Florida Journal of International Law

Volume 15 | Issue 2 Article 1

September 2002

Intervention in Iraq: Towards A Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention

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VOLUME 15 FALL 2002 NUMBER 2

INTERVENTION IN IRAQ: TOWARDS A DOCTRINE OF ANTICIPATORY COUNTER-TERRORISM, COUNTER-PROLIFERATION INTERVENTION

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"It is hard to imagine how the tragedy of [September 11th] could have been worse. Yet, the truth is that a single attack involving a nuclear or biological weapon could have killed millions."
— Kofi Annan[1]

I. INTRODUCTION

The convergence of international terrorism and weapons of mass destruction presents a grave threat to international peace, security, and prosperity. It threatens the survival of entire nations. This threat multiplies exponentially when governments foster and encourage these dual scourges. The highest levels of military, legal, and diplomatic policymakers in Washington are currently debating how the United States should confront states that sponsor terrorism and proliferate weapons of mass destruction. The immediate focus of that debate centers on U.S. policy towards Iraq. President George W. Bush foreshadowed the likely end game of this debate when he announced that "the policy of [his] government is the removal of Saddam [Hussein]."[2]

The intention of President Bush to oust Saddam Hussein should come as little surprise. Hussein has remained a source of constant concern for the United States since his army invaded Kuwait in 1990. He has repeatedly menaced his own people and the international community since

1. Press Release, United Nations, Secretary-General, Addressing Assembly on Terrorism, Calls for 'Immediate, Far-Reaching Changes' in U.N. Response to Terror (Oct. 1, 2001), U.N. Doc. SG/SM/7977, *available at* http://www.un.org/News/Press/docs/2001/sgsm7977.doc.htm disarmament.un.org/terrorism.htm (last visited Dec. 18, 2002). Although this comment was not made specifically about Iraq, the sentiments underlying it, i.e., that international terrorism and weapons of mass destruction cannot be allowed to converge, hold serious implications for U.S. policy towards Iraq.

2. *Allies Discuss Terrorism and the Middle East: Bush and Blair on Policy*, N.Y. TIMES, Apr. 7, 2002, at A14.

he seized power in Iraq two decades ago.[3] In the months ahead, the United States will likely pursue its stated policy of regime-change in Iraq.[4]

The United States quickly identified the al Qaeda terrorist network with the support of the Taliban government, as the perpetrators of the September 11, 2001 terrorist attacks,[5] but it recognized that the modern threat to U.S. power and security rises not from one particular organization, but from the growing threat of international terrorism, particularly terrorism that enjoys active or tacit state support.[6] "Operation Enduring Freedom" in Afghanistan signaled a renewed determination on the part of the United States to combat international terrorism and states that sponsor it, but the operation did not fundamentally alter the strategic or legal approach of the United States to such threats. Strategically, the U.S. military action against the Taliban continues the Reagan-era doctrine of "swift and effective retribution" against terrorist organizations that strike U.S. interests.[7] Legally, the United States justified "Operation Enduring Freedom" under the established doctrine of self-defense.[8]

The circumstances surrounding U.S. intervention in Iraq differ fundamentally from those in Afghanistan. The United States has not conclusively proven that al Qaeda maintained Iraqi training bases or that it received financial, logistic or military support from the Iraqi Government.[9] The strategic and legal calculus for action in Iraq does not compare to that which motivated U.S. action in Afghanistan in late 2001.

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3. For an excellent account of the tyrannical excess and ambition of Saddam Hussein, see generally Mark Bowden, *Tales of the Tyrant*, ATLANTIC MONTHLY, May 2002, at 35.

4. Thom Shanker & David Sanger, *U.S. Envisions Blueprint on Iraq Including Big Invasion Next Year*, N.Y. TIMES, Apr. 28, 2002, at A1.

5. *See* President George W. Bush, Address to a Joint Session of Congress and the American People, *in* 37 WEEKLY COMP PRES. DOC. 1347 (Sept. 20, 2001) ("The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al [sic] Qaeda.").

6. *See id.* (The war on terror "will not end until every terrorist group of global reach has been found, stopped and defeated. . . . From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.").

7. WESTERN RESPONSES TO TERRORISM: A TWENTY-FIVE YEAR BALANCE SHEET 307, 316 (Ronald Crelinsten & Alex P. Schmid eds., 1992). The policy described by Crelinsten and Schmid has clearly been continued by Reagan's successors. This is evident in Clinton's air strikes against Iraq for the attempted assassination of George H.W. Bush and his strikes against Sudan and Afghanistan following the Embassy Bombings in Tanzania and Kenya.

8. For a discussion of the international legal validity of U.S. military action "Operation Enduring Freedom" in Afghanistan, see Jack Beard, *America's New War on Terror: the Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 559 (2002).

9. *But see* R. James Woolsey, *The Iraq Connection: Blood Baath*, NEW REPUBLIC, Sept. 24, 2001, at 20; Jeffrey Goldberg, *The Great Terror*, NEW YORKER, Mar. 25, 2002, at 52, 69 ("There's been a relationship between the Mukhabarat [Iraqi intelligence] and the people of Al Qaeda since 1992 . . . .").

Strategically, there is little precedent for a major U.S. military offensive against a state that has not proximately used force against U.S. interests. Legally, while a number of legitimate justifications might permit the use of force, the international legal system does not currently provide such an outlet. An appropriate international law doctrine, under which the United States could execute the campaign it will likely wage against Iraq, does not currently exist.[10]

International law tries mightily to limit the ability of nation-states to use military force against one another.[11] While it has not successfully eliminated international military conflict, states nonetheless strive to couch military actions in terms justifiable under international law.[12] While the United States has several possible legal arguments to support military intervention in Iraq,[13] these arguments do not articulate the underlying paradigm-shift that U.S. action against Iraq will constitute. This Article posits the idea that if the United States can establish that the Hussein regime actively or tacitly supports international terrorism and continues to stockpile and acquire weapons of mass destruction, the United States should need not rely on old strategic policies of reprisal couched in the legal jargon of self-defense. The old truism, that international law is not a suicide pact, grows only more forceful in "an age of uniquely destructive weaponry."[14]

Experts have predicted that Saddam Hussein is three years away from having a deliverable nuclear weapon.[15] In the face of this threat and the ongoing relationships between Hussein and terrorist organizations, the duty of the United States to confront this menace constitutes a strategic and moral imperative which international law should embrace. Sound strategy counsels swift and decisive action against Iraq and sound international legal theory ought to support such a policy. The United States should articulate the need for the establishment of a new international

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10. In fall 2002, the U.N. Security Council became more actively involved in the issue of intervention in Iraq and unanimously passed U.N. Security Council Resolution 1441. Although Resolution 1441 does not constitute clear-cut U.N. Security Council authorization for intervention, it does indicate that it is possible the United Nations will eventually sanction some action against Iraq. *See* S.C. Res. 1441, *infra* note 149.

11. *See, e.g.*, U.N. CHARTER art. 2, para. 4.

12. *See generally* Louis Henkin, *The Use of Force: Law and U.S. Policy, in* RIGHT V. MIGHT 39-40 (1991).

13. *See infra* Part IV.

14. Louis R. Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 TEMPLE INT'L & COMP. L.J. 231, 239 (1992).

15. Goldberg, *supra* note 9, at 75 (quoting August Hanning, the chief of the Bundesnachrichtendienst (B.N.D.), the German intelligence agency).

legal norm condoning anticipatory, offensive intervention against states that foster international terrorism and pursue the development of weapons of mass destruction.[16]

This Article analyzes the international legal implications of the particular problem facing U.S. policymakers as they confront the threat posed by Iraqi support of international terrorism and its pursuit of weapons of mass destruction. In Part II, this Article examines the bloody legacy of the Hussein regime. Hussein's disregard for the lives of his own citizens, exemplified by the genocide of Iraqi Kurds, his pursuit of weapons of mass destruction, and his support for international terrorism, are essential components to an understanding of why the United States can justifiably view his ouster as imperative. Part III examines the existing international legal norms governing the use of force potentially applicable to a U.S. military action against Iraq. Part IV proposes the legal doctrine of anticipatory counter-terrorism, counter-proliferation intervention, as a legitimate answer to the modern threat of international terrorism and weapons of mass destruction. Part V offers conclusions.

The United States will likely soon deploy military force to oust the Hussein regime. Such action already could, in theory, enjoy support under some interpretations of existing international law. Any such claim of legality, however, does not provide an appropriate international legal doctrine reflecting the legitimacy of U.S. action. Any confrontation between the United States and Iraq will likely signal a significant strategic and international legal paradigm shift, empowering the international community to address similar challenges in the future.

II. BACKGROUND: THE MOST DANGEROUS REGIME

The reign of terror by Saddam Hussein in Iraq has secured him a prominent place in the pantheon of heinous tyrants in history. Hussein is guilty of genocide against his own people, committing sinister crimes against humanity, and gravely breaching the laws of war and international law. He has used chemical weapons both in international conflict against Iran and in Iraqi Kurdistan against his own people.[17] His regime has vigorously sought to acquire and develop nuclear weapons,[18] in blatant

16. The Article will call this proposed doctrine "anticipatory counter-terrorism, counter-proliferation intervention" throughout the text.

17. *See generally* RICHARD BUTLER, THE GREATEST THREAT 11, 18 (1999).

18. *See infra* Part II(E). *See generally* SHYAM BHATIA & DANIEL MCGRORY, BRIGHTER THAN THE BAGHDAD SUN: SADDAM HUSSEIN'S NUCLEAR THREAT TO THE UNITED STATES (2000) (discussing the nuclear capabilities of Iraq).

violation of the Nuclear Non-Proliferation Treaty.[19] Iraq is guilty of at least two straightforward acts of international aggression, the first against Iran in 1980 and the second against Kuwait a decade later. Perhaps most significant in the post-September 11th context, evidence is mounting that Iraq both actively and tacitly supports international terrorism and nurtures an ongoing relationship with al Qaeda.[20]

A. *Aggression and Use of Chemical Weapons Against Iran*

Hussein officially ruled Iraq for only a year when he launched an invasion of Iran in September 1980 to capture the coveted Shatt al-Arab waterway, a river leading from oil deposits to the busy shipping lanes of the Persian Gulf.[21] His aggression breached fundamental principles of international law, particularly Article 2(4) of the U.N. Charter, and his bilateral treaty obligations.[22]

When the Iraqi army did not secure immediate victory, Hussein authorized the development and deployment of chemical weapons in violation of international law. He unleashed mustard agents on the Iranians through artillery, helicopter, and airplane bombardments.[23] Iraq became the first state known to have deployed chemical weapons in the seventy years since the end of World War I.[24] Eventually, the Iraqi development of ballistic missiles capable of reaching the capitol of Iran, Tehran, coupled with the demonstrated willingness of Hussein to use chemical weapons, motivated the Iranians to spare their civilians the chemical horrors Iranian soldiers had endured, and the countries reached a peace settlement.[25] When the Iran-Iraq war ended in 1988, the two states had lost

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19. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, art. II, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter Nuclear Non-Proliferation Treaty].

20. *See infra* Part II(F).

21. *See* SCOTT RITTER, ENDGAME 68 (1999).

22. *See* Christopher Joyner, *The Gulf War of 1980-1988*, 88 AM. J. INT'L L. 401, 403 (1994) (book review). A 1975 treaty between Iran and Iraq had effectively resolved all contested legal issues concerning the nations' disputed border. *See also* U.N. CHARTER art. 2, para. 4.

23. *See* Captain Sean M. Condron, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 142 (1999).

24. *See* BUTLER, *supra* note 17, at 18-19 (noting the significant exception that Hitler used chemical weapons in concentration camps). The gruesome deployment of mustard gas in World War I convinced the world that there was no place among civilized nations for such weapons. Until Saddam Hussein's deployment of chemical weapons against Iranian soldiers, the 1925 Geneva Protocol represented one of the few great successes of international law. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Geneva Protocol].

25. *See* RITTER, *supra* note 21, at 81, 89.

almost a million soldiers in one of the bloodiest conflicts of the Twentieth Century.[26] The enduring legacy of this conflict remains the considerable advances in Iraq's weapons of mass destruction program, particularly the chemical element of that program.[27]

B. *Use of Chemical Weapons Against Iraqi Kurds*

As the Iran-Iraq War subsided in spring 1988, Iraq turned its chemical weapons against its own people. That March, a coordinated assault of Iraqi army and air force units pounded the Iraqi city of Halabja with artillery fire and chemical weapons.[28] Heavy chemical clouds smothered the city, transforming basements, the most basic places of refuge, into gas chambers for frightened Iraqi Kurds.[29] The lingering fog of chemicals killed thousands and left tens of thousands permanently blinded, sterilized, disfigured and unnaturally prone to develop cancer and respiratory diseases.[30]

The persecution of Iraqi Kurds did not end with the attack on Halabja. The Washington Kurdish Institute estimates that as many as 200 towns across Iraqi Kurdistan were attacked with poison gas in the course of seventeen months from March 1987 to October 1988.[31] Though the precise number of victims is unknown, Kurdish estimates claim that 200,000 Kurds were killed.[32] Human Rights Watch places the number between 50,000 and 100,000.[33] Kurdish doctors believe that "up to ten percent of the population of northern Iraq — nearly four million people—have been exposed to chemical weapons."[34] Experts have concluded that the chemical agents used in the attacks against Kurdish cities in northern Iraq were most likely a combination of mustard gas and various nerve agents,

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26. *See* Goldberg, *supra* note 9, at 55.

27. *See* RITTER, *supra* note 21, at 67. Some evidence indicates that Iran is not the only foreign state against which Iraq has unleashed its chemical weapons. Chemical detection devices deployed during the Persian Gulf War indicated a high level of chemical toxins on seven different occasions. Phillip Shenon, *New Report Cited on Chemical Arms Used in Gulf War*, N.Y. TIMES, Aug. 22, 1996, at A1.

28. *See* Goldberg, *supra* note 9, at 52-53; RITTER, *supra* note 21, at 89.

29. *See* Goldberg, *supra* note 9, at 53.

30. *See* Statement by the Washington Kurdish Institute on 14th Anniversary of Halabja Attacks, Mar. 15, 2002, *available at* http://www.kurd.org/halabja14.html (last visited Oct. 29, 2002) [hereinafter Kurdish Anniversary Statement]; *see generally* Goldberg, *supra* note 9.

31. *See* Kurdish Anniversary Statement, *supra* note 30; *see generally* Goldberg, *supra* note 9.

32. Goldberg, *supra* note 9, at 53.

33. *Id.* at 61 (citing HUMAN RIGHTS WATCH/MIDDLE EAST, IRAQ'S CRIME OF GENOCIDE (1995)).

34. *Id.* at 57.

including sarin and VX.[35] Significant evidence also suggests that Hussein released lethal biological agents during these attacks on the Kurds.[36]

The long-term effects of the chemical attacks against Iraqi-Kurdistan are only beginning to surface. Today, pregnant women in cities that were attacked with chemical weapons miscarry at rates fourteen times greater than other Kurdish cities.[37] Rates of colon cancer in attacked cities are five times greater than elsewhere.[38] Survivors of the chemical attacks now suffer "Hiroshima levels of sterility."[39] In Halabja, "there are more abnormal births than normal ones."[40]

While Iraq has attempted to hide evidence of its use of chemical weapons,[41] officials have rarely openly denied the charge. An Iraqi general boldly asserted that Iraqi use of chemical weapons is unremarkable because "[w]hen you have an insect problem, you use insecticide."[42] This disrespect for human life permeates many of the Hussein regime's policies,[43] but is most evident in the efforts to decimate Iraqi Kurds.

C. *The Iraqi Persecution of Iraqi Kurds*

The persecution of Iraqi Kurds by Saddam Hussein involved more than the deployment of chemical weapons. In 1988, Iraq coordinated the wanton destruction of Kurdish communities and the systemic mass murder of its Kurdish population. After air assaults with chemical weapons, ground troops entered Kurdish towns, destroyed homes, looted valuables, and burned what little remained.[44] Fleets of army trucks then transported villagers to holding centers while Iraqi officials combed surrounding

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35. *See id.* at 59.
36. *See id.* at 72-74.
37. Goldberg, *supra* note 9, at 72-74.
38. *Id.*
39. *Id.* (quoting Dr. Fouad Babn, a Kurdish physician).
40. *Id.*
41. HUMAN RIGHTS WATCH/MIDDLE EAST, IRAQ'S CRIME OF GENOCIDE 343 n.20 (1995) [hereinafter HRW GENOCIDE REPORT] (quoting letter Sh. 5/19299 from the Amn director of the governorate of Erbil to all branches, Dec. 17, 1988,

> Pursuant to the memorandum from the Honorable Office of the President, 4/4/11/44154 of 4 December 1988, a decision has been taken to give all memoranda that contain information about the production of chemical weapons the highest degree of secrecy. Take all necessary measures, keep this memorandum to yourself and sign for its receipt . . . .).

