

TERROR AND THE LAW: THE UNILATERAL USE OF FORCE AND THE JUNE 1993 BOMBING OF BAGHDAD

I. INTRODUCTION

On June 26, 1993, U.S. missiles destroyed the Iraqi intelligence complex in downtown Baghdad in response to an alleged Iraqi assassination plot against former President George Bush. This U.S. military action renews the debate about the unilateral use of force in the post-cold war era. The U.S. administration's justification for its defensive use of force against Iraq is significant because of the potential impact that a superpower's actions can have on the development of international law.¹ It is essential that explanations for controversial uses of force be grounded in law, not expediency. However, in order to influence state policy, international law must also be interpreted in light of the evolving nature of aggression and responses thereto.

Reflecting a desire for stability, the post-cold war years have been marked by an increased interest in the use of collective, as opposed to unilateral, force.² Within a system of collective security, obtaining the approval of the U.N. Security Council for a belligerent operation requires states to justify their proposed actions under international law and to present the evidence underlying the necessity of a forceful response.³ The Baghdad raid illustrates the existing tension between furthering multilateralism and defending rights inherent in sovereignty, such as the protection of a nation's leaders. It also exemplifies the effect of a politically-charged situation on the interpretation of international law. The recent history of U.S.-Iraqi

1. Because state practice is one essential source of international law, it follows that the more powerful states will have greater influence on the development of international law. For a general discussion of state practice as a source of international law, see J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34-38 (1984).

2. The Gulf War coalition is the paradigmatic example of the use of collective force.

3. Article 51 of the U.N. Charter states: "Measures taken by Members in the exercise of . . . self-defense shall be immediately reported to the Security Council . . ." U.N. CHARTER art. 51; *see also infra* notes 53-60 and accompanying text (noting that, although the United States did not seek prior Security Council approval for the Baghdad raid, it did seek to present evidence and a legal justification for the raid).

relations and the U.S. desire to punish Iraq, combined with pressure from the public and the press, led the Clinton administration to act unilaterally and bypass the United Nations.⁴ Because the U.N. process had proven effective as a means of combatting various Iraqi aggressions (primary among them Iraq's incursion into Kuwait), the United States' avoidance of those processes is noteworthy.

Without a pre-strike approval from the United Nations, the United States needed an adequate legal justification for the its military action. Modern notions of self-defense or reasonable reprisal provided a sufficient legal basis for a forceful response to a specific Iraqi aggression—the alleged assassination plot. Less convincing was the proposition that the bombing was justified in order to deter indefinite future threats.

This Note explores the derivation and effects of the United States's legal justification for unilateral action against Iraq. Part II evaluates the factual circumstances of the incident.⁵ Along with a presentation of the Clinton administration's legal argument, Part III addresses both the international reaction to the raid and state practice with regard to assassinations. Part IV introduces the issue of unilateral versus collective security. As Part IV demonstrates, an effective legal analysis of the Baghdad raid must provide for the evolution of self-defense law in order to meet the exigencies of terrorist violence. An evolving norm of self-defense, however, necessitates a stricter reviewing process to evaluate unilateral uses of force. Such an international review inevitably will be affected by the political and security concerns of states, as demonstrated in Parts IV and V. Part V further tests the limits of the self-defense theory, examining the administration's action in light of reprisal law. Part VI concludes by proposing the alternative possibility of a multilateral response to assassination threats.

II. FACTUAL BACKGROUND

The expectations of what states will do in a given situation is dependent upon the circumstances of that situation. Thus, the factual background in which an event occurs is important. The 1991 Gulf

4. See *infra*, notes 6-8, 43 and accompanying text.

5. Although the publicly released facts express doubt as to whether Iraq actually ordered the assassination of former President Bush, for the purposes of legal analysis the allegations against Iraq are assumed to be true (with exceptions made when doubts about Iraqi complicity impact legal analyses).

War and its repercussions underlie questions about the use of force against Iraq. Ever since the U.S.-led, and U.N.-approved, coalition expelled the Iraqi army from Kuwait, the world has searched for a way to deal effectively with Saddam Hussein.

In the months before the bombing, Iraq was consistently testing the limits of international resolve. Iraq threatened Allied "no-fly" zones⁶ and menaced the Kurds in northern Iraq.⁷ Immediately before the U.S. raid on Baghdad, the Security Council was involved in a test of wills with Saddam Hussein concerning surveillance of Iraq's missile test sites.⁸ In short, the post-Gulf war behavior of Iraq was far from peaceful.

