The directive was apparently declassified and made public by security officials inadvertently. See *U.S. Oks Kidnapping Terrorists*, Chi. Trib., Feb. 5, 1997, at Section 1 p. 10. Those actions make it difficult for the United States to condemn legislation such as that passed by the Iranian parliament in 1989, which authorizes Iranian agents to abduct Americans anywhere in the world to stand trial in an Iranian court. See Kristin B. Weissman, Comment, *Extraterritorial Abduction: The Endangerment of Future Peace*, 27 U.C. Davis L. Rev. 459, 489 (1994).

willingly use to justify our own actions, but would not so gladly extend to other nations. As we have seen from the Oklahoma City bombings, the plague of terrorism recruits its operatives from within our own borders and from among our own citizens. Our actions in Sudan and Afghanistan could set a precedent that may make acceptable in international law the idea that states or groups may strike those they deem to be terrorists residing in the territory of an innocent third-party state. Have we subjected our own territory to the possibility of the use of force that we imposed on Sudan and Afghanistan? The Bradley-Goldsmith argument would, in fact, expose us to such a threat.

This policy argument in response to Professors Bradley and Goldsmith may account for the U.S. judiciary's general reluctance to disregard customary international law. In *United States v. Alvarez-Machain*, the Supreme Court examined whether an American agent's internationally illegal abduction of a Mexican national to bring him to the United States would invalidate the Mexican national's trial on murder charges in U.S. courts.¹⁶⁶ The Court recognized the international custom against abduction, but held that the proper remedy for the violation of international law was not to dismiss the charges and release the defendant.¹⁶⁷ This case would have been the perfect opportunity for the Supreme Court to reject customary international law as U.S. law if it recognized the view that Bradley and Goldsmith advocate. However, the Court did not reject the applicability of the custom under U.S. law, nor did it find the U.S. agent's actions were legal. It was reticent to disregard customary international law and our international obligations. It merely rejected the remedy sought.

The Court's refusal to invalidate the trial nevertheless had negative consequences for the United States. Nations with whom we signed extradition treaties, including Canada, said that they would no longer extradite criminals to the United States for trial. Because of the United States' violation of international law, the United States was threatened with having to renegotiate numerous bilateral extradition treaties to explicitly incorporate the custom against abduction.¹⁶⁸ Sanctions such as these show that an outright *rejection* of custom as U.S. law could have even potentially worse effects for the United States' relations with its international partners and for U.S. citizens abroad. It would hinder, rather than help the attempts to combat crime.

V. CONCLUSION

International law protects the fundamental interests of states and their citizens from abuse by actors in the international system. If the Bradley-Goldsmith argument is recognized, the United States will make a declaration to

166. 504 U.S. at 655, 112 S. Ct. at 2188.

167. *Id.* at 669-70, 112 S. Ct. at 2196-97.

168. See Covey T. Oliver et al., *The International Legal System* 208 (1995). Canada's amicus brief in the *Alvarez-Machain* case specifically warned that the incident could threaten U.S.-Canada relations, and the U.S.-Mexican treaty was in fact renegotiated. *Id.* See also *supra* note 165.

the world that it has only limited respect for international law. When we disregard customary international law in our own courts, and allow the Executive to constitutionally violate, unchecked, international customs with actions like the U.S. missile strikes, we will suffer the consequences of the precedents we create. As Oscar Schachter has commented, once we make decisions about the use of force, those decisions "become part of the law-shaping process, influencing expectations as to the acceptability of future actions influencing use of force."¹⁶⁹

The dissent in *Alvarez-Machain* recognized the risk of treating international law so lightly. The dissent emphasized the Court's duty to decide according to the rule of law, and cautioned that courts in other nations would follow the majority's example.¹⁷⁰ It then quoted Justice Brandeis, author of the *Erie* opinion which Bradley and Goldsmith rely on so heavily, who foresaw the consequences of a position such as theirs: "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."¹⁷¹

*Maureen F. Brennan**

169. Schachter, *supra* note 17, at 141.

170. *Alvarez-Machain*, 504 U.S. at 687, 112 S. Ct. at 2205.

171. *Id.* at 686, 112 S. Ct. at 2205 n.33 (Stevens, J., dissenting) (quoting *Olmstead v. U.S.*, 277 U.S. 438, 485, 48 S. Ct. 564, 575 (1928) (Brandeis, J., dissenting)).

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