42. *See id.*
43. *See generally* Bowden, *supra* note 3, at 35.
44. *See generally* HRW GENOCIDE REPORT, *supra* note 41.

hillsides to hunt down escapees.[45] Human Rights Watch has compared the bureaucratic efficiency of the Iraqi mass murder of Kurds to that of the Nazis:

> [T]he range of execution methods described by Kurdish survivors is uncannily reminiscent of [the Nazi genocide] . . . Each of the standard operating techniques used by the [Nazis] is documented in the Kurdish case. Some groups of prisoners were lined up, shot from the front, and dragged into predug mass graves; others were shoved roughly into trenches and machine-gunned where they stood; others were made to lie down sardine-style, next to mounds of fresh corpses, before being killed; still others were tied together, made to stand on the lip of the pit, and shot in the back so that they would fall forward into it. . . . Bulldozers then pushed earth or sand loosely over the heaps of corpses. Some of the grave sites contained . . . the bodies of thousands of victims.[46]

When Hussein eventually ceased his campaign of mass murder, he pursued other means of destroying the Iraqi Kurds. Hussein has implemented a plan of nationality correction under which Iraqi security agents force Kurds to sign identity papers changing their nationality from Kurdish to Arab and admitting that their birth records are "false."[47] The cost of failing to change nationality is forfeiture of property and eviction to make room for Arab families.[48] In the most sadistic of twists, the security forces then levy fines on acquiescent Kurds for having falsified their past ethnicity.[49] Iraqi hospitals have been ordered not to register babies with Kurdish ethnic names.[50] In some regions, Hussein has ordered the razing of Kurdish tombstones and their replacement with new graves with Arab ethnic names.[51] This cradle to grave annihilation of Kurdish

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45. *See* Goldberg, *supra* note 9, at 62. For a chilling account of the maniacal methods of Saddam Hussein and his top generals, see Goldberg, *supra* note 9, at 62, 63 (where he tells the story of Salma Aziz Baban whose six-year-old son died from hunger and illness and then was fed to an Iraqi army dog).

46. HRW GENOCIDE REPORT, *supra* note 41, at 12.

47. *See* Goldberg, *supra* note 9, at 71-72.

48. *See id.* at 72.

49. *See id.*

50. *See id.*

51. *See id.*

history in Iraq constitutes a comprehensive strategy of ethnic genocide and is hauntingly similar to the efforts of other genocidal tyrants in history.[52]

Although the Iraqi actions taken in pursuit of the genocide of the Kurdish population of Iraq speak for themselves, the animus underlying the effort has been made explicit. Human Rights Watch has authenticated audiotapes made by the official who directed the Anfal.[53] That official mused during one recorded meeting, "[w]hy should I let them live there like donkeys who don't know anything? . . . I will smash their heads. . . . I will bury them with bulldozers."[54] Hussein and his subordinates have slaughtered thousands of Kurds and left those who survived weak, diseased, infertile, and deprived of their identity and heritage. One can only wonder whether the Iranians or the Kuwaitis would have faced similar fates had the plans of Hussein for aggressive conquest been realized.

D. *Aggression Against Kuwait*

On August 2, 1990, over 100,000 Iraqi troops and 300 tanks invaded Kuwait.[55] Kuwait had been a peaceful neighbor of Iraq with a modest military force of only 20,000 soldiers.[56] Former U.S. President George H.W. Bush described this invasion as an act of naked aggression.[57] The United Nations concurred with President Bush and expressed that

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52. Hussein's bloody campaign likely qualifies as genocide under the Genocide Convention. Genocide is defined as, *inter alia*, "killing members of a [national, ethnical, racial, or religious] group;" or "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 9, 1948, art. II(a), (c), 78 U.N.T.S. 277.

53. "Anfal" is the Iraqi name for the military campaign against the Kurds. It translates literally as "the spoils." *See generally* HRW GENOCIDE REPORT, *supra* note 41, at 10.

54. *Id.*

55. Michael R. Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. TIMES, Aug. 2, 1990, at A2; *see also* Caryle Murphy, *Iraqi Force Invades Kuwait; Tanks, Troops Storm Capitol*, WASH. POST, Aug. 2, 1990, at A1.

56. Iraq formally recognized the nation of Kuwait in 1963 following Kuwait's admission to the United Nations. The existence of a Kuwaiti nation was clearly established long before 1963 when the Kuwaiti government effectively oversaw a fixed territory and population. Any claim Iraq once may legitimately have had to Kuwait matters little in light of these intervening developments. Iraq had been on notice that Kuwait was an independent nation entitled to its sovereignty, free from interference long before summer 1990. *See generally* DAVID H. FINE, SHIFTING LINES IN THE SAND: KUWAIT'S ELUSIVE FRONTIER WITH IRAQ (1994).

57. Dan Balz & Ann Devroy, *Iraqi Invasion Force Seizes Control of Kuwait; U.S. Bans Trade, Joins Allies in Freezing Assets; Bush Leaves Open Military Options*, WASH. POST, Aug. 3, 1990, at A1.

sentiment in several U.N. Security Council resolutions.[58] Most significantly, the United Nations, through U.N. Security Council Resolution 678,[59] authorized member-states to use "all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions and to restore international peace and security to the area."[60] Resolution 660, adopted on August 2, 1990, strongly condemned the Iraqi invasion into Kuwait.[61]

The forces of Hussein swiftly established a provisional government in Kuwait made up of Iraqi army officers.[62] The Iraqi reign over Kuwait was marked by brutality. Iraqi forces systemically tortured Kuwaiti citizens to extract intelligence and to punish those unwilling to renounce their Kuwaiti allegiance. Amnesty International described the Iraqi brutality:

> Two categories of [Kuwaitis] appear to have been targeted for particularly severe torture: actual or suspected members of the Kuwaiti armed forces, National Guard, police and security forces, and individuals suspected of having participated in armed resistance against Iraqi forces. However, others have been tortured for involvement in non-violent activities such as peaceful demonstrations, . . . writing anti-Iraq slogans on walls, possessing opposition leaflets and raising the Kuwaiti flag . . . [t]orture in these cases was aimed at extracting information about the identity of persons involved in opposition activities. . . . In other cases, the objective was to force [Kuwaitis] to cooperate with the Iraqis after release by acting as informers . . . forcing them to make statements against the Kuwaiti ruling family . . . and making declarations of allegiance to . . . Saddam Hussein. Finally, the sheer brutality of the torture inflicted on [Kuwaitis] was designed to terrorize the population at large and to discourage others from expressing . . . their opposition to the Iraqi presence in Kuwait.[63]

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58. *See, e.g.*, S.C. Res. 660, U.N. SCOR, 45th Sess., 2933d mtg., U.N. Doc. S/Res/660 (1990).

59. *See* S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/Res/678 (1990).

60. *Id.* § 2.

61. *See, e.g.*, S.C. Res. 660, *supra* note 58.

62. John Kifner, *The Iraqi Invasions: Hundreds of Westerners Rounded up in Kuwait*, N.Y. TIMES, Aug. 7, 1990, at A9.

63. Amnesty International, Iraq/Occupied Kuwait Human Rights Violations Since 2 August, Excerpted from Amnesty International Document, Dec. 19, 1990 *in* INTERNATIONAL LAW AND THE USE OF FORCE 34 (Thomas Ehrlich & Mary Ellen O'Connell eds., 1993).

This brutality escalated over the seven-month occupation culminating in an Iraqi rampage of "torture, kidnapping, rape and pillage over the final days of occupation."[64]

In February 1991, the United States led a coalition of forces in a military rout of the Iraqi occupiers.[65] Despite the fact that Iraqi military personnel outnumbered allied forces by a ratio of three to two, the allies easily drove Iraqi forces from Kuwait. The allied forces captured some 50,000 Iraqi prisoners of war, inflicted tens of thousands of casualties and, in the opinion of U.S. General Norman Schwarzkopf, reduced the Iraqi Army to the point where"[t]here [was] not enough left for [Hussein] to be a regional threat."[66]

The Iraqi invasion of Kuwait was the first instance since the inception of the United Nations that a U.N. member used force in an attempt to absorb another state.[67] Iraq has not engaged in an act of aggression comparable to its forays against Iran and Kuwait since the conclusion of the Persian Gulf War. The U.S. Government's policy of containment may be the most significant cause of this restraint on the part of Saddam Hussein. Iraq has been closely monitored since the end of the Persian Gulf War. No-fly zones established at the end of the war still protect Kurdish populations in Northern Iraq and Shia groups in Southern Iraq. Nevertheless, in the decade since the conclusion of Operation Desert Storm, Iraq has significantly rebuilt its military, particularly its elite fighting force, the Special Republican Guard.[68] It has done so despite U.N. sanctions intended to keep the Hussein regime from reasserting itself as a

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64. R.W. Apple, Jr., *War in the Gulf: The Overview; Allies Destroy Iraqi's Main Force; Kuwait is Retaken After 7 Months*, N.Y. TIMES, Feb. 28, 1991, at A1.

65. President Bush's remarks on the commencement of hostilities in the Persian Gulf War seem apt even today as the world again waits for Saddam Hussein:

> While the world waited, Saddam Hussein systematically raped, pillaged and plundered a tiny nation, no threat to his own. He subjected the people of Kuwait to unspeakable atrocities . . . . While the world waited, Saddam sought to add to the chemical weapons arsenal he now possesses, an infinitely more dangerous weapon of mass destruction — a nuclear weapon. And while the world waited, Saddam Hussein dug in. . . . While the world waited . . . Saddam Hussein met every overture of peace with open contempt. While the world prayed for peace, Saddam prepared for war. . . . Regrettably we now believe that only force will make him leave.

27 WEEKLY COMP. PRES. DOC. 50 (Jan. 16, 1991).

66. Apple, Jr., *supra* note 64, at A1.

67. BUTLER, *supra* note 17, at 34.

68. Daniel Byman et al., *Can Saddam be Toppled?*, FOREIGN AFF., Jan./Feb. 1999, at 27.

regional threat. A large component of this rearmament has likely included advancements in the Iraqi weapons of mass destruction programs.

E. *Iraq and International Terrorism*

The Persian Gulf War cease-fire resolutions forbid Iraq from committing or supporting any acts of international terrorism. Iraq was not to ". . . allow any organization directed towards commission of [terrorist] acts to operate within [Iraqi] territory and [was] to condemn unequivocally and renounce all acts, methods and practices of terrorism."[69] Yet, Iraq long ago adopted organized terror as a tool of statecraft and has shown no intention of renouncing its support of international terrorism. Past examples of Iraqi terrorism include several assassination plots. As the Persian Gulf War coalition finalized plans to repel Iraq from Kuwait, in 1991, Iraq sent out "hit" squads to attack international diplomatic missions and officials.[70] Furthermore, in 1993 Kuwaiti authorities seized a Toyota Landcruiser rigged with Iraqi explosives intended to assassinate former President George H.W. Bush during a visit to celebrate the liberation of Kuwait.[71]

Although no facts in the public domain have conclusively linked Iraq to the planning or execution of the September 11th terrorist attacks, there is some evidence that Iraqi government officials may have played a role. CIA director George Tenent has cautioned that "[as] to . . . September 11, the jury is still out. . . . [I]t would be a mistake to dismiss the possibility of state sponsorship."[72] When it comes to the Iraqi sponsorship of terrorism, former CIA Director R. James Woolsey has pointed out, "absence of evidence is not evidence of absence."[73]

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69. S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg., § H(32), U.N. Doc. S/Res/687 (1991).

70. *See* BUTLER, *supra* note 17, at 35.

71. Michele L. Malvesti, *The New World Disorder: Bombing Bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, 26 FLETCHER F. WORLD AFF. 17, 20 (2002).

72. *Worldwide Threats to U.S. National Security: Hearing Before the Senate Armed Services Committee*, 107th Cong. (2002) (statement of Director George Tenet, Central Intelligence Agency). *See also* Jim Mannion, *Iraq has had Contacts with al-Qaeda, Tactical Cooperation Possible: CIA Director*, AGENCE FRANCE PRESSE, Mar. 20, 2002.

73. Woolsey, *supra* note 9, at 20. A significant and often forgotten fact is that Iraq was linked to the original World Trade Center bombing in 1993. *Id.*; *see also* Gary Schmitt, *Why Iraq?; If Saddam Stays in Power, the War on Terrorism Will Have Failed*, WKLY. STANDARD, Oct. 29, 2001, at 13 ("The mastermind behind the plot was linked to Iraq (via a passport and other details), and a second key figure in the bombing fled soon afterwards to Iraq."); *see also* Claudia Winkler, *The*

Iraq has been linked to the al Qaeda terrorist network responsible for the September 11th attacks. A credible report in December 2002 indicated that Iraq has smuggled significant quantities of the lethal VX nerve agent to al Qaeda operatives in Turkey. This report marks "two significant milestones. It would be the first known acquisition of a nonconventional weapon other than cyanide by al Qaeda . . . [and] the most concreate evidence to support the charge . . . that al Qaeda terrorists receive material assistance in Iraq."[74] Furthermore, Czech Republic intelligence officials have confirmed that the alleged mastermind of the attacks, Mohammad Atta, met a high-ranking Mukhabarat official in summer 2001 in Prague.[75] Hussein recently hosted Ayman al-Zawahiri, a top leader of al Qaeda, for a personal meeting at one of his Baghdad palaces.[76] Hussein also regularly sent his own emissaries to Afghanistan to meet with Osama bin Laden and other al Qaeda leaders.[77] Muhammad Mansour Shahaab, an Iranian smuggler captured by Kurdish intelligence officials, has divulged specific information linking the Iraqi Mukhabarat to international terrorism and al Qaeda. He served as an agent for the Mukhabarat over the course of several missions, at first smuggling basic explosives and rifles from Iraq into Iran and Afghanistan.[78]

More ominously, Mukhabarat agents paid Shahaab $10,000 to transport several dozen refrigerator motors attached to canisters filled with an unknown liquid from Iraq to Taliban agents in Afghanistan.[79] When Shahaab inquired as to the contents of the canisters, he was told that they contained "my life, and your life."[80] Shahaab asserts that contacts such as these are part of a "relationship between the Mukhabarat and the people of al Qaeda [that has gone on] since 1992."[81] More recently, the

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Iraq Report, WKLY. STANDARD ONLINE, *available at* http://www.weeklystandard.com/content/public/articles/000/000/000/376qesgj.asp (last visited Oct. 30, 2002) ("[a] group of Baghdad intelligence officials led by Faruq Hijazi met with bin Laden in Kandahar in December 1998").

74. Barton Gellman, *U.S. Suspects Al Qaeda Got Nerve Agent from Iraqis: Analysts: Chemical may be VX, and was Smuggled Via Turkey*, WASH. POST., Dec. 12, 2002, at A1.

75. *See* Schmitt, *supra* note 73, at 13. A bizarre back and forth about the veracity of this report has recently erupted, but the link still appears valid. A senior Bush administration official recently cautioned those discrediting the report that, "you cannot say the Czech report about a meeting in 2001 between Atta and the Iraqi is discredited or disproven in any way. The Czechs stand by it . . . ." William Safire, *Mr. Atta Goes to Prague*, N.Y. TIMES, May 9, 2002, at A39 (quoting a senior Bush administration official).

76. *See* Goldberg, *supra* note 9, at 68.

77. Schmitt, *supra* note 73, at 13.

78. *See* Goldberg, *supra* note 9, at 69-70.

79. *See id.* at 70.

80. *Id.*

81. *Id.*

Mukhabarat ordered Shahaab to begin to organize a series of nine boat bombings similar to the one that killed seventeen U.S. Navy personnel on the U.S.S. Cole in 2000.[82] The Mukhabarat instructed Shahaab to load small boats with explosives and use a crew of suicide bombers to blow the vessel up near U.S. ships in the Persian Gulf.[83] He was captured by Kurdish intelligence before he could execute these strikes.

The Hussein Government has been linked with other international terrorist organizations as well. Hussein has forged a particularly close link with Hamas and its terrorist activity aimed at Israel.[84] Recently, Hussein has enhanced Iraqi policies inspiring and financing suicide bombings in Israel.[85] Hussein has pledged $25,000 to the families of successful suicide bombers in Israel — a sum that constitutes a handsome raise for suicide bombers who had previously only earned $10,000 from the Iraqi treasury.[86]

Iraq has also financed and organized a number of terrorist training camps within its borders for the express purpose of training "warriors . . . to strike back at America."[87] The most menacing of these terrorist training camps is that at Salman Pak, south of Baghdad, which incorporates a mock Boeing 707 fuselage to refine terrorist hijacking skills.[88] This and other facilities have been used to train a steady stream of terrorists in sabotage, assassination, plane and train hijacking, and suicide bombing.[89]

In June 1996, U.N. Special Committee (UNSCOM) inspectors uncovered evidence of another highly organized terrorism school near Abu Ghraib, operated by the Iraqi Mukhabarat. UNSCOM inspectors searched

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82. *Id.* Since this revelation, exactly such an attack has transpired. The fall 2002 terrorist attack on a French oil tanker in the Persian Gulf indicates that terrorists still threaten East Asian shipping.

83. *See* Scott Peterson, *Ex-Smuggler Describes Iraqi Plot to Blow Up U.S. Warship*, CHRISTIAN SCI. MONITOR, Apr. 3, 2002, *available at* http://www.csmonitor.com/2002/0403/p01s01-wome.htm (last visited Oct. 23, 2002).

84. *See* Goldberg, *supra* note 9, at 68.