A. The Bombing of Iraqi Intelligence Headquarters in Baghdad

Iraqi intelligence headquarters⁹ was destroyed by twenty-three Tomahawk cruise missiles fired from U.S. Naval warships in the Red Sea and the Persian Gulf.¹⁰ Though the Pentagon reported that the bombing was scheduled for the middle of the night so as to avoid civilian casualties,¹¹ three missiles went off course and landed in a residential neighborhood in Baghdad.¹² The official Iraqi news agency INA reported eight civilians killed.¹³

Domestically, President Clinton enjoyed overwhelming popular support for the bombing. A joint poll by the New York Times and

6. Iraqi gunners fired on U.S. jets more than two months before the bombing. Eric Schmitt, *Iraqi Gunners Fire on American Jets in North, U.S. Says*, N.Y. TIMES, Apr. 10, 1993, § 1, at 1. Iraq continued to threaten the zones after the Baghdad raid. A U.S. fighter pilot fired at an Iraqi antiaircraft artillery site on June 29th, after Iraqi radar marked his plane. Douglas Jehl, *U.S. Jet Patrolling Iraq Fires Missile at Artillery Site*, N.Y. TIMES, June 30, 1993, at A3. The same type of incident occurred on July 25th. Stephen Engelberg, *Another U.S. Jet on Patrol Fires at Iraqi Antiaircraft Battery*, N.Y. TIMES, July 26, 1993, at A6.

7. Youssef M. Ibrahim, *Trial of 14 in Plot Resumes, But U.S. Verdict is Known*, N.Y. TIMES, June 27, 1993, § 1, at 12.

8. Before the strike, President Clinton warned Iraq that it must let U.N. officials monitor missile test sites. The Security Council passed a resolution admonishing Iraq to allow U.N. inspectors to install cameras at missile test sites or face "serious consequences." Douglas Jehl, *Clinton Bluntly Warns Iraq to Yield to Arms Inspectors*, N.Y. TIMES, June 26, 1993, § 1, at 4. Iraq finally agreed to allow surveillance cameras at missile testing sites, as per U.N. agreement, on July 22nd. Engelberg, *supra* note 6.

9. Iraqi intelligence is known as the "Mukhabarat."

10. Gwen Ifill, *Clinton Bluntly Reports 'Compelling Evidence' Found Against Iraq*, N.Y. TIMES, June 27, 1993, § 1, at 1.

11. Tim Weiner, *Attack is Aimed at the Heart of Iraq's Spy Network*, N.Y. TIMES, June 27, 1993, § 1, at 1.

12. Eric Schmitt, *U.S. Says Strike Crippled Iraq's Capacity for Terror*, N.Y. TIMES, June 28, 1993, at A1.

13. *Id.*

CBS indicated that the president's approval rating increased eleven percent immediately after the raid.¹⁴ The U.S. Congress also expressed its approval, demonstrating bipartisan support for the military action.¹⁵ What little criticism existed was centered upon the fear in some quarters that the use of force was becoming increasingly unregulated.¹⁶

B. The Threat Against Former President Bush

Controversy surrounds the evidence upon which the Clinton administration based its decision to use force against Iraq. Critics such as journalist Seymour Hersh¹⁷ claim that the evidence which was made public was weak and circumstantial. Specifically at issue was the design of the assassination weapon, the veracity of the suspected assassins, and the motives of the Kuwaiti government. Proponents of the administration's position claim that the most compelling evidence supporting the decision was too sensitive to be made public and that there was no doubt that Iraq was behind an assassination plot against former President Bush.¹⁸

Credible evidence and suspicions both supported the administration's conclusions and the criticism thereof. For example, former Central Intelligence Agency (CIA) Director Robert Gates cited a 1992 CIA warning of a possible attempt by Iraq to assassinate a top government official in retaliation for its defeat in the Gulf War.¹⁹ However, another CIA report stated that Kuwait may have

14. Douglas Jehl, *U.S. Says It Waited for Certain Proof Before Iraq Raid*, N.Y. TIMES, June 29, 1993, at A1. The poll found that two-thirds supported the air strike and sixty percent supported Clinton's stand toward Iraq. Richard L. Berke, *Poll Shows Raid on Iraq Buoyed Clinton's Popularity*, N.Y. TIMES, June 29, 1993, at A7.