85. Vernon Loeb, *Countries Tied to Attacks on Israel; Rumsfeld Links Iran, Iraq, Syria to Raids*, WASH. POST, Apr. 2, 2002, at A11. This Article cannot grapple with the ethical debate over the difference between terrorists and freedom fighters, but it must at least note that if anything is terrorism, it is the indiscriminate mass murder of innocent civilians such as that perpetrated by the Palestinian suicide bombers in spring 2002. This observation sheds no light on the righteousness of the Palestinian cause. In the Middle East, no country's hands are clean, but nothing in the region is quite as despicable as Hussein's blood money.

86. Mohammed Daraghmeh, *Iraq Raises Suicide Bombers' Payments*, ASSOCIATED PRESS, Apr. 4, 2002, at A20.

87. Bowden, *supra* note 3, at 35, 38.

88. Peterson, *supra* note 83.

89. David Rose, *Iraq's Arsenal of Terror*, VANITY FAIR, May 2002, at 124.

what Iraqi officials claimed was an anti-terrorism school.[90] At that facility, inspectors discovered thousands of documents detailing past and future terrorist operations including plans to disguise terrorist bombs in the form of toys for children and to mislead investigators into attributing terrorist atrocities to Iran.[91]

Indisputable facts, such as the thousands of pages of terrorism-related documents uncovered by UNSCOM, indicate that the Iraqi support for terrorism is pervasive and sophisticated. New information, such as that provided by Shahaab, indicates that Iraqi terrorist activity is not on the decline. But terror is an inherently clandestine activity. That so much is publicly known of Iraqi-supported terrorism is disturbing — that which is not yet known is what the international community must fear.

F. *The Iraqi Pursuit of Weapons of Mass Destruction*

1. International Law of Weapons of Mass Destruction

The international community has drawn multilateral guidelines to control the spread of weapons of mass destruction, yet the Iraqi weapons programs have clearly and repeatedly transgressed most of these specific norms. The constant Iraqi pursuit of weapons of mass destruction constitutes a serious threat to the international community and to the overall effectiveness of these multilateral weapons of mass destruction regimes.

The 1925 Geneva Protocol limited the ability of states to deploy chemical and biological weapons (nuclear technology was two decades hence). This treaty, however, made no specific effort to ban the acquisition of such weapons.[92] To begin to rectify this omission, the states party to the 1925 Geneva Protocol reconvened in January of 1989 and agreed upon a declaration establishing the objective of universal elimination of chemical weapons.[93] Iraq ratified the 1925 Geneva Protocol and is a signatory of the 1989 declaration. The Vienna Convention on the Law of Treaties explicitly prohibits even signatory states from "acts which would defeat

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90. RITTER, *supra* note 21, at 120-21.

91. *Id.*

92. *See generally* Geneva Protocol, *supra* note 24.

93. *See* Final Declaration by the Conference of State Parties to the 1925 Geneva Protocol and other Interested States on the Prohibition of Chemical Weapons, Jan 11, 1989, U.N. Doc. A/44/88 (1989). Iraq has subscribed to this declaration.

the object and purpose" of these agreements.[94] Yet, as is evidenced by the Iraqi use of chemical weapons against Iranians and Iraqi Kurds, Iraq has egregiously violated these treaties.

With the promulgation of the Nuclear Non-Proliferation Treaty of 1968, international law sought to prevent the spread of the most dangerous weapons in the world.[95] In that treaty, Iraq and other non-nuclear weapons states committed "not to receive[,] . . . manufacture[,] . . . seek or receive any assistance in the manufacture of nuclear weapons[,] or other nuclear explosive devices."[96]

This approach to nuclear weapons was then extended to biological weapons in 1972 with the creation of the Biological Weapons Convention.[97] This Convention committed states "never in any circumstances to develop, produce, stockpile or otherwise acquire or retain" biological weapons,[98] and to "destroy, or to divert to peaceful purposes . . . not later than nine months after entry into force of the Convention" all biological weapons, including "agents toxins weapons, equipment and means of delivery."[99] This Convention articulates the clearest of norms that the state signatories are to abide by.[100] Iraq is a signatory of the Biological Weapons Convention.

These conventions, the 1925 Geneva Convention together with the 1989 Declaration, the 1968 Nuclear Non-Proliferation Treaty, and the

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94. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 332 [hereinafter Vienna Convention]. Iraq is not a party to the Vienna Convention on the Law of Treaties. The Vienna Convention on the Law of Treaties is, however, declaratory of customary international law. *See* JOSEPH M. SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM, 993-94 (3d ed. 1988).

95. *See* Nuclear Non-Proliferation Treaty, *supra* note 19.

96. *Id.* art. II.

97. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction, Mar. 26, 1975, 1015 U.N.T.S. 163 [hereinafter Biological Weapons Convention].

98. *Id.* art. I.

99. *Id.* art. II.

100. The international community is currently attempting to strengthen these norms with enforcement mechanisms. *See* Barry Kellman, *An International Criminal Law Approach to Bioterrorism*, 25 HARV. J.L. & PUB. POL'Y 721, 726 (2000).

1972 Biological Weapons Convention, bind Iraq.[101] Actions in direct contravention of the terms of these instruments, such as the development and stockpiling of chemical and biological weapons, certainly defeat the object and purpose of these agreements. Together they demonstrate the profound concern of the international community over the spread of weapons of mass destruction. Iraq grievously violated each of these covenants, and thereby entrenched itself as an international pariah.

2. Iraqi Commitments under the Gulf War: Cease-Fire Resolutions

Once coalition forces removed the Iraqi military from Kuwait, U.S. and U.N. diplomats conditioned the end of hostilities on the elimination of the capacity of Iraq to acquire weapons of mass destruction. U.S. Secretary of State James Baker emphasized that, "[o]ur position is[:] [A]s long as that particular Government continues in power, we'll want to make certain . . . that there are some sort of constraints on rearmament and . . . particularly weapons of mass destruction."[102] No formal peace treaty was ever signed between Iraq and the nations that liberated Kuwait.[103] Instead, the U.N. Security Council approved a series of cease-fire resolutions, detailing the measures required of Iraq. The U.N. Security Council passed the most important of these resolutions, Resolution 687,[104] in April of 1991.[105] U.N. Security Council Resolution 687 required Iraq to:

> unconditionally accept the destruction, removal or rendering harmless, under international supervision of:

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101. *See* Vienna Convention, *supra* note 94, art. 18:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance of approval, until it shall have made its intention clear not to become a party to the treaty; or (2) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into is not unduly delayed.

Id.

102. Andrew Rosenthal, *Bush Declares Halt to Allied Offensive; Declares Kuwait Free, Iraq Beaten; Sets Stiff Terms For Full Cease-Fire*, N.Y. TIMES, Feb. 28, 1991, at A1.

103. The significance of there being no formal peace treaty, or even cease-fire declaration, is that the matter of the Iraqi invasion of Kuwait remains unconcluded under international law. *See* BUTLER, *supra* note 17, at 39.

104. *See id.*

105. S.C. Res. 687, *supra* note 69.

> (a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities;
>
> (b) All ballistic missiles with a range greater than 150 kilometers and related major parts, and repair and production facilities . . . .[106]

This resolution also created UNSCOM to "carry out immediate on-site inspection of Iraq's biological, chemical and missile capabilities . . . ."[107] Furthermore, Resolution 687 vested the International Atomic Energy Agency (IAEA) with monitoring the Iraqi nuclear weapons programs and their capacity.[108] Resolution 687 specifically prohibited Iraq from acquiring or developing nuclear weapons, nuclear weapons materials, or any components or manufacturing facilities for nuclear weapons.[109]

Iraqi noncompliance with Resolution 687 began immediately. The United Nations gave Iraq fifteen days to provide a disclosure statement detailing its inventory of weapons of mass destruction and the ingredients and mechanisms it had developed to create them.[110] The original Iraqi report was a few handwritten scribbles listing a handful of items allegedly already destroyed.[111] Even eight years later, in the final report of UNSCOM to the U.N. Security Council, the Iraqi statements remained nonsense in the opinion of UNSCOM inspectors and international experts.[112]

3. Iraqi Chemical and Biological Weapons

Iraqi defectors have revealed that the Iraqi military had already actively pursued chemical weapons by the mid-1970s.[113] Former-Iraqi Foreign

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106. *Id.* § 8(a) & (b).

107. *Id.* § 9(b)(1).

108. *Id.* §§ 12, 13.

109. *Id.* § 12.

110. S.C. Res. 687, *supra* note 69, § (9)(a).

111. *See* BUTLER, *supra* note 17, at 50.

112. *See id.* at 51. On December 8, 2002, Iraq claimed to finally provide a comprehensive declaration proving it had destroyed all of its weapons of mass destruction. In this 11,000 page report, the Iraqis offer "no new evidence" to support their claims. Rajiv Chandrasekaran, *Iraq Lacks New Proof of Arms Destruction: U.S., U.N. Had Demanded Evidence for Claims*, WASH. POST, Dec. 9, 2002, at A16. In offering the massive document, Iraq appears to have changed its obstruction policy from one of un-cooperation to one of over-cooperation, effectively appearing to cooperate but burying the United Nations in a meaningless blizzard of documents. *Id.*

113. RITTER, *supra* note 21, at 83. This revelation was made by Lieutenant General Nizar Abd al-Karim al-Khazraji, the former chief-of-staff of the Iraqi Ministry of Defense.

Minister Tarik Aziz has confirmed that Iraq had developed weapons of mass destruction "in order to deal with the Persians and the Jews."[114] The program advanced from initially producing simple mustard gas, to eventually concocting sophisticated nerve agents such as sarin and VX.[115] During the Iran-Iraq War, Iraq also began an aggressive program to develop biological weapons.[116]

UNSCOM confirmed the extent of the frighteningly sophisticated Iraqi chemical, biological and ballistic missile programs, beginning in April 1991.[117] Despite the constant Iraqi policies of evasion, deceit, and concealment,[118] UNSCOM and IAEA confirmed that Iraq had weaponized anthrax,[119] botulism,[120] and aflatoxin,[121] and armed twenty-five "germ warheads for Al Hussein missiles, which have a range of four hundred miles."[122] Aflatoxin was loaded into two Scud-ready warheads with even greater range.[123] Iraq had also filled 157 twenty-gallon bombs with

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114. Goldberg, *supra* note 9. Internal Iraqi propaganda in the 1980s corroborates this information and cites deterrence of Israel and Iran as the primary reasons for the vigorous pursuit of a chemical weapons program. *See* RITTER, *supra* note 21, at 92. Ritter cites an official Presidential Council memorandum of September 17, 1988:

> The principle of deterrence is the best means of defense against the Zionist entity and we suggest in this respect the following: to continue to develop weapons with an attempt to acquire more lethal types of munitions in large quantities; . . . to secure our ability to launch surprise attacks and to respond quickly to deter the enemy.

Id. at 92.

115. RITTER, *supra* note 21, at 86.

116. *See* Condron, *supra* note 23, at 144. *See generally* Barry Kellman, *Biological Terrorism: Legal Measures for Preventing* Catastrophe, 24 HARV. J.L. & PUB. POL'Y 417 (2001) (for an excellent discussion of the threat posed by various biological weapons).

117. S.C. Res. 687, *supra* note 69, § C(9)(b)(i).

118. *See* BUTLER, *supra* note 17, at 51 (for an accounting of the lies used by Iraqi officials in their efforts to obstruct UNSCOM. Among the more colorful examples: "The wicked girlfriend of one of our workers tore up documents in anger, . . . [or,] a wandering psychopath cut some wires to the chemical-plant monitoring camera.").

119. Anthrax is an acute infectious disease. It is almost 100% fatal if inhaled and between 20-60% fatal if exposure is cutaneous or digestive. *See* CENTER FOR DISEASE CONTROL, DIVISION OF BACTERIAL AND MYCOTIC DISEASES, DISEASE INFORMATION, *available at* http://www.cdc.gov/ncidod/dbmd/diseaseinfo/anthrax_g.htm#Whatisanthrax (last visited Oct. 31, 2002).

120. Botulism's proper name is botulinum toxin. It is a pathologic bacterium that causes muscular paralysis resulting in death. Condron, *supra* note 23, at 144.

121. Alfatoxin is a biological agent that causes aggressive forms of cancer, usually liver cancer. *See id.*

122. *Id.*

123. Goldberg, *supra* note 9, at 72-73.

anthrax, botulism, and aflatoxin.[124] UNSCOM further uncovered that Iraq had perfected the purposeful dilution of aflatoxin into tear gas to diabolically mask its use against civilian populations.[125] These weapons were perfected on humans during programs (uncovered by UNSCOM) in which Iraq subjected humans, mostly political prisoners, to their deadly biological toxins.[126]

UNSCOM concluded that despite their efforts, Iraq successfully concealed, and likely retains today, chemical weapons consisting of, at the very least: several tons of VX nerve agent; almost 3,000 tons of other chemical gas agents; and about 500 artillery shells filled with mustard gas.[127] The biological arsenal of Hussein may be even more potent. UNSCOM received no Iraqi cooperation with regard to biological weapons. UNSCOM never destroyed the 8,400 liters of anthrax, 19,000 liters of botulism, or the 2,000 liters of aflatoxin and clostridium that they know existed from both documentary evidence and first-hand accounts of Iraqi scientists who had weaponized the germs.[128] Iraq also likely concealed as many as forty al Hussein missiles that have the capacity to strike targets as far away as Tel Aviv and Tehran.[129] A missile strike by chemical and biological warheads would devastate its target, but such carnage would pale in comparison to that which would ensue from a nuclear strike.

4. Nuclear Mujahidin

In September 2000, Saddam Hussein publicly urged Iraqi nuclear scientists, engineers, and military officials, a team he called his Nuclear Mujahidin, to work in a race against time to defeat the United States.[130]

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124. Condron, *supra* note 23, at 144.

125. Victims of aflatoxin-laden tear gas would suffer immediate effects from tear gas but they would also develop cancers long after the tear gas had dissipated. Goldberg, *supra* note 9, at 72-73.

126. *See id.; see also* BHATIA & MCGRORY, *supra* note 18, at 291. Hussein likely approved these human tests personally. ("Saddam chaired the meeting that sanctioned using these prisoners. His scientists showed him videos of what their inventions had done to animals. Saddam demanded film of what these toxins would do to humans.") *Id.*

127. Goldberg, *supra* note 9, at 74.

128. *Id.* at 73; *see also* Josh Tyrangiel, *What Saddam's Got*, TIME, May 13, 2002, at 35 ("A single gram of anthrax — roughly 1/30 oz. — contains 1 trillion spores, or enough for 100 million fatal doses.").

129. *See* Rose, *supra* note 89; at 131. Missiles of that range far exceed the maximum range of 93 miles permitted under the U.N. Security Council Resolution 687. *See* S.C. Res. 687, *supra* note 69.

130. DIRECTOR OF CENTRAL INTELLIGENCE, UNCLASSIFIED REPORT TO CONGRESS ON THE ACQUISITION OF TECHNOLOGY RELATING TO WEAPONS OF MASS DESTRUCTION AND ADVANCED

This mandate is the latest in a long history of nuclear calls to arms.[131] The Iraqi pursuit of a nuclear weapon began over three decades ago.[132] Since its inception, the programs of Hussein have steadily advanced to a point where he may already have a working nuclear device.[133]

At its height in the early 1990s, the nuclear program of Saddam Hussein maintained some 12,000 employees, including more than 200 engineers and more than 300 nuclear science and engineering Ph.Ds.[134] At that time, Iraq lacked the scientific and technical capacity to produce a nuclear weapon, but Iraq possessed enough bomb-grade uranium to produce a Hiroshima-sized bomb.[135] A chance air strike during the Persian Gulf War bombardments obliterated much of the stock of enriched uranium Hussein had gathered.[136] Currently, however, it is widely acknowledged that Iraq has overcome its scientific and technical shortcomings and the only impediment to Iraq's production of nuclear weapons is a lack of fissionable bomb-grade material.[137] Graham Allison, director of the Harvard Belfer Center for Science and International Affairs and former-Assistant Secretary of Defense, has warned that once a nation such as Iraq has "obtained 40 pounds of highly enriched uranium, or less than half that weight in plutonium, with material otherwise available off the shelf, it could produce a nuclear device in *less than a year*."[138]

Iraq is working diligently to overcome this impediment. Iraqi contacts with former Soviet Union officials are of gravest concern. Several military officials from former Soviet bloc countries including Kazakhstan and Belarus have been arrested for attempting to smuggle weapons-grade plutonium out of their countries.[139] Four kilograms of unprocessed uranium and six grams of plutonium made it as far as Turkey, the

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CONVENTIONAL MUNITIONS, 1 JANUARY THROUGH JUNE 2001, *available at* http://www.fas.org/irp/threat/bian_jan_2002.htm#4 (last visited Oct. 23, 2002).

131. *See* Rose, *supra* note 89, at 120.

132. For a first hand account of the history of Saddam Hussein's pursuit of nuclear weapons, see KHIDIR HAMZA, SADDAM'S BOMBMAKER 13 (2000). Dr. Hamza was among the first recruits into Saddam Hussein's atomic weapons program and successfully defected in 1994. *Id.*

133. *Hearing Before the Subcomm. on Near E. & S. Asian Affairs, Comm. on Foreign Relations*, 107th Cong. 19 (Mar. 1, 2001) (Comments of Senator Brownback) ("Two defectors from the regime have told the British press that Saddam has a small nuclear weapon.").

134. *See* HAMZA, *supra* note 132, at 333.

135. *See id.* at 334; *see also* BHATIA & MCGRORY, *supra* note 18, at 40-41.

136. BHATIA & MCGRORY, *supra* note 18, at 222-23.

137. *Id.* at 304.

138. Graham Allison, *Could the Worse be Yet to Come? — Fighting Terrorism*, ECONOMIST, Nov. 3, 2001 (emphasis added).

139. *See id.*; *see also* BHATIA & MCGRORY, *supra* note 18, at 304-05.

immediate neighbor of Iraq, before being intercepted.[140] At least one plausibly credible report details a clandestine Iraqi purchase of radioactive materials from agents of a former Soviet bloc country in Tanzania.[141] Ominously, a report from spring 2002 indicates that "Iraq's known nuclear scientists are gravitating to the country's five [known] nuclear test sites;"[142] the risk is that they may have material to work with.

Graham Allison has warned of the devastating consequences of a terrorist nuclear strike:

> Had al-Qaeda attacked the World Trade Centre not with a minivan filled with explosives, as in 1993, nor with jumbo jets, but with a vehicle containing [even a crude] nuclear device . . . [it] could create an explosive force of 10,000 to 20,000 tons of TNT, demolishing an area of about three square miles. Not only the World Trade Centre, but all of Wall Street and the financial district, and the tip of lower Manhattan up to Gramercy Park would have disappeared. Hundreds of thousands of people would have died suddenly.[143]

Even this horror is not the worst-case scenario. The bombings of the U.S. embassies in Kenya and Tanzania in 1998 and the September 11th terrorist attacks revealed a disturbing terrorist affinity for concerted action. If Iraq can obtain sufficient fissionable material, coordinated terrorist nuclear strikes pose a genuine threat.

Hussein may also have even more rudimentary nuclear options at his disposal. If Hussein can secure access to small amounts of radioactive material, he may transform it into a dirty bomb. Such a device would combine conventional explosives with layers of highly radioactive material. Although the initial blast of such a device would work like an ordinary explosive, killing persons in its immediate vicinity — the more gruesome cost would be borne by those in a wide surrounding area. Victims of such an attack would develop rare forms of cancer after their inhalation of, or exposure to, fine radioactive dust.[144] An effective dirty bomb could be hidden in containers as small as an average suitcase.[145] Such a rudimentary device could also devastate the economy of a nation.

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140. *See* BHATIA & MCGRORY, *supra* note 18.
141. *See* Rose, *supra* note 89, at 127.
142. Tyrangiel, *supra* note 128, at 34-35 (citing Charles Duelfer, former UNSCOM official).
143. Allison, *supra* note 138.
144. *See* Rose, *supra* note 89, at 125.
145. *See id.*

Large sections of major cities would need to be evacuated for decontamination for years.[146]

Hussein's record of international aggression, disregard for human life, and past willingness to deploy weapons of mass destruction indicates that the threat posed by his Nuclear Mujahidin must be taken seriously. The prospect of Hussein unleashing a nuclear device grows more ominous with each day that he continues in power, even if molested by inspections and confronted by the international community.[147] This threat grows even more unacceptable in light of the mounting evidence of Iraqi support of international terrorism.

5. Iraq After UNSCOM and IAEA

The Iraqi tenure of UNSCOM and IAEA must be considered a failure. These organizations were unable to account for or destroy massive elements of the Iraqi chemical and biological programs. The mission of UNSCOM was constantly undermined by Iraqi obstructionism and concealment.[148] UNSCOM and IAEA inspectors have been barred from Iraq since December 1998. The United Nations has created a second-generation inspection program, the U.N. Monitoring, Verification and Inspection Committee (UNMOVIC), and a parallel IAEA inspection group, the IAEA Iraq Action Team. But Iraq refused to permit these new groups to begin inspections until the U.N. Security Council unanimously passed Resolution 1441 in fall 2002. This resolution forced Iraq to accept U.N. inspections.[149] U.S. government officials have all but given up hope that an inspections regime can effectively monitor and curtail Saddam

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146. *See* Associated Press Report, *Al Qaida Leader: Dirty Bomb Possible*, Apr. 22, 2002, *available at* http://nuclearno.com/text.asp?2663 (last visited Oct. 30, 2002).

147. In late November 2002, Iraq acquiesced to U.N. demands to readmit teams of weapons inspectors. The inspectors have been empowered with broader authority and fewer constraints than their predecessors. It remains to be seen whether Iraq will comply with this broad mandate. *See* S.C. Res. 1441, *infra* note 149.

148. Saddam's Special Security Operation masterminded the Iraqi efforts to thwart UNSCOM. The primary means of their evasion was a simple plan that loaded sensitive material onto Mercedes trucks and shuffled them between a series of ever-changing sites. *See* BHATIA & MCGRORY, *supra* note 18, at 288-89. An incomplete catalog of instances of Iraqi nonparticipation with UNSCOM and IAEA includes at least the following dates: June 1991, July 1992, Mar. 1996, June 1996, June 1997, Sept. 1997, Jan. 1998, *see id.* at 180; Aug. 1998, Dec. 1998. *See* RITTER, *supra* note 21, at 15, 36, 108, 120, 136-37, 158, 164-75, 180; BUTLER, *supra* note 17, at 208.

149. *See generally* S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg., U.N. Doc. S/Res/1441 (2002). *See also* DIRECTOR OF CENTRAL INTELLIGENCE 2001, *supra* note 130.

Hussein's ability to outmaneuver inspectors. U.S. Secretary of Defense Donald Rumsfeld has cautioned that "[he] can't quite picture how intrusive [an inspection regime] would have to be that it could offset the ease with which they have previously been able to deny and deceive .... [T]oday one would think they would be vastly more skillful, having had all this time without inspectors there ...."[150]

Former UNSCOM inspectors agree that "no one really knows the true extent of Iraq's prohibited weapons holdings today."[151] At the end of its inspections, UNSCOM could confidently say that Iraq retained large potent arsenals of chemical and biological weapons and the capacity to produce and weaponize more such weapons.[152] Furthermore, IAEA had confirmed that Iraq has continued to research and develop nuclear weapons.[153] Freed from international scrutiny, the weapons of mass destruction programs of Hussein have likely advanced considerably in the last four years.[154] The extent of that advancement remains unknown — and troubling.

The history of Iraqi international aggression, its continuing gross and systemic persecution of its Kurdish population, its relentless pursuit of weapons of mass destruction, and its active support of international terrorism demonstrate the grave threat it poses to the international community. Since the conclusion of the Persian Gulf War, U.N. strategies to address this threat have largely failed. Some policies have eased the suffering endured by the Kurdish minorities in Iraq through the enforcement of no-fly zones and have curtailed Iraqi attempts to annex neighboring states. Nothing, however, has eliminated the Iraqi threat of weapons of mass destruction and support of international terrorism.

In the immediate aftermath of the liberation of Kuwait, former President George H.W. Bush refused to press the military offensive deeper into Iraq. Many factors influenced his decision, but significant among these were the indications that an internal revolution or a coup d'etat would soon depose a weakened Hussein.[155] Former President Bush adopted, and his successor, President Clinton, continued a policy of containment and weapons inspections to neutralize the threat of Iraqi

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150. Pamela Hess, *Rumsfeld: Iraq Inspections May Not Work*, U.P.I. REP., Apr. 15, 2002.

151. RITTER, *supra* note 21, at 127.

152. *See id.* at 217.

153. For a good accounting of Iraqi weapons of mass destruction programs at the end of UNSCOM inspections, see the appendix to Scott Ritter's book *Endgame*. *Id.* at 217.

154. Iraq has purchased several dual use facilities, such as pesticide manufacturing plants, which could be converted very quickly to the production of chemical weapons. *See id.*

155. *See generally* BOB WOODWARD, THE COMMANDERS (1993).

weapons of mass destruction and to attempt to expedite the overthrow of Hussein.[156] The ruthless control of Hussein over his people and effective obstruction of UNSCOM ensured this effort's failure.

Facing a roused United States set on ending his sponsorship of terrorism and his pursuit of weapons of mass destruction, Hussein reinstated negotiations about the composition and access of a new inspection team.[157] The United States and the United Nations agreed that any future inspections must be comprehensive and unmolested. Hans Blix, the Chairman of the new U.N. inspection regime, UNMOVIC, has announced that if Hussein allows inspectors to reenter Iraq, they must have "immediate, unconditional and unrestricted access."[158] The recommencement of inspections in fall 2002 provides some hope that conflict may be averted. But if history is any guide, the new round of inspections will fail. Iraq will likely soon return to tired games of obstructionism, stalling, and deceit. Today, Iraq still has an opportunity to cooperate; however, the chances of that occurring are remote. The following legal proposal does not depend upon whether or not Iraq complies with the new unrestricted inspection regime. Rather, the following analysis applies to any confrontation with terrorist-supporting states which maintain and pursue weapons of mass destruction. It remains possible, indeed likely, that the United States will use military force to end Iraqi support for international terrorism and pursuit of chemical, biological and nuclear weapons. Should inspecting again fail, U.S. military action should proceed swiftly and decisively to end the Iraqi threat. Eventual military action should emerge from as wide a coalition as practicable.[159]

III. EXISTING INTERNATIONAL LEGAL JUSTIFICATIONS FOR U.S. INTERVENTION IN IRAQ

The United States did not seek U.N. authorization for its recent use of force against Afghanistan because it "initiated actions in the exercise of its inherent right of individual and collective self-defense following the armed

156. *See* Kenneth Pollack, *Next Stop Baghdad?*, FOREIGN AFF., Mar./Apr. 2002, at 1.

157. *See* William Saffire, *The Inspection Ploy*, N.Y. TIMES, Mar. 4, 2002, at A21.

158. Michael R. Gordon, *If Iraq Bends, U.N. Inspectors Are Ready*, N.Y. TIMES, Apr. 7, 2002, at A1.

159. Other international relations scholars addressing the Iraq question have reached the same conclusion. Kenneth Pollack concluded that the "one strategy that offers a way out of the impasse [is that] [t]he United States should invade Iraq, eliminate the present regime, and pave the way for a successor prepared to abide by its international commitments and live in peace with its neighbors." Pollack, *supra* note 156, at 1.

attacks" of September 11, 2001.[160] This claim of self-defense was consistent with the U.N. Security Council resolutions which "[u]nequivocally condemn[ed] in the strongest terms, the horrifying terrorist attacks . . . on 11 September . . .[and] recogniz[ed] the inherent right of individual or collective self-defence."[161] Indeed, there has been little challenge to the legitimacy of U.S. intervention against al Qaeda and Taliban forces in Afghanistan.[162] However, unless evidence emerges which decisively links Iraq to either the September 11th attacks or subsequent terrorism such as the anthrax letters of fall 2001, the United States cannot contend that military action against Iraq would be a direct, justifiable extension of the military action in Afghanistan.

The attorneys in the Legal Advisor's Office at the State Department have an array of arguments to consider as they seek grounds on which to justify possible U.S. military intervention in Iraq. Any such justification will necessarily have to contend with Article 2(4) of the U.N. Charter. Article 2(4) sets down the basic principle of international restraint, compelling nations to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."[163] State Department attorneys will likely first consider whether U.S. action against Iraq is a justified exercise of the inherent right of self-defense, consistent with Article 51 of the U.N. Charter.[164] Alternatively, the Legal Advisor's Office may contend that all U.N. member-states have already secured the U.N. Security Council authorization to use force against Iraq in enforcement of the Persian Gulf War cease-fire resolutions. They may also argue that an intervention is justified based on support for an armed belligerency of Iraqi Kurds. Finally, State Department attorneys may also consider justifying U.S.

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160. Letter from the Permanent Representative of the United States of America, to the President of the U.N. Security Council, United Nations (Oct. 7, 2001), U.N. SCOR, 56th Sess., at 1, U.N. DOC. S/2001/946 (2001).

161. S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg. at 1, U.N. Doc. S/RES/1368 (2001); *see also* S.C. Res. 1373 U.N. SCOR, 56th Sess., 4385th mtg. at 1, U.N. Doc. S/RES/1373 (2001).

162. Some questions have been raised about the necessity and proportionality of U.S. intervention in Afghanistan. For a good discussion of the way these requirements are satisfied, see Jack Beard's article, *America's New War on Terror: the Case for Self-Defense under International Law*. Beard, *supra* note 8, at 583-89 ("[I]n the case of an armed attack, self-defense 'includes a right both to repel the armed attack and to take the war to the aggressor State in order effectively to terminate the attack and prevent a recurrence.'"). *Id.* at 589 (citing Henkin, *supra* note 12, at 45).

163. U.N. CHARTER art. 2, para. 4. The obligation to refrain from the threat or use of force internationally has also been recognized as a rule of customary international law. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 100.

164. *See* U.N. CHARTER art. 51.

action as a permissible humanitarian intervention. While these justifications enjoy varying degrees of acceptance under international law, they are largely inadequate.[165] Each of these arguments fails to comprehensively justify and uphold the strategic and moral imperative that drives likely U.S. action against Iraq.

A. *Self-Defense*

1. Strict Article 51 Self-Defense

The U.N. Charter prohibits the unilateral use of force between member-states unless consistent with the "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations."[166] Unless the United States or an ally is a victim of an Iraqi attack, and the U.S. response is in defense against such an attack, it cannot justify a military intervention under the letter of Article 51. Therefore, unless there is an Iraqi military offensive against the United States or its allies, it is unlikely that the United States will be able to make a case that military action against Iraq meets the *strict* requirements of Article 51. Although the United States has gradually broadened its interpretation of Article 51,[167] it has never claimed a right to act in self-defense unless an armed attack has occurred.[168] The concept of armed attack, however, has proven rather elastic.[169]

For the United States to argue that Iraq has perpetrated an armed attack, it will have to rely on less overt actions than past examples of Iraqi

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165. Creative attorneys could certainly fashion other potential justifications for U.S. intervention in Iraq. For instance, the doctrine of "necessity" could be stretched to encompass the broad threat posed by the Hussein regime. Necessity, however, paradigmatically has been restricted to cases more limited in nature, brief in duration and restricted in responsive means required. *Cf.* John-Alex Romano, *Combating Terrorism and Weapons of Mass Destruction: Reviving the Doctrine of a State of Necessity*, 87 GEO. L.J. 1023, 1048 (1999). Furthermore, necessity constitutes a "ground for precluding the wrongfulness" of otherwise illegal conduct. *Id.* at 1046. While this Article acknowledges the likely immediate technical "illegality" of intervention in Iraq, it posits that such intervention should quickly be endorsed in *positive* international law because of the likely persistence of the threat of states that sponsor terrorism and pursue weapons of mass destruction. This Part of the Article limits itself to only the most likely justifications that the Legal Advisor's Office may consider.

166. U.N. CHARTER art. 51.

167. *See generally* Henkin, *supra* note 12, at 40-47.

168. *See id.* at 46.

169. *See* Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41 (2002).

aggression against Iran in 1981 and Kuwait in 1990. International legal scholars "believe that state sponsorship and support of international terrorists constitutes a use of force contemplated by Article 2(4)."[170] State practice also supports the view that terrorist bombings may constitute an armed attack justifying self-defense under Article 51.

For example, the United States justified its cruise missile attacks against Sudan and Afghanistan following the 1998 terrorist bombings of the U.S. embassies in Tanzania and Kenya, as an exercise of self-defense.[171] The United States has maintained the policy of considering terrorist bombings armed attacks for some time and has accordingly justified several U.S. military actions against states that have supported terrorists.[172] Furthermore, the international community has increasingly agreed that terrorist bombings qualify as armed attacks for the purposes of justifying military action in self-defense.[173] Significant evidence exists that Iraq has supported terrorist operations that target the United States.[174] Such activity would fall under the category of what John Norton Moore has called the "low intensity" spectrum of aggression.[175] A full right of individual self-defense is provided for even such low intensity attacks.[176] Therefore, if the United States can establish that Iraq harbors terrorists that have attacked the United States, it can justify military action against Iraq under even a rather strict reading of Article 51. The primary drawback of relying on this justification is that the United States would be required to wait until it has become the target of such an armed attack.[177]

The requirements of immediacy, necessity, and proportionality further limit U.S. ability to use military force against Iraq under the strict

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170. *See* RICHARD ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 109, 113 (1989).

171. *See* Murphy, *supra* note 169, at 49-50.

172. Henkin, *supra* note 12, at 46; *see also* Letter from the Acting Permanent Representative of the United States of America, to President of the U.N. Security Council, United Nations (Apr. 14, 1986), U.N. SCOR, 41st Sess., U.N. Doc. S/17990 (1986).

173. *See* Murphy, *supra* note 169, at 50; *see generally* Beard, *supra* note 8, at 562-66 ("The Council's unprecedented willingness to invoke and reaffirm self-defense under Article 51 in response to the September 11 terrorist attacks is an important act . . . ."). *Id.* at 566.

174. *See infra* Part II(F).

175. *See* Federalist Society, International Law & National Security News, International Law and the Use of Force, Proceedings from a Panel of the May 2000 Federalist Society Conference, *available at* http://www.fed-soc.org/Publications/Transcripts/useofforce.htm (last visited Oct. 30, 2002) (panelist Professor John Norton Moore speaking).

176. *See id. But see* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 100.