15. The ranking Republican on the Senate Foreign Relations Committee, Senator Richard Lugar, endorsed "sure and swift" U.S. retaliation against Iraq. Douglas Jehl, *Car Bomb Found Near Bush Said to Suggest Hand of Iraq*, N.Y. TIMES, May 11, 1993, at A3. The Democratic chairman of the Senate Intelligence Committee, Senator Dennis DeConcini, said, "If there is real credible information [against Iraq], the United States should in my view take unilateral action—a bombing or other air strike." *Id.*

16. A New York Times editorial stated, "Surely the Administration does not intend to usher in an age when nations feel free to fire weapons at each other's cities based on unilateral assertions that intelligence evidence justifies it." *Still Not Good Enough on Iraq*, N.Y. TIMES, June 30, 1993, at A14.

17. See generally Seymour Hersh, *A Case Not Closed*, NEW YORKER, Nov. 1, 1993, at 80.

18. See *infra* note 47 and accompanying text.

19. Jehl, *supra* note 14.

manufactured evidence to make an unrelated plot seem like an assassination attempt.²⁰

The chain of events which triggered the U.S. bombing began in April of 1993. Kuwaiti officials informed Washington of a plot against the life of the former President after some of the alleged conspirators confessed.²¹ One accused leader, Wali al-Ghazali, stated that Iraqi intelligence ordered him to move a bomb-rigged jeep to a location near the Kuwait University area, where Mr. Bush was to receive an honorary degree during his April 1993 visit.²² The bomb was to be detonated while Mr. Bush was giving his speech. U.S. authorities determined that the explosion would be powerful enough to injure people within a radius of 400 yards.²³ Administration officials concluded that Iraqi agents intended to kill former President Bush on his visit to Kuwait.²⁴

C. The U.S. Investigation

Given the political pressure to respond to an assassination attempt on a former President and the anti-Iraq sentiments prevalent among the U.S. public, the administration wanted to compile conclusive evidence before making a forceful response.²⁵ Secret Service, Federal Bureau of Investigation (FBI), and CIA officials were dispatched to Kuwait to undertake a thorough investigation of the collected evidence.²⁶ Although not able to establish conclusively that the assassination plot was ordered by Saddam Hussein or the head of Iraqi intelligence, the CIA remained convinced that Iraqi intelligence was involved.²⁷

20. Douglas Jehl, *U.S. Defers Response to Iraqis' Plot Against Bush*, N.Y. TIMES, June 8, 1993, at A13. Kuwaiti evidence has proved unreliable in the past. During the Gulf War, an adolescent Kuwaiti girl testified before Congress that Iraq had removed babies from incubators in Kuwaiti hospitals. Journalists and human rights groups have questioned the accuracy of her testimony, noting that the girl turned out to be the daughter of Kuwait's ambassador to the United States. Hersch, *supra* note 18, at 81.

21. See Douglas Jehl, *U.S. Convinced Iraqi Saboteurs Plotted to Kill Bush*, N.Y. TIMES, May 8, 1993, § 1, at 5. Kuwait arrested 16 people, including 11 Iraqi nationals. *Id.*

22. Ibrahim, *supra* note 7. Wali al-Ghazali claimed, "They told me to kill Bush." Jehl, *supra* note 21. The ringleader, Raad al-Assadi, maintained that he did not know that Bush was the target. *Id.*

23. U.N. SCOR, 48th Sess., 3245th mtg. at 4, U.N. Doc. S/PV.3245 (1993).

24. Jehl, *supra* note 20.

25. Jehl, *supra* note 14.

26. *Id.*

27. In fact, administration officials indicated that the attack was limited because of the lack of direct evidence linking the plot to Hussein. See Jehl, *supra* note 14.

Information from the alleged assassins constituted a significant part of the U.S. investigation. After allegedly aborting the assassination plan the suspects were found wandering in the desert by Kuwaiti authorities.²⁸ FBI and CIA agents questioned the suspects on at least two occasions in April and May of 1993,²⁹ after the leaders of the plot had confessed to the Kuwaiti authorities.³⁰ The intervention by these U.S. agencies was prompted by the concern that the suspects' confessions to the Kuwaitis had been extracted by torture.³¹ However, the FBI found no evidence of coercion or physical torture.³²

Interviews with the suspects led the CIA to conclude that the group was amateurish,³³ although the agency believed that at least one suspect was familiar with the Iraqi intelligence structure in Basra.³⁴ The alleged assassins never came close to their goal of placing a bomb near Kuwait University during the former President's visit.³⁵ However, neither the CIA nor the FBI discounted the Kuwaiti assessment that these suspects were part of an Iraqi-backed assassination plot. Rather, administration officials contended that it was conceivable that Iraq deliberately enlisted the aid of amateurs. Iraq would have expected that the amateurs were more likely to be killed during the attempt on former President Bush's life, thereby foreclosing the probability of discovery of Iraq's involvement. The lack of conclusive evidence of Iraqi involvement would have enabled Saddam Hussein to test the resolve of the U.S. government without directly challenging the "No Fly Zones," harassing the Kurds, and