177. Murphy, *supra* note 169, at 44 ("most governments and scholars, and the International Court of Justice, appear to agree that self-defense is permitted . . . only when there *has been* an 'armed attack.'" (emphasis added) (citations omitted).

requirements of Article 51. Immediacy requires that the threat of armed attack has occurred close in time to the exercise of self-defense.[178] The United States could not simply rest on the voluminous history of Iraqi support of terrorism, but would have to establish a specific past or ongoing Iraqi threat to U.S. interests.[179] Any action against Iraq based on prior acts of terrorism would likely violate the requirement of immediacy. The requirements of necessity and proportionality also limit self-defense arguments at the disposal of U.S. policymakers.

Necessity, for instance, would likely require formalities such as providing exhaustive opportunity to the government hosting a terrorist organization to take steps to remove the threat.[180] Necessity could hinder U.S. counter-terrorism, counter-proliferation intervention because exhaustive diplomatic negotiations could prevent the United States from acting as swiftly and decisively as possible. Proportionality is even more problematic. The United States is considering a more comprehensive approach than sending missile strikes against terrorist camps. The threat posed by Iraqi sponsorship of terrorism and vigorous pursuit of weapons of mass destruction requires not pinpricks, but a decisive military campaign of regime-change.[181] Proportionality likely does not support the invocation of the doctrine of self-defense for interventions where the explicit purpose is the ouster of a threatening regime.

The fundamental shortcoming of reliance on a literal reading of Article 51 to support U.S. action against Iraq is self-evident. The basic problem is that self-defense is justified only when there *has been* an armed attack.[182] The international community cannot wait to be the victim of Iraqi-sponsored chemical, biological or nuclear terrorism. The restrictive nature of the doctrines of immediacy, necessity and proportionality further limit U.S. flexibility in crafting a military response that will neutralize the Iraqi threat. Against rogue regimes that have both sponsored and harbored terrorist activities, and continue to possess and to pursue weapons of mass destruction, few restrictions should be countenanced.

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178. *See* Robert J. Beck & Anthony Clark Arend, *"Don't Tread on U.S.:" International Law and Forcible State Response to Terrorism*, 12 WISC. INT'L L.J. 153, 213 (1994).

179. *Cf.* Mark Baker, *Terrorism and the Inherent Right of Self-defense (A Call to Amend the United Nations Charter)* 10 HOUS. J. INT'L L. 25, 34 (1987).

180. Murphy, *supra* note 169, at 50 n.57.

181. *See infra* Part IV.

182. Murphy, *supra* note 169, at 44.

2. Anticipatory Self-Defense

The drafters of the U.N. Charter deliberately limited permissible self-defense because they "did not want... the right of self-defense [exercised] before an armed attack had occurred."[183] They did, however, intend to preserve the customary self-defense requirements that preexisted the U.N. Charter. International legal scholars generally agree that customary international law recognized a right to anticipatory self-defense.[184] The most often cited articulation of those customary standards is found in the words of then-Secretary of State Daniel Webster from the *Caroline* case.[185] Webster confined justifiable anticipatory self-defense to circumstances "in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[186] This standard has been recognized as setting out a method of evaluating claims of self-defense when an armed attack has not yet occurred.[187]

The requirements of the *Caroline* case, however, fit only a very narrow category of anticipatory self-defense. The facts of the *Caroline* incident are instructive. During a Canadian insurrection against the Crown in 1837, a British officer authorized an armed band of marauders to cross into the United States to burn a U.S. ship, docked in port, and cut it loose, sending it crashing over Niagara Falls. The officer believed the ship was going to provide future support of the insurrection. It is generally agreed that the British action was improper,[188] but that it would have been acceptable had the *Caroline* been en route to strike British forces.[189] The continued legitimacy, or inherence, of this sort of self-defense under similar

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183. Thomas M. Frank, *The Institute for Global Legal Studies Inaugural Colloquium: The UN and the Protection of Human Rights: When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 58 (2001) (quoting Governor Harold Stassen, deputy head of the U.S. delegation at San Francisco *in* Minutes of the Forty-Eighth Meeting (Executive Session) of the U.S. Delegation, Held at San Francisco, Sunday May 20, 1945, *in* 1 FOREIGN RELATIONS OF THE UNITED STATES 1945, 813, 818 (1967)).

184. ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW & THE USE OF FORCE 72 (1993).

185. *See Destruction of the Caroline*, 2 MOORE, A DIGEST OF INTERNATIONAL LAW § 217 (1906).

186. *Id.* at 412. Such standards, it should be noted, apply to anticipatory self-defense and not more traditional self-defense against an armed attack. Beard, *supra* note 8, at 585-86.

187. *See* ERICKSON, *supra* note 170, at 111. *But see* Beard, *supra* note 8, at 586.

188. Lord Ashburton sent Webster a letter of apology for the incident. ERICKSON, *supra* note 170, at 142.

189. *See* HILARIE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 92 (1992).

circumstances where preparations for an attack are ongoing, or all-but-completed is little disputed. But such a doctrine is not truly anticipatory self-defense; it is perhaps better described as *en train de* self-defense.[190]

Some scholars believe, however, that such a right of truly anticipatory self-defense has emerged outside of Article 51 in light of the availability of weapons of mass destruction.[191] Thomas Frank accounts for the emergence of a viable doctrine of anticipatory self-defense through, "the transformation of weaponry to instruments of overwhelming and instant destruction. These [weapons] brought into question the conditionality of Article 51, which limits states' exercise of the right of self-defense to the aftermath of an armed attack. Inevitably, first-strike capabilities begat a doctrine of 'anticipatory self-defense.'"[192]

State practice since 1945 indicates that states have not always awaited imminent destruction before acting.[193] Michael Glennon has observed that a set of changed conditions likely permits some legitimate anticipatory defensive action:

> Twenty-first-century security needs are different from those imagined [at the founding of the United Nations].
>
> First, . . . the intended safeguard against unlawful threats of force — a vigilant and muscular Security Council — never materialized . . . .
>
> Second, modern methods of intelligence collection, such as satellite imagery and communications intercepts, now make it unnecessary to sit out an actual armed attack to await convincing proof of a state's hostile intent.
>
> Third, with the advent of weapons of mass destruction and their availability to international terrorists, the first blow can be devastating — far more devastating than the pinprick attacks on which the old rules were premised.

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190. *See* Michael Glennon, *Self-defense and Incoherence in the U.N. Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 547 (2002). Note that U.S. action against Iraq is not so pressing as to leave *no choice of means, or no moment for deliberation* as a strict application of the *Caroline* case would require. The fact that the Bush administration is engaged in a deliberate and careful development of military, diplomatic, and legal strategies for the conduct of action against Iraq belies any claim to the contrary.

191. D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 191-92 (1958); *see also* ERICKSON, *supra* note 170, at 142-43.

192. Frank, *supra* note 183, at 57-58.

193. Consider the Cuban Missile Crisis of 1962 and the Israeli missile strike against the Iraqi nuclear power plant at Osarik in 1981.

> Fourth, terrorist organizations "of global reach" were unknown when Article 51 was drafted. To flourish, they need to conduct training, raise money, and develop and stockpile weaponry — which in turn requires communications equipment, camps, technology, staffing, and offices. All this requires a sanctuary, which only states can provide — and which only states can take away.
>
> Fifth, the danger of catalytic war erupting from the use of preemptive force has lessened with the end of the Cold War. It made sense to hew to Article 51 during the [Cold War] . . . . It makes less sense today, when safe-haven states and terrorist organizations are not themselves possessed of preemptive capabilities.[194]

This assessment of the modern state of self-defense doctrine has led some to conclude that a doctrine permitting certain anticipatory self-defense actions is available for states to utilize.[195] Truly anticipatory self-defense would permit the use of force "[i]f a state has developed the capability of inflicting substantial harm upon another, indicated explicitly or implicitly its willingness or intent to do so, and to all appearances is waiting only for the opportunity to strike."[196]

If the United States determines that Iraq is harboring terrorist organizations that intend to attack the United States, the United States may support its military action under the increasingly accepted doctrine of anticipatory self-defense. Iraq's history indicates that Iraq has weapons of mass destruction and is willing to use them. Evidence suggests that the Iraqi government continues to foster terrorist operations against the United States and its allies.[197] At a minimum, it seems certain that Iraq has failed to prevent the planning of terrorist activities from within its territory. Even failure to suppress terrorist activity may justify action in self-defense:

> It cannot be supposed that the inviolability of territory is so sacrosanct as to mean that a state may harbour within its territory the most blatant preparation for an assault upon another state's independence with impunity; the inviolability of territory is subject

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194. Michael Glennon, *Preempting Terrorism; The Case for Anticipatory Self-Defense*, WKLY. STANDARD, Jan. 28, 2002, at 24, 26.

195. ERICKSON, *supra* note 170, at 149 ("anticipatory self-defense, can be a legal justification for the use of armed force.").

196. Glennon, *supra* note 190, at 552.

197. *See infra* Part I(F).

> to the use of that territory in a manner which does not involve a threat to the rights of other states.[198]

There is no requirement under the literal letter of Article 51 that a foreign government itself directly undertake the attack to which a state responds. Anticipatory self-defense against even the harboring of terrorists by Iraq may give rise to legitimate, legal justification for an anticipatory U.S. military intervention.

Any such claim, however, is still fundamentally one of self-defense. Therefore, it is still restricted by a number of threshold requirements including imminence, necessity and proportionality.[199] While the United States can make a case for the necessity of intervening against Iraq, it will have a much more difficult time satisfying the proportionality and imminency requirements as the United States likely will seek to undertake an extraordinarily broad intervention at a time and place of its choosing.[200]

3. Inadequacy of Self-Defense Against Nations that Sponsor Terrorism and Pursue Weapons of Mass Destruction

Neither the U.N. Charter nor the emerging doctrine of anticipatory self-defense accounts for the intractable problem of state-sponsored terrorism's convergence with weapons of mass destruction. The Framers of the Charter "did not fully anticipate the existence, tenacity and technology of modern day terrorism."[201] The literal limitations of Article 51, therefore, certainly cannot support any U.S. justification of military action unless Iraq actually strikes against the United States. Anticipatory self-defense is a delicate and unsettled doctrine under international law. As weapons have grown more destructive and the ability of states to predict when they may be the victim of an armed attack has diminished, the legitimacy of anticipatory self-defense has advanced. Even if the legitimacy of anticipatory self-defense were universally acknowledged as reflecting the *opinio juris* of state practice, it would not suffice to legitimate the likely U.S. intervention in Iraq. The doctrine is still restrained by limitations of immediacy, necessity and proportionality.

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198. BOWETT, *supra* note 191, at 54.

199. *See* Condron, *supra* note 23, at 147. Some scholars would further limit the right of anticipatory self-defense, adding *inter alia*: last resort, reasonableness, and a requirement of reporting to the U.N. Security Council. *See also* ERICKSON, *supra* note 170, at 145-50.

200. *See* Condron, *supra* note 23, at 151-52 (discussing the failure of "Operation Desert Fox" to satisfy the proportionality and imminency requirement of anticipatory self-defense).

201. Beck & Arend, *supra* note 178, at 214.

It is impossible to predict when the threat posed by regimes that sponsor terrorism and pursue weapons of mass destruction will actually be realized; terrorists may unleash a nuclear holocaust next week or next decade. The imperative driving action against regimes that support terrorism and pursue weapons of mass destruction requires action with the express purpose of changing the leadership of a country, not just proportionately diminishing its forces. Most fundamentally, such action may require patently offensive uses of force more in the spirit of the emerging doctrine of humanitarian intervention.[202] A truly appropriate legal doctrine would recognize a whole new paradigm to address the threat posed by terrorist-supporting states with chemical, biological and nuclear weapons.

B. *Existing U.N. Security Council Authorization*

1. Arguments Underlying the Claim of Existing Authorization

The United States may instead contend that military action against Iraq is authorized under existing U.N. Security Council resolutions. It is not surprising that the United States would look to prior U.N. Security Council authorization because it is unlikely that today the United States will be able to secure new, explicit U.N. Security Council action against Iraq.[203] China, France and Russia have cultivated amicable relationships with the Iraqi regime, and they have little to gain from the removal of Hussein from power. The relationship of these permanent members of the U.N. Security Council with Iraq indicates that these states may use their vetoes to prevent explicit U.N. Security Council authorization of future military action against Iraq.[204]

The Persian Gulf War was a legitimate collective security operation authorized by the U.N. Security Council.[205] It is well settled that U.N. Security Council Resolution 687 brought the actual armed conflict against Iraq to a close.[206] The U.N. Security Council approved the resolution and

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202. *See infra* Part III(D).

203. The U.N. Security Council did unanimously pass Resolution 1441 in fall 2002. The resolution declared Iraq to be in material breach of its obligations under past U.N. mandates. It also informs Iraq it will face "serious consequences" if it fails to cooperate. *See* S.C. Res. 1441, *supra* note 149. It is questionable whether it authorizes a member-state to unilaterally take action in the event of further noncompliance.

204. These permanent members did support Resolution 1441.

205. *See* S.C. Res. 678, *supra* note 59; *see also* Nigel D. White & Robert Cryer, *Unilateral Enforcement of Resolution 687: A Threat too Far*, 29 CAL. W. INT'L L.J. 243, 270-71 (2002).

206. *See* White & Cryer, *supra* note 205, at 271.

Iraq agreed to it.[207] Nevertheless, the United States may contend that the scope of the U.N. Security Council resolutions authorizing the use of force, and the staggering degree of Iraqi noncompliance with the disarmament and inspection regime, justify military action.

The U.N. Security Council Resolution 678 authorized member-states to "use all necessary means to uphold and implement resolution 660 . . . and all subsequent relevant resolutions and to restore international peace and security in the area."[208] The broad scope of Resolution 678 may have authorized not only U.S. action to oust Iraq from Kuwait in 1991, but also other action pursuant to subsequent relevant resolutions, such as U.N. Security Council Resolution 687. Resolution 687 articulates the terms of the Persian Gulf War cease-fire, and imposed a series of strict obligations on Iraq. Resolution 687 certainly was subsequent to Resolution 660, and it would be very difficult to contend that the cease-fire resolution imposing an inspection regime is not also relevant to Resolution 660, which authorized the initial use of force.[209]

The United States could argue that persistent Iraqi noncooperation with UNSCOM, IAEA and UNMOVIC to enter the country constitutes blatant violation of Resolution 687. Noncooperation with Resolution 687, particularly in connection with "U.N. efforts to inspect Iraq's weapons facilities, [supports] an argument that the cease-fire is no longer in effect because the conditions underlying it are not being met."[210] Resolution 678 broadly justifies the use of any necessary means to restore international peace and security to the region.

The risk of continued Iraqi acquisition and stockpiling of weapons of mass destruction certainly constitutes a grave threat to international peace and security in the area. Therefore, the argument contends, member-states retain full U.N. Security Council authorization to use force under Resolution 678.[211] The logic of this argument, while facially sound, gives rise to a very broad authority.[212] This argument was proffered by the

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207. Condron, *supra* note 23, at 147.

208. S.C. Res. 678, *supra* note 59, para. 2.

209. Frederic L. Kirgis, *The Legal Background on the Use of Force to Induce Iraq to Comply with Security Council Resolutions*, ASIL INSIGHTS, (Nov. 1997), *available at* http://www.asil.org/insights/insigh12.htm (last visited Nov. 1, 2002).

210. Frederic L. Kirgis, *U.S.-British Air-Strikes on Targets in Iraq*, ASIL INSIGHTS, (Feb. 2001), *available at* http://www.asil.org/insights/insigh62.htm (last visited Nov. 1, 2002).

211. Edwin D. Williamson, *Comment on The Legal Background on the Use of Force to Induce Iraq to Comply with Security Council Resolutions*, ASIL INSIGHTS (Mar. 1998), *available at* http://www.asil.org/insights/insigh16.htm (last visited Oct. 31, 2002).

212. There is no discernable limit as to the duration of the authority, nor as to which U.N. member-states could take military action. *See* White & Cryer, *supra* note 205, at 277.

United States and the United Kingdom in justification of Operation Desert Fox in 1998.[213] The United Kingdom explicitly argued that "Iraq's refusal to allow the inspectors free access constituted a breach of [Resolution 687]. The cease-fire, therefore, no longer applied and the United Nations fell back on Resolution 678."[214] The response of the U.N. Security Council to Operation Desert Fox sheds little light on the legality of the action. Six of the fifteen members of the U.N. Security Council, including Russia and China, decisively condemned the air strikes, while three members, including the United States and the United Kingdom, defended the strikes.[215] The legality of the strikes was further muddied by the comments of U.N. Secretary General Kofi Annan who commented that "[i]f the U.S. had to strike, I think some sort of consultations with other members would be required."[216] The clear omission of requiring renewed U.N. Security Council authorization left many content to assume that the United States could proceed under the pre-existing resolutions.[217]

2. Arguments Against Existing Authorization

Objections to the U.S. claim that these U.N. Security Council resolutions authorize military action against Iraq contend that the declaration of a cease-fire constitutes the establishment of international peace and security as countenanced by Resolution 678. Therefore, the window of opportunity for member-states to take all necessary action under that resolution, including military action, would be closed upon the adoption of Resolution 687. This argument also contends that because the matter is still seized by the U.N. Security Council,[218] member-states must refrain from action against Iraq, unless they receive further affirmative

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213. *See* Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to use Force, Cease-fires and the Iraqi Inspections Regime*, 93 AM. J. INT'L L. 124, 124-25 (1999).

214. Michael Binyon, *Britain Says New Resolution Required*, TIMES (London), Feb. 19, 1998.

215. White & Cryer, *supra* note 205, at 276.

216. *ABC This Week: Remarks of Secretary General Kofi Annan* (ABC television broadcast, Mar. 8, 1998), *available at* LEXIS, Nexis Library, News File.

217. *See* Ruth Wegewood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AM. J. INT'L L. 724, 728 (1998).

218. *See generally* S.C. Res. 1137, U.N. SCOR, 52nd Sess., 3831st meeting, U.N. DOC. S/RES/1137 (1997) (condemning Iraq for its "continued violations . . . of its obligations" under prior Security Council Resolutions and expressing "the firm intention to take further measures as may be required for the implementation of this resolution.").

authorization. This argument is consistent with the fact that the original action was a collective security operation of the United Nations and not a collective self-defense operation of member-states.[219]

3. The Inadequacy of U.N. Security Council Authorization During the Persian Gulf War

The United States should hesitate to ground any potential action against Iraq on claims of authorization stemming from the Persian Gulf War, U.N. Security Council resolutions. Such justification is inadequate because of the dubious legality of the underlying arguments and the failure of such a justification to provide the necessary flexibility for future action. The contention that U.N. Security Council Resolution 678 is still effective is unsettled.[220] The Persian Gulf War was a collective security operation under U.N. Security Council authorization. Without additional U.N. Security Council authorization, attempts to justify additional military action likely fall outside the collective security paradigm.

Furthermore, the military authorization countenanced by Resolution 678 would "implement resolution 660 and all subsequent relevant resolutions [for the purpose of] restor[ing] international peace and security to the area[.]"[221] The United States would have to contend that an almost absurdly broad interpretation of the phrase "restore international peace and security to the area" ought to govern. It is true that an invasion of Iraq by massive military force for the express purpose of ousting Saddam Hussein will probably greatly enhance international peace and security, but the U.N. Security Council almost certainly did not intend such a broad objective when it passed Resolution 678.

Finally, if the United States relies on this form of U.N. Security Council authorization, it will be missing an opportunity to describe a new paradigm of legitimate international uses of force. The U.N. Security Council has largely failed at its mission of maintaining international peace

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219. White & Cryer, *supra* note 205, at 270. The broader argument, it should be noted, does not necessarily prohibit states from taking military action against Iraq. That a matter has been referred to the U.N. Security Council, and that the U.N. Security Council is seized of such matter, cannot eliminate member-states' legitimate rights to use force under other legitimate justifications, most particularly in self-defense. If the right of self-defense ceased to exist as soon as a matter had been referred to the U.N. Security Council, matters simply would never be referred to the Council. *See* Federalist Society, *supra* note 175.

220. White & Cryer, *supra* note 205, at 279. Condron, *supra* note 23, at 178 ("[I]t is a close call as to whether international law would allow material breach of Resolution 687 to form the basis for unilateral action by the United States."); *see also* White & Cryer, *supra* note 205, at 278-79.

221. S.C. Res. 678, *supra* note 59.

and security.[222] In the winter spanning 1990 and 1991 it appeared, for a moment, that a new day was approaching where the permanent members would effectively respond to threats to international security. That moment, it seems, has passed.[223] If the United States seeks to rely on the U.N. Security Council resolutions from a unique historic moment of cooperation to uphold the legitimacy of its impending action against Iraq, it will be limiting its future ability to confront other terrorist-supporting regimes with biological, chemical and nuclear weapons when such (dubious) authorization is not available.

C. *Intervention In Support of Armed Belligerency*

1. Traditional International Law on Support for an Armed Belligerency

Armed conflict has raged between the Kurdish populations of northern Iraq and the Hussein regime since at least the end of the Persian Gulf War, when an iron Iraqi fist left 180,000 Kurds dead.[224] The conflict has continued with varying degrees of intensity since that time, and now maintains a muted existence under a no-fly-zone-imposed pseudo-peace whereby Iraqi forces cannot strike the Kurdish population. The characterization of this conflict between Kurdish forces and the Hussein Government has significant consequences for the right of the United States to intervene under traditional international law. Should the Kurdish armed conflict qualify as a belligerency under classical international law, outside states such as the United States would enjoy the "formal option of joining with one of the 'belligerents' against the other."[225] Such a categorization would grant the Kurdish movements essentially the same rights and

222. Michael Glennon has observed that "[b]etween 1945 and 1999, two-thirds of the members of the United Nations — 126 states out of 189 — fought 291 interstate conflicts in which 22 million people were killed." Glennon, *supra* note 190, at 540.

223. Since the Persian Gulf War, the United Nations has failed to get involved in several major international crises. Particularly grievous examples of U.N. inaction include: Rwanda in 1994, Srebrenica in 1995, and Kosovo in 1999.

224. Owen Matthews, *Welcome to Kurdistan*, NEWSWEEK, Mar. 25, 2002, at 22.

225. M.J. Peterson, *Recognition of Governments Should Not be Abolished*, 77 AM. J. INT'L L. 31, 47-50 (1983), *reprinted in* BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM ORIENTED CASEBOOK 270 (3d ed. 1997).

obligations as independent sovereign states in interstate-armed conflict.[226] The significance of this determination is that it creates a legal situation that closely resembles collective self-defense.[227]

A determination of whether the Kurdish rebel groups in Iraq constitute a belligerency under international law is a factually contingent analysis:

> [F]irst, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; second, the insurgents must occupy and administer a substantial portion of national territory; third, they must conduct the hostilities in accordance with the rules of war and through organized forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.[228]

The first criterion may already be met. The conflict between dissidents and the Iraqi regime spans the entire northern region of Iraq, as well as pockets of Shia armed resistance in the south. The second criterion is easily met as well; the Kurdish Iraqis of the north have set up a virtually independent, de facto state, complete with its own army, flag, television stations, school system and language, as well as an elected parliament with multiple parties participating.[229] It is difficult to determine the extent of Kurdish comportment with the laws of war, but no notable examples of the breach of those standards has been widely publicized. Therefore, it is unlikely that the third criterion would be difficult to satisfy. The fourth criterion is easily satisfied by the U.S. interest in neutralizing the threat of Iraqi weapons of mass destruction and support of terrorism. The satisfaction of these four criteria demonstrate that under classical international law, U.S. policymakers could make a rather straightforward argument that its military involvement constituted lawful support of an armed belligerency.

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226. *See* HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 176 (1947).

227. Henkin, *supra* note 12, at 48 (restating a finding of the Nicaragua Case of the International Court of Justice); *see also* Peterson, *supra* note 225 ("As with truly interstate conflict, an outside state is given the formal option of joining with one of the 'belligerents' against the other or of remaining strictly neutral . . . ."). *Id.*

228. LAUTERPACHT, *supra* note 226, at 176.

229. *See* Matthews, *supra* note 224.

2. Contemporary Status of the Law of Support for an Armed Belligerency

The U.N. Charter rendered contemporary use of this classical doctrine unsettled under international law. Although nothing in the U.N. Charter directly addresses outside governments' involvement in civil wars, Louis Henkin has concluded that "[u]nder the Charter, a state probably may not send troops into the territory of another state to support either side in a civil war[.]"[230] Contemporary thinking regards foreign support of either party in a civil war as a dual violation of Article 2(4) of the U.N. Charter. First, any support, particularly in the form of ground troops, would violate the territorial integrity of a state.[231] Second, an intervention on either side in an armed civil war would "deprive the people in some measure of their right to decide the issue by themselves. It is, in terms of Article 2(4), a use of force against the political independence of the state engaged in the civil war."[232] The International Court of Justice (I.C.J.) has also found that, "no such general right of intervention, in support of an opposition within another State, exists in contemporary international law."[233] Neither the opinions of renowned legal scholars nor the opinion of the I.C.J. are binding on states,[234] but both are subsidiary means for determining the rules of law.[235] These interpretations of the U.N. Charter may be rejected by the United States, but such an approach would be novel in contemporary international law. It seems most states have concluded that the doctrine of support for belligerents is best left in disuse.[236]

3. Inadequacy of the Doctrine of Support for Armed Belligerency under Contemporary International Law

It is likely that any U.S. military campaign against Iraq will involve dissident Iraqi forces such as the Kurds in Northern Iraq. But the United

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230. Henkin, *supra* note 12, at 47.

231. U.N. Charter art. 2, para. 7.

232. Oscar Schacter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1641 (1984).

233. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 109, para. 209 (1986).

234. Article 59 of the Statute of the International Court of Justice states that its decisions have no "binding force except between the parties" to the particular case being decided. *See* Statute of the International Court of Justice, June 26, 1945, art. 59, 832 U.N.T.S. 993.

235. *See id.* art. 38.

236. *See* Robert W. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency*, 63 WASH. L. REV. 43, 44 (1988).

States should not seek to ground justification on support of an armed Iraqi belligerency.[237] The widespread rejection of this doctrine in contemporary international law greatly undermines its utility. Even if the United States were to attempt to revive this doctrine, the legal argument underlying its approach is cumbersome, requiring precarious legal reasoning at several steps.

The ultimate undoing of this approach is that it cannot comport with the battlefield reality in which the United States would likely find itself engaged. Senior members of the Bush Administration have dismissed any approach to a conflict that relies heavily on Iraqi opposition. The military of Hussein, "while only one-third its strength from before the gulf war, is strong enough to defeat any confrontation by proxy."[238] In pursuit of victory the United States will almost certainly engage more of its own forces than could be provided by the combined Iraqi dissident factions. For the United States to stand before the world and profess the legality of its intervention based on support of a legitimate, armed belligerency and then dwarf that belligerency with its own forces, would appear a desperate and dishonest justification.

D. *Humanitarian Intervention*

1. Contemporary Development of the Doctrine of Humanitarian Intervention

One of the most debated questions of international law since the end of the Cold War has been the legality of coercive military action for the purpose of protecting people at risk in other states — so-called

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237. Although contemporary international law would likely not support the United States if it attempted to ground its intervention in Iraq on the doctrine of support for a belligerent group, domestic law ironically requires such support. Congress passed and President Clinton signed the Iraq Liberation Act into law on October 31, 1998. Iraq Liberation Act, Pub. L. No. 105-338, 112 Stat. 3178 (codified as amended in scattered sections of 22 U.S.C.). This law requires the United States to support military force to replace Saddam Hussein's regime. *Id.* That support seems to be escalating in anticipation of the likely U.S. campaign for regime-change in Iraq. Anthony Shadid, *CIA Met With Iraq Opposition: Agents Discussed Ousting Hussein, Dissidents Say*, BOSTON GLOBE, Feb. 28, 2002, at A1. Cooperation between the CIA, the INC and the Kurdish military groups has been increasing in recent months, and some reports indicate that Americans have been scouting bases in Kurdish controlled territory with an eye towards imitating their staging bases used inside Afghanistan so successfully. *Id.*

238. Shanker & Sanger, *supra* note 4, at A18.

"humanitarian intervention."[239] The debate has pitted staunch defenders of sovereignty and the strict letter of Article 2(4) of the U.N. Charter against those who would observe a higher principle compelling action to end unjust human suffering. It is widely acknowledged that the U.N. Charter regards unilateral humanitarian intervention as an illegal violation of state sovereignty.[240] Therefore, if the doctrine were to be regarded as legitimate, it would have to constitute an authoritative norm of international law found in a state practice.[241] During the Cold War, several factors undermined the extent to which interventions that might qualify as humanitarian could establish a dispositive state practice creating a norm of customary international law. Principally, it was difficult to separate the humanitarian aspects of most interventions from their strategic Cold War setting.[242] States rarely designated interventions as humanitarian, and even if they did, that description would likely be challenged in the bipolar Cold

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239. This simple description of humanitarian intervention is adapted from that proffered by Gareth Evans and Mohamed Sahnoun in their recent paper, *The Responsibility to Protect*, FOREIGN AFF., Nov./Dec. 2002. A more detailed definition emerges in this Part. An incomplete list of the leading pieces on the humanitarian intervention debate includes: EMERGING NORMS OF JUSTIFIED INTERVENTION, (Laura W. Reed & Carl Kaysan eds., 1993), and STANLEY HOFFMANN, THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION (1996).

240. *But see* John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145, 154 (1984) (contending that humanitarian intervention does not meet the Article 2(4) threshold because it is not a use of force against the "territorial integrity" or "political independence" of any state).

241. One of the clearest definitions of how a putative norm of international law becomes a binding customary rule of international law can be found in a law review article co-authored by Robert J. Beck and Anthony Clark Arend in which they proffer a two part test:

> First, any rule of international law must be authoritative: states must regard the norm as legitimate and they must consider it binding law. In the traditional parlance of international law, the norm must reflect *opinion juris* [sic]. Second, the prospective legal norm must *control* state behavior: through their practice, states must actually comply with the requirements of the rule. Neither 100% compliance nor 100% perception of authority is required. . . . However, a general perception of authority, and regular, wide-spread compliance are necessary [for a rule to be binding].

Beck & Arend, *supra* note 178, at 156-58 (citations omitted) (emphasis in original).

242. *See* Christopher C. Joyner & Anthony Clark Arend, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*, 10 U.S.A.F.A. J. LEGAL S. 27, 39 (1999/2000). Consider, for example, the Belgian intervention in the Congo which mixed humanitarian and post-colonial motivations, as well as the U.S. intervention in Grenada which stood both for U.S. humanitarian protection of nationals and U.S. geo-strategic refusal to allow a second Caribbean communist beachhead. *Id.*

War system.[243] Therefore, during the Cold War, it was difficult to divine a recognized, legitimate state practice establishing a customary international legal norm of humanitarian intervention.

The response of the international community to three crises during the 1990s significantly moved international law towards the establishment of a customary rule of international law permitting humanitarian intervention. First, the United Nations showed its shortcomings as a humanitarian intervener through the botched and tragic Unified Task Force mission in Somalia in 1992.[244] Thereafter, states that desired to engage in humanitarian intervention were less likely to act inside the U.N. system, and increasingly sought to act alone or through regional coalitions.[245] The lack of any significant response to the next major humanitarian crisis provided the second influential shaping of the international community's perception of humanitarian interventions. In Rwanda, the United Nations did not permit the handful of troops stationed there to intervene to stop the 1994 mass murder of 800,000 Tutsi people.[246] The scope of the slaughter in Rwanda shocked the conscience of the international community and influenced the thinking of international statesmen and legal scholars. The third pivotal moment of the 1990s was the NATO confrontation against the horrific campaign of ethnic cleansing in Kosovo. The actions of NATO in Kosovo may have paved the way for acceptance of humanitarian intervention in international law.

In a display of remarkable forthrightness for Western political leaders, NATO never sought to claim its intervention in Kosovo as legal under the U.N. Charter. Rather, it emphasized the legitimacy (not legality) of the action under both the spirit of the U.N. Charter and basic notions of state responsibility to prevent human atrocities.[247] The authoritativeness of their action was bolstered by the paucity of condemnation offered by other U.N. member states.[248] Furthermore, Secretary-General Kofi Annan gave his implicit blessing to the NATO air campaign, citing it as an example of force that was necessary for the restoration of peace.[249]

After Somalia, Rwanda, and Kosovo, much of the international community recognized the cost of tepid attempts at humanitarian

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243. *See id.* at 36-37.

244. *See generally* MARK BOWDEN, BLACKHAWK DOWN: A STORY OF MODERN WAR (1999).

245. Consider U.S. leadership of the humanitarian and political crisis in Haiti in 1994 and NATO leadership in ending ethnic cleansing in Kosovo in 1999.

246. *See* Joyner & Arend, *supra* note 242, at 39.

247. *See* Michael Glennon, *The New Interventionism: The Search for a Just International Law*, FOREIGN AFF., May/June 1999, at 2.

248. Joyner & Arend, *supra* note 242, at 42.

249. *Id.* at 41.

intervention, the tragedy of ignoring widespread, acute human suffering, and the legitimacy of robust humanitarian intervention even outside the U.N. Security Council's structures. These trends indicate the emergence of humanitarian intervention as lex feranda, a developing norm of law.[250] A recent report by a prominent international commission may be influential in securing humanitarian intervention a safe position in established international law.

The recent report of the International Commission on Intervention and State Sovereignty further bolsters humanitarian intervention. That report examined humanitarian intervention and its relationship to sovereignty. It describes an ongoing paradigm shift in the international community, moving "from sovereignty as control to sovereignty as responsibility in both internal functions and external duties."[251] This marks a significant departure from the concept of sovereignty that heretofore had been conceptualized as the right of a government to exercise supreme power over its territory and citizens free from outside interference. The potentially dramatic consequences of this paradigm shift are discussed at length in Part IV(A) of this Article, but the conclusions of the panel regarding the legitimacy of humanitarian intervention are significant. The International Commission on Intervention and State Sovereignty concluded that "[w]here a population is suffering serious harm . . . and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."[252] This conclusion may bolster U.S. justification for intervention in Iraq based on the emerging customary international legal doctrine of humanitarian intervention.