28. Hersh, *supra* note 18, at 89.

29. Youssef Ibrahim, *Suspects' Haste a Puzzle in Kuwait Trail*, N.Y. TIMES, June 13, 1993, §1, at 22.

30. See Jehl, *supra* note 21.

31. See Jehl, *supra* note 14. A German news agency reported that one suspect had been harshly beaten after his arrest. He signed a confession but proclaimed his innocence on the witness stand. During interviews with U.S. officials, the suspect reported that he had been beaten. His attorney told U.S. officials that suspects were routinely beaten by Kuwaiti police. Hersh, *supra* note 18, at 90.

32. Hersh, *supra* note 18, at 84. The FBI did not conduct medical tests on the suspects to determine whether or not they were tortured. *Id.* at 90.

33. For example, one suspect, who had been recruited in early April for the mission, had been a male nurse in An Najaf, Iraq. Another suspect had been the owner of a coffee shop in Basra, Iraq. *Id.* at 91.

34. *Id.* at 92.

35. The bomb-rigged cruiser was found by Kuwait police outside of Kuwait City. Scott Baldauf, *Defendants in Kuwait Deny Conspiracy in Trial of Attempt of Bush's Life*, CHRIST. SCI. MONITOR, July, 1993, at 7.

stalling U.N. inspectors.³⁶ Moreover, if they managed to survive and were caught, these amateurs would not be able to give the U.S. authorities any significant information on Iraqi intelligence activities.³⁷

The most important finding derived from the investigation by the CIA and FBI was the similarity between the bomb recovered in Kuwait³⁸ and other Iraqi bombs used in the past.³⁹ National Security Advisor Anthony Lake claimed that the soldering method and wiring of the Kuwait University bomb bore an Iraqi "signature."⁴⁰ Other analysts, however, have questioned the credibility of this evidence. Seymour Hersh interviewed several bomb experts, some of whom testified that it was impossible to identify signature traits in bombs of this nature, because the devices in question were made of routine electronic parts.⁴¹ In response, other bomb experts certified that distinguishing characteristics could be identified in the bomb, but that the evidence of these characteristics had not been released to the public for security reasons.⁴²

The lack of publicly available information prompted administration critics to create alternative theories as to why the administration acted as it did. Hersh claims the administration was driven to take quick and strong action because it feared that the results of the FBI's investigation into the assassination plot would leak to the press.⁴³ A

36. See *supra* notes 6-8 and accompanying text.

37. Hersh, *supra* note 18, at 92.

38. The bomb was rigged in a Toyota land cruiser. Jehl, *supra* note 14.

39. For example, Iraqi devices found in Turkey during the Gulf War. See Ibrahim, *supra* note 7.

40. Hersh, *supra* note 18, at 84.

41. For instance, a photograph of the remote control mechanism displayed before the Security Council actually showed a common commercial item that bore no specific characteristics. One of the experts interviewed by Hersh, Donald L. Hansen, served 28 years on the bomb squad at the San Francisco Police Department and is now an instructor at the State Department's school for foreign police officers. He concluded that the devices shown by the White House were generic and lacked the unique attributes necessary for a signature. *Id.* at 85.

42. Hersh cites an unnamed analyst now working for the U.S. Government. This analyst was convinced that Iraq was behind this plot because the components of bombs recovered in Kuwait and other known Iraqi bombs were similar. He stated that there was other information which was not made public for fear of alerting the Iraqis to what the U.S. government knew. *Id.* at 86, 88. This theory was supported by the chief of the FBI's counterterrorism section Neil Gallagher, who stated "[w]hat was made public was not the best case. There are other photographs." *Id.* at 88.

43. Hersh claims that the administration feared that New York Times columnist William Safire would have the report within days after its release. *Id.* at 80. The Wall Street Journal anticipated the coming of the FBI report with the headline on June 23rd: "For the President, It's Decision Time on Attacking Iraq." The article spoke of a confidential report that Clinton

leak of the FBI report and the subsequent failure of the United States to respond would have weakened the country's international stature. For example, Saudi Arabia apparently advised a strong U.S. action on grounds that, "if people think they can get away with this, you'll [the United States] have no credibility in the Middle East."⁴⁴ Hersh posits that Kuwait intentionally misled the United States regarding Iraq