2. Standards for Legitimate Humanitarian Intervention

The International Commission on Intervention and State Sovereignty presented a set of standards to judge the legitimacy of humanitarian interventions which fundamentally include: a just-cause cause threshold requiring ongoing or imminent serious and irreparable harm to human beings through large scale loss of life or ethnic cleansing;[253] a

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250. *Id.*

251. *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, ch. 2.14 (2001), *available at* http://www.idrc.ca/books/960and961/02_Protect.html (last visited Oct. 30, 2002) [hereinafter ICISS Report].

252. *Id.* Synopsis (1).

253. *Id.* chs. 4.18-4.27.

precautionary requirement to ensure that interventions have a primary purpose of halting or averting human suffering and that every nonmilitary option has been explored;[254] a proportionality requirement guaranteeing that "the scale, duration, and intensity" of the intervention be minimized;[255] a reasonable prospect requirement that there be a reasonable chance of success in halting the suffering and that the consequences of the military intervention not worsen the situation;[256] and a requirement that an authoritative body, usually the U.N. Security Council, be involved in the resolution.[257] These standards articulate a workable formulation of norms that may govern an emerging customary norm of international law permitting humanitarian interventions.[258] Measured by these conditions, however, the United States will have a very difficult time seeking justification for a military action against Iraq on the emerging customary rule of international law of humanitarian interventions.

Two crises in Iraq could attract the attention of policymakers. The first crisis centers on the situation of the Kurds in northern Iraq that Hussein has long persecuted. At least momentarily, however, the Kurds appear secure. The northern and southern no-fly zones set up to protect Iraqi Kurds in the north and Iraqi Shias in the south have been very effective in limiting the ability of Hussein to persecute these minorities. The no-fly zones have been so successful, in fact, that Iraqi Kurdistan is undergoing something of an economic renaissance.[259] The first criterion for judging a humanitarian intervention is that a group of human beings is threatened with "serious and irreparable harm."[260] The widespread mass murder of Kurds seems to have been forestalled, and as sadistic as the bureaucratic Arabization campaign may be, it is not irreparable.

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254. *Id.* chs. 4.33, 4.37.

255. *Id.* chs. 4.39-4.40.

256. *The Responsibility to Protect*, *supra* note 251, chs. 4.41-4.42.

257. *Id.* ch. 6. The Commission unfortunately never squarely addressed the legality of non-U.N. Security Council authorized intervention. The Report indicates that the Commission maintains a preference for the U.N. Security Council authorization, but that it sees the duty of states to react as paramount. If the U.N. Security Council fails to act, the international community is not relieved of its duty to act. Note that there are several additional requirements governing the operational principles of any intervention. These requirements fit more squarely into a jus in bello discussion, but can be found in the ICISS Report at Chapter 7. *Id.* ch.7.

258. Joyner and Arend have proffered the following seven governing criteria: "(1) the exhaustion of peaceful means to resolve the crisis; (2) the inability of the Security Council to act; (3) the proportionate character of the intervention; (4) the humanitarian motivation for intervention; (5) the significant scale of the human rights violation; (6) a preference for multilateral action; and (7) non-opposition from the international community." *See* Joyner & Arend, *supra* note 242, at 43.

259. *See* Matthews, *supra* note 224.

260. ICISS Report, *supra* note 251, ch. 4.18.

The second potential humanitarian crisis justifying an intervention involves the children of Iraq. Nearly five million Iraqi children "suffer from malnutrition-induced stunting and wasting."[261] Thousands of Iraqi children die every month from inadequate water, unsanitary conditions and malnutrition.[262] Claims that the economic sanctions imposed after the Persian Gulf War are to blame for this crisis are specious. True blame for this tragedy lies with Hussein because of both his refusal to comply with inspections regimes that would end the sanctions and his misallocation of oil-for-food funds and resources. The oil-for-food program alone currently provides enough calories per Iraqi to almost meet the recommended ideal of 2400 calories.[263] This wider tragedy of mass starvation would meet the ongoing or imminent serious and irreparable harm threshold.

Such U.S. intervention, however, likely could not satisfy either the precautionary or proportionality requirements for humanitarian intervention.[264] Vis-à-vis the precautionary requirement, it is unquestionable that the primary reason for U.S. intervention in Iraq will be to keep Hussein and terrorist leaders from using weapons of mass destruction. As noble as this cause may be, it does not fit squarely within the concept of humanitarian intervention.[265] The United States will be intervening in Iraq in order to end the threat of a tyrant that supports terrorism and has shown no hesitancy to pursue, stockpile, and use chemical and biological weapons. This also undermines a humanitarian intervention argument because it would fail to satisfy the proportionality limitation. The United States would not limit itself to a mission of ending child starvation in Iraq; rather, it would not rest until the Hussein regime no longer controls weapons of mass destruction.

3. The Inadequacy of the Doctrine of Humanitarian Intervention

The treatment by Hussein of the most vulnerable of his own citizens is surely an important piece of any thoughtful consideration of the morality and legality underlying the justifications of a military intervention in Iraq. The responsibility of the broader community of states to protect human beings from avoidable catastrophes, such as starvation, when their own

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261. Patrick Clawson, *Sanctioning Iraq; The Numbers Don't Lie, Saddam Does*, WASH. POST, Feb. 27, 2000, at B3.

262. *Cf. id.*

263. *Id.*

264. *See* ICISS Report, *supra* note 251, chs. 4.39-4.42.

265. *But see infra* Part V.

governments are unwilling or unable is unavoidable.[266] However, the United States has other motives underlying its desire to pursue military action against Iraq. Furthermore, the United States is not seeking the kind of targeted relief of human suffering which likely undergirds the legitimacy of humanitarian interventions as an emerging customary rule of international law.

The progress of humanitarian intervention from illegal violation of sovereignty to a developing customary norm of international law is, however, extremely valuable to U.S. policymakers considering the legal justifications for action against Iraq. State actions that are legitimate, if not per se legal, under the U.N. Charter have incredible force in moving international law. If the United States comports itself with honesty in its ensuing conflict with Iraq, it may be able to make significant progress towards the establishment of a new norm of customary international law in much the same way humanitarian intervention has progressed.

E. *Failure of Current Use of Force Doctrine*

None of the existing legal doctrines adequately account for the unprecedented threat of terrorist-sponsoring states that pursue weapons of mass destruction. Attempts to justify international military action begin with the U.N. Charter. The problem is that the U.N. Charter presents an excellent device for confronting the threats to the international system as they existed before 1945.[267] While the United Nations has inevitably been the forum of much debate on the propriety of international responses to terrorism, its attempts to confront terrorism have been "patchy and often ineffective."[268] Confronted with the convergence of shadowy, transnational terror networks and rogue states that disregard international law, the world cannot rely on ineffective U.N. intervention doctrines. The cost of continued inadequacy could be devastating.

Each of the existing legal justifications does, however, add to a more complete understanding of the legitimacy of the impending U.S. intervention in Iraq. The same logic that increasingly condones anticipatory self-defense against imminent and overwhelming threats also underlies the U.S. action against Iraq. Potential U.S. action is buoyed by the experience of the U.N. Security Council having authorized member-states to restore international peace and security to Iraq and the Iraqi

266. ICISS Report, *supra* note 251, Foreword: The Commission's Report.

267. *See* Glennon, *supra* note 247, at 2.

268. Anne-Marie Slaughter, *An International Constitutional Moment*, 43 HARV. J. INT'L L. 1, 11 (2002).

legacy of noncompliance. U.S. motivation to intervene in Iraq arises out of the responsibility of states to protect innocents from serious and avoidable threats, in much the same spirit as the emerging doctrine of humanitarian intervention. Finally, U.S. intervention would likely proceed side by side with dissident Iraqi groups that have established an autonomous region and press for the liberation of all of Iraq. None of these justifications alone, however, adequately or effectively accounts for the unique threat posed by states such as Iraq, which support international terrorism and develop illicit weapons of mass destruction. Such nations threaten not only the sovereignty of the nations they challenge — they threaten their very survival.

IV. THE NEW INTERVENTION PARADIGM: ANTICIPATORY COUNTER-TERRORISM, COUNTER-PROLIFERATION INTERVENTION

A. *Reexamining the International Legal Landscape*

Existing international legal justifications for the use of force seem antiquated and inappropriate. They are the product of an international system shaped in an age of fascist dictators, dueling superpowers, and in the case of self-defense doctrine, warring bands of militiamen on a colonial frontier. These doctrines are hopelessly anachronistic in the post-September 11th world order. Today, the convergence of the emerging menace of weapons of mass destruction and the established nightmare of international terrorism poses new, unaddressed threats. Nothing in the existing international law of the use of force adequately accounts for the destructive force of the new threats, the shadowy realm in which they grow, and the palpable and irreparable damage done by prolonged inaction. The existing international law must be reexamined and updated to address these new threats.[269]

269. One of the boldest proposals of such a reexamination emerged in Australia. The Prime Minister of Australia, John Howard, proposed amending the U.N. Charter to permit nations to strike pre-emptively against terrorism in other nations. *See* Neil Frankland, *Australian Prime Minister Ready to Act Against Terror*, ASSOCIATED PRESS, Dec. 1, 2002. This proposal merits serious consideration because of the illusive and unpredictable nature of terrorism.

1. Extending the Responsibility of Protection to Threats to Humanity

The humanitarian crises of the 1990s sparked heated debate among international legal studies over the legitimacy and legality of humanitarian intervention. While the debate remains unsettled, the rethinking of the international system induced by this debate may reverberate into other areas of international relations and international law and help reconstitute the governing doctrines. One such paradigm shift may offer international law a better approach to the impending conflict with Iraq.

The International Commission on Intervention and State Sovereignty's Report on Humanitarian Intervention (ICISS Report) reconsidered the doctrine of sovereignty. Whereas sovereignty has classically been defined as the "[s]upremacy of authority or rule . . . [r]oyal rank, power, or authority . . . [t]otal independence and self government . . . ,"[270] the Commission determined that sovereignty "implies responsibility . . . for the protection of [the] people [within] the state itself."[271] The most significant implication of this reconceptualization of sovereignty is that when domestic governments cannot or will not undertake the responsibility to protect their citizens, "the principle of non-intervention yields to the international responsibility to protect."[272]

This concept of the responsibility to protect provides a new paradigm for consideration of the long-standing norm of nonintervention. Under this understanding, the responsibilities of sovereigns are as important as the rights of sovereigns. The ICISS Report recognizes both the responsibility of every nation to protect its citizens and the responsibility of the international community to act to protect citizens whose states have failed to provide protection. It is not a significant stretch of this logic to conclude that states, therefore, must also have a responsibility to protect their own citizens from other states who threaten them.

International law has, for too long, regarded self-defense as a right of sovereigns rather than a responsibility. But, sovereignty carries with it a responsibility to protect citizens from preventable harm from both within and without state borders. Weapons of mass destruction pose a threat of complete destruction equal to or greater than even the cataclysmic humanitarian crises of the 1990s. The responsibility of states to prevent mass murder of their citizens is just as imperative against foreign enemies as from homegrown threats.

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270. WEBSTER'S II NEW COLLEGE DICTIONARY, (1995).
271. ICISS Report, *supra* note 251, Synopsis (1).
272. *Id.*

States that pursue the development and acquisition of weapons of mass destruction fundamentally fail to live up to the bare minimums of state responsibility that the international community must demand.[273] The threat of chemical, biological, and nuclear weapons to destroy whole countries and to decimate entire populations cannot hide behind a decaying concept of sovereignty as the carte blanche of state conduct. The relationship between individuals and governments that this reconceptualization of sovereignty produces demands that states act decisively to uphold their responsibility to protect their people.

The fate of this approach to sovereignty is uncertain. Governments may only grudgingly accept responsibilities, when they have long-disavowed them in favor of absolute prerogatives. Regardless of the outcome of the debate over the concept of humanitarian intervention grounded in a responsibility to protect human beings from governments that cannot or will not ease their suffering, the responsibility of states to protect their own citizens from other countries bears serious consideration. Self-defense has long been spoken of as a right, yet it is fundamentally about defensive measures — fundamentally about the responsibility to protect.

By the time the United States struck Afghanistan on October 7, 2001, the September 11th attacks had been over for almost a month. The U.S. strikes could not mitigate the damage that had already been done. If on September 10, 2001 the United States had known the full extent of the terrorist capabilities of al Qaeda, and its links with the Taliban regime, international relations theory and common sense dictate that the United States should have acted on September 10th in the same manner it did on October 7th. The legitimacy of the U.S. action in Afghanistan lay not in that it came after a vicious, unprovoked attack, but in the fact that the United States was acting to protect its citizens from future attacks.[274]

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273. It is beyond the scope of this Article to comprehensively address the question of the status of states that already possess nuclear weapons. But note that major attempts to use significant force against nuclear states are likely prohibitively dangerous; there is no reasonable prospect that an intervention could successfully disarm the power without initiating nuclear holocaust. This reality is the most significant factor underlying the apparent hypocrisy of prohibiting small states from pursuing weapons of mass destruction while permitting large states to keep nuclear weapons. The consequence of permitting armed conflict between nuclear powers is likely to be far graver than had there been no action at all.

274. Reprisal only in retaliation for past acts is a clear violation of international law.

2. Honesty and Leadership in International Law and International Relations

None of the existing current legal doctrines governing the use of force adequately account for the threat posed by states such as Iraq that pursue arsenals of mass destruction and sponsor terrorism. The argument that the U.N. Charter system is no longer coherent or controlling is not a new one. Scholars have observed that the United Nations was founded on the unfulfilled promise that the U.N. Security Council would regularly deploy a standing U.N. military force to protect international peace and security.[275] The U.N. Charter has failed in this mission in two ways. First, the Charter system has not successfully created a norm of nonintervention in international relations. The principle of Article 2(4), that all states must refrain from the threat or use of force against the territory and political independence of all other states, has been violated countless times since 1945.[276] This has led some scholars to conclude that states "have chosen to change this rule through their actions."[277] The second way in which the U.N. Charter system has failed is that states that have been the victim of threats to their peace and security have not been able to rely on the U.N. Security Council to intervene on their behalf. Since 1945, the U.N. Security Council has rarely authorized the use of military force,[278] and no standing U.N. military has ever been constituted. The quid-pro-quo of the

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275. *See, e.g.*, Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1, 4-5 (1990).

276. Anthony Clark Arend has identified a "representative sampling" of such transgressions:

> [T]he U.S. action in Guatemala (1954), the Israeli, French, and British invasion of Egypt (1956), the Soviet invasion of Hungary (1956), the U.S.-sponsored Bay of Pigs invasion (1961), the Indian invasion of Goa (1961), the U.S. invasion of the Dominican Republic (1965), the Warsaw Pact invasion of Czechoslovakia (1968), the Arab action in the 1973 Middle East War, North Vietnamese actions against South Vietnam (1960-1975), the Vietnamese invasion of Kampuchea (1979), the Soviet invasion of Afghanistan (1979), the Tanzanian invasion of Uganda (1979), the Argentine invasion of the Falklands (1982), the U.S. invasion of Grenada (1983), the American invasion of Panama (1989), and, of course, the Iraqi attack on Kuwait (1990).

Id. at 23. Since Arend's sample was taken one could add, at least, NATO action in Kosovo (1998) and allied action in Afghanistan (2001-2002).

277. *Id.* at 24.

278. A generous catalog of U.N. enforcement actions would include: Korea (1950); Iraq (1990); Somalia (1992); Bosnia (1993); Haiti (1994); and Zaire (1996).

U.N. Security Council system was that states would forgo self-help in return for collective-help.

In the face of weapons of mass destruction and continued Iraqi support of international terrorism, the United States should not feel constrained by the broken promises of the U.N. Charter system. The United States can be reasonably certain that Iraq will not hesitate to use force against it because of Article 2(4). Furthermore, the United States can reasonably anticipate that it will not be the recipient of collective help against Iraq from all of its peers on the U.N. Security Council.

If international law fails to address its own inadequacies, it risks abandoning any claim that it has meaning in shaping state behavior in the post-September 11th world. Michael Glennon has observed that "[n]o rules will work that do not reflect underlying geopolitical realities." A conflict is coming, and it will be fought for legitimate reasons.[279] Now, the United States must show leadership in the establishment of new rules of international law that can lead to a sustainable and legitimate international legal order. This order should be grounded not in the manipulations of attorneys in the Legal Advisor's office attempting to fit the square of the legitimacy of U.S. action against Iraq into the circle of antiquated international legal doctrine. Rather, the order should announce that it has commenced a new era of legitimate conduct that will establish a new rule of the international law of the use of force.

The so-called Bush Doctrine articulates a portion of such a new rule of international law. President Bush announced that: "[f]rom this day forward, any nation that continues to harbor or support terrorism will be considered by the United States as a hostile regime."[280] That doctrine, however, should add a more explicit warning for Iraq and other states that pursue weapons of mass destruction: if a hostile regime also pursues the acquisition or development of chemical, biological or nuclear weapons, the decisive use of anticipatory military force to end that regime is a legitimate response.

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279. *See infra* Part II.

280. Address to a Joint Session of the Congress and the American People, 37 WKLY COMP. PRES. DOC. 1347, 1349 (Sept. 20, 2001).

B. *The Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention, and its Limitations*

Proposing a new international legal doctrine for the use of force is a grave endeavor. This proposal does so in the conviction that the use of force paradigm outlined here will lead to greater peace and stability and reduce the threat of weapons of mass destruction. This Article proposes that states whose regimes both foster international terrorism and accumulate biological, chemical or nuclear weapons must be eliminated by swift and decisive military force. Several standards can be identified to limit this principle so that an authentic legalist rule of international law can emerge that will minimize the scope and frequency of future crises involving weapons of mass destruction and international terrorism.[281]

1. Preference for Multilateral Action

States seeking to engage in anticipatory counter-terrorism, counter-proliferation intervention should first inquire as to the ability of international institutions to deal with particular rogue states. Should this appeal to international institutions fail either out of inability or unwillingness of the institution, there should be a strong preference for multilateral action in an effort to avoid the egregious pursuit of naked self-interest risked by unilateral state action. Michael Glennon has noted that "[h]istory is not without examples of exploitative alliances, but the greater abuses by far occur when states act unilaterally. The need to persuade allies to join in intervention makes it less likely that the intervention will be for ulterior motives."[282] Nevertheless, unilateral action against terrorist states pursuing chemical, biological and nuclear weapons is significantly better than the danger of prolonged inaction.

2. Existence of Compelling Evidence

States seeking to use force against states for their support of international terrorism and pursuit of weapons of mass destruction should not proceed unless they have ascertained through compelling evidence that a given state is actually supporting international terrorism and is in

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281. Two sources have influenced the compilation of these standards. First, the ICISS Report on The Responsibility to Protect, which itself explicitly found inspiration in classical just war doctrine. ICISS Report, *supra* note 251, at 4.10-4.14. Second, Christopher Joyner and Anthony Clark Arend's standards articulated in *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*. Joyner & Arend, *supra* note 242, at 43.

282. MICHAEL GLENNON, LIMITS OF LAW, AND PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 198-99 (2001).

possession or in active pursuit of weapons of mass destruction. The evidence ought to be displayed within the international community so that states may not make empty claims based on mere suspicion or pretense. Reasonable doubt presents too high a threshold when faced with a threat as overwhelming and as quickly deployed as modern weapons of mass destruction.

3. Attempted Peaceful Resolution

States contemplating an anticipatory counter-terrorism, counter-proliferation intervention must attempt to peacefully resolve the crisis. This would involve diplomatic action, attempts to improve transparency through effective inspection regimes, and providing fair warning to the rogue state of the imminence of military action. The seriousness of the threat and the profound cost of prolonged delay make reliance on a doctrine of exhaustion of peaceful alternatives too burdensome to contemplate.

4. Proportionality

Faced with weapons of mass destruction, very little in the way of military response is actually disproportionate. Nevertheless, beyond the existing corpus of rules governing the conduct of war, there must be an explicit prohibition on the first use of weapons of mass destruction against states that proliferate weapons of mass destruction and terrorist activity. No doctrine could withstand the hypocrisy inherent in any claim that first use of weapons of mass destruction would be appropriate. If, in the course of a counter-terrorism, counter-proliferation intervention, the intervener is attacked by weapons of mass destruction, proportionality permits responses-in-kind. The ultimate objective of this doctrine is to prevent the use of such weapons, and deterrence requires at least this much flexibility.

5. Non-Conquest

Absolutely pure motives cannot be reasonably required of anticipatory counter-terrorism, counter-proliferation missions. States will be acting to protect their own citizens against the gravest of threats and frequently the terrorist state will already possess potent arsenals. The overthrow of a ruling regime will frequently be a necessary goal of counter-terrorism, counter-proliferation operations. The best means of limiting the risk of inappropriate use of force is to require that such operations forbid territorial or material conquest by intervening states.

While international organizations, such as the United Nations, have not effectively governed the rules of intervention, they are better suited to nation-building after an intervention. Either the United Nations or coalitions of concerned states should oversee the political future of states subject to this form of intervention. The rebuilding of defeated states must happen swiftly, perhaps in anticipation of or in concert with the initial intervention.

6. Reasonableness

This limit emerges out of classical just war theory and it requires that there must be a reasonable prospect of success in any military campaign. If an intervening state cannot establish a reasonable prospect that the intervention will successfully end the threat justifying the military action, it must not act. Furthermore, such success cannot be the only measure of reasonableness. If the consequences of pursuing such success will be worse than the consequences of inaction, states must refrain from anticipatory counter-terrorism, counter-proliferation operations. This limit would forbid any campaign against a major nuclear power such as the United States, Russia, or China — the prospect of nuclear holocaust is simply too grave.

Together these standards effectively limit a doctrine of anticipatory counter-terrorism, counter-proliferation intervention that will legitimately reflect the underlying geopolitical reality. These limitations, if adhered to, will eliminate the ability of states to use the doctrine as a pretense for less legitimate ambitions. This doctrine will place the world on notice that the international community will not tolerate the convergence of state support for international terrorism and state-pursuit of weapons of mass destruction.

C. *Realizing the New Intervention Doctrine*

The means by which the doctrine of anticipatory counter-terrorism, counter-proliferation becomes a part of recognized international law is rather ancillary to the focus of this Article, which has been the need for such a doctrine. Nevertheless, it is important to note how this doctrine may become a recognized tenet of international law. At least three possibilities present themselves.

1. The U.N. Security Council Practice

In his book, *The Greatest Threat*, Richard Butler, former Chairman of UNSCOM, proposes a sort of gentleman's agreement to address the

proliferation of weapons of mass destruction.[283] In the opinion of Butler, the threat posed by weapons of mass destruction is too serious to be addressed by the politics of the U.N. Security Council.[284] He considers the veto too great an obstacle to reducing the proliferation of such weapons.[285] He proposes that:

> [C]ertainty of enforcement can be achieved if the following steps are taken: First, the permanent members of the Security Council must agree and solemnly declare to the world that they will always act together to remedy any situation identified by a credible report on the violation of [weapons of mass destruction] treaties. Second, this must mean that they will undertake never to use or to threaten to use their veto in such circumstances.[286]

His proposal recognizes that conflicts such as the current impasse with Iraq will present themselves in the future and military action will be necessary to destroy weapons of mass destruction and the capacity of rogue states to create them. His idea provides essentially a back-door attempt to dress anticipatory counter-terrorism, counter-proliferation intervention in U.N. Charter legitimacy.

This proposal is unlikely to prove successful. Iraq has cultivated favorable relationships with Russia, China, and France. These relationships have complicated U.N. attempts to reinvigorate weapons inspections.[287] While this proposal works well in the abstract where there is no special relationship between a rogue regime and a permanent member of the U.N. Security Council, in reality some member of the U.N. Security Council will often have something to gain from using their veto. The inability of the U.N. Security Council to overcome the narrow national interests of its permanent members will likely prevent even an informal gentleman's agreement from realizing the doctrine of anticipatory counter-terrorism, counter-proliferation intervention. The U.N. Security Council could not come to such a gentleman's agreement even in the case of humanitarian intervention in Kosovo where it is difficult to argue that any member had vital interests at stake in the outcome of the crisis.[288] Why

283. *See* BUTLER, *supra* note 17, at 233-42.
284. *See id.* at 235.
285. *See id.*
286. *Id.* at 238.
287. *See* Pollack, *supra* note 156.
288. Richard D. Bilder, *Kosovo and the New Interventionism: Promise or Peril?*, 9 J. TRANSNAT'L L. & POL'Y 153, 157 (1999).

would such a system fail in the realm of humanitarian intervention but succeed for anticipatory counter-terrorism, counter-proliferation intervention? It likely will not make a difference; old habits are difficult to break.

2. An International Constitutional Moment[289]

Humanity has a tendency to coalesce after times of grave conflict in pursuit of lasting regimes dedicated to the establishment of a lasting peace. The Peace of Westphalia in 1648 followed the Thirty Years War. The Congress of Vienna followed the Napoleonic Wars. The League of Nations followed World War I and World War II produced the United Nations. Paper treaties, the world has often agreed, offer an improvement over power politics.[290] International regimes crumble not so much because they are futile endeavors but because they are bypassed by world events. Professor Anne-Marie Slaughter, in recognizing the challenges of the new threats posed by international terrorism, has called for the international community to amend the international legal system because,

> [t]o respond adequately and effectively to the threats and challenges that are emerging in this new paradigm, we need new rules. Just as in 1945, the nations of the world today face an international constitutional moment. . . . In this new constitutional moment, the world's nations must come together at the outset rather than at its end.[291]

Professor Slaughter proposes an amendment to Article 2(4) to establish a principle of civilian inviolability.[292] Her proposal does not specifically

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289. This phrase is respectfully borrowed from Professor Anne-Marie Slaughter, who herself was influenced by Professor Bruce Ackerman's writings on domestic constitutional "moments." Slaughter, *supra* note 268, at 2 (citing BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 20, 26 (1998)); *see also* Bruce Ackerman, *A Generation of Betrayal*, 65 FORDHAM L. REV. 1519, 1519 (1997).

290. *See* GLENNON, *supra* note 282, at 192.

291. Slaughter, *supra* note 268, at 2 (citations omitted).

292. *Id.* While Slaughter does not address the specific confrontation with Iraq, nor the general crisis of the proliferation of weapons of mass destruction to rogue regimes, her proposal to establish a principle of civilian inviolability could prove to be an important element of the fight against the convergence of weapons of mass destruction and international terrorism in at least two ways. First, Slaughter's recommended norm of civilian inviolability augments the movement towards conceptualizing sovereignty as a responsibility to protect. *Id.* at 2-3. The most troublesome feature of weapons of mass destruction is that they cannot discriminate between civilian and military targets. The second way is through her emphasis on the individualization of international law. A

address the threat posed by Iraq or the proliferation of weapons of mass destruction, but her proposed means of establishing a new doctrine in international law may provide a viable forum through which to establish a doctrine of anticipatory counter-terrorism, counter-proliferation intervention. Indisputably, such an approach comports significant legitimacy on an emerging doctrine — "the dignity of a solemnly negotiated text."[293] The appropriate moment to solemnize this doctrine in a text, however, has not arrived. Nonproliferation doctrines already exist, and Iraq has signed and then violated many of the most important of these treaties.[294] Furthermore, Iraqi weapons pose too immediate of a threat to await the outcome of prolonged negotiation and compromise that inevitably will occupy the crafters of new international constitutional principles. While it would be preferable if a written doctrine could be fashioned both preventing states from pursuing weapons of mass destruction and empowering the international community with viable enforcement tools, it appears that consensus is simply not yet present — and time is short. An international constitutional moment may yet arise from the impending invasion of Iraq, but for now, new doctrine must emerge from legitimate state practice.

3. State Practice

While the more prominent and predictable form of international law emerges from treaties and conventions, perhaps the least violated doctrines of international law emerge from customary state practice. This is largely because rules of customary state practice that are widely violated cease to be recognized as law; treaties and conventions that are violated remain on the dusty shelves of diplomatic offices. State practice provides the best chance for the proposed doctrine of anticipatory counter-terrorism, counter-proliferation intervention to eventually become a recognized international legal doctrine.

If the doctrine of anticipatory counter-terrorism, counter-proliferation intervention is to become international law it will likely do so through the processes by which state practice becomes customary international law. This means that, for now, the United States will have to show the honest

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valuable component of any counter-terrorism and counter-proliferation regime should include holding individual terrorists and government officials who develop weapons of mass destruction accountable. *Id.* at 13-16.

293. GLENNON, *supra* note 282, at 193.

294. *See infra* Part II(E)(3).

courage to say that an intervention in Iraq is not strictly legal by existing standards — but that it is legitimate and ought to be legal. After the intervention is finished, the question will arise over time: When and how will the doctrine of anticipatory counter-terrorism, counter-proliferation intervention become clearly legal?

Legality becomes clear once the doctrine has become "authoritative state practice."[295] The authoritativeness of a rule is determined by examining "official and unofficial communications by decision-making elites."[296] Michael Glennon has expanded on that standard by requiring that new intervention regimes receive "long-term, sustained acceptance . . . throughout the community of nations . . . [by states which] believe that the decision to intervene has been made to pursue just objectives."[297] State practice is the measure of control a given doctrine exerts on state behavior. Put simply, "the rule is controlling if international actors comply with the rule."[298]

Military action to remove the threat of chemical, biological and nuclear proliferation in Iraq is not so much a strategic option as it is a strategic imperative. The risk of inaction in the face of such a threat is intolerable. *Justice* need not operate through statutes, charters or custom. The NATO intervention in Kosovo proved this to much of the world.[299] The United States must describe its motives with honesty and promote the establishment of new rules better suited for the new threats of the Twenty-First Century. State practice is, in the long term, the ultimate arbiter of what international law is. It is a consequence of this fact that more powerful states will exert the greatest influence on the development of international law, and the United States should not hesitate to take the lead in practicing the legitimate doctrine of anticipatory counter-terrorism, counter-proliferation intervention.[300]

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295. Anthony Clark Arend, *Towards an Understanding of International Legal Rules, in* INTERNATIONAL RULES, at 300 (Robert J. Beck et al. eds., 1996) (emphasis omitted).

296. *Id.* at 301.

297. GLENNON, *supra* note 282, at 193.

298. Arend, *supra* note 295, at 192.

299. *See* Glennon, *supra* note 247, at 2.

300. Alan D. Surchin, Note, *Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad*, 5 DUKE J. COMP. & INT'L L. 457, 457 n.1 (1995).

V. CONCLUSION

A. *A Cautionary Note*

U.N. Secretary-General Kofi Annan, in a discussion of the legitimacy of humanitarian intervention, cautioned of the "danger of such interventions undermining the imperfect, yet resilient, security system created after the Second World War, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and under what circumstances."[301] The greatest risk of championing a new intervention paradigm of anticipatory counter-terrorism, counter-proliferation intervention is that it will be misunderstood or manipulated. For example, India, citing the presence of residual al Qaeda leaders in the Pakistani-Afghan border, and Pakistan's nuclear arsenal, could try to assert that a massive invasion to depose General Musharaff would be appropriate under this doctrine. Such flimsy justification would both fail the literal application of the standards iterated in Part IV(B) of this Article, and more importantly, be readily preventable.

States and international organizations made of reasonable people can foresee such situations and adopt reasonable measures to prevent such behavior. The articulation of a new norm of intervention will not suddenly make state actors lose all sense of reason and behave in unpredictable and destabilizing manners. Rather than engage in reckless quests to settle old grudges with new justifications, the international community is far more likely to pause for reflection and take a very deep breath after the U.S. intervention in Iraq. States, by and large, are rational actors, and will likely adopt prudent strategies, alter their conduct and recalibrate their intentions to better account for the new intervention paradigm.[302]

B. *Concluding Reflections*

Saddam Hussein has developed massive stockpiles of biological and chemical weapons. His nuclear program is likely only grams of enriched uranium away from weaponizing a nuclear device. In the four years since U.N. inspectors were last inside Iraq, it is impossible to know how far Iraq has advanced its weapons of mass destruction programs. Hussein has also systemically fostered terrorism in sophisticated training camps and maintains relationships with some of the most prolific and deadly

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301. U.N. GAOR, 54th Sess., 4th plen. mtg. at 2, U.N. Doc. A/54/PV.4 (1999).

302. *See* Glennon, *supra* note 194, at 24, 29 (discussing reaction to the emerging norm of humanitarian intervention).

international terrorist organizations of the new century.[303] Hussein is a tyrant who does not hesitate to slaughter his own people. He has not and will not hesitate to slaughter the citizens of other countries. The United States must not stand idly by while Iraq develops more lethal chemical and biological agents and more effective means of delivery. The United States need not stand idly by until Hussein strikes. The threat escalates each day that the United Nations fails to act. The United States must act, even unilaterally if necessary, against so grave a threat.[304]

The moment of U.S. intervention in Iraq will constitute a paradigm-altering event, and it must be embraced as such. Should the United States decide to resort to tired political games of legal rationalization, the legality of its behavior will not have changed, but its chance at offering a new and righteous doctrine — with the legitimacy that inheres in such honest leadership — might never be restored. What is most vital is that the rationale proffered by the Bush administration at the commencement of hostilities with Iraq be one of forethought and honesty.

Intervention to prevent the sinister marriage of international terrorism and weapons of mass destruction is not only strategically required of the United States, it is just and legitimate. U.S. policymakers should not be intimidated out of action by a reverence for antiquated, anti-intervention, international legal proscriptions. The threat posed by biological, chemical or nuclear holocaust demands a new international legal doctrine. Addressing this threat is imperative. If the United States uses its power to pursue the just and legitimate goal of ending the menace posed by states that sponsor terrorism and pursue weapons of mass destruction, international law will follow.[305]

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303. *See infra* Part II(F) (al Qaeda and Hamas).

304. President Bush has indicated that the United States "will not wait for the authors of mass murder to gain weapons of mass destruction. [The United States] act[s] now because [it] will lift this dark threat from our age and save generations to come." James Gerstenzag & David Holly, *Bin Laden Seeks to Gain Nuclear Arms, Bush Says: Terrorists Also Want Chemical and Germ Weapons, President Warns as He Tries to Rally Support From Abroad*, L.A. TIMES, Nov. 7, 2001, at A1. *See also* Joseph Nye, *The New Rome Meets the New Barbarians*, ECONOMIST, Mar. 23, 2002, at 25 ("Faced with such a threat, a certain degree of unilateral action . . . is justified if it brings global benefits. After all, the British navy reduced the scourge of piracy well before international conventions were signed in the middle of the 19th century.").

305. *See* Glennon, *supra* note 247, at 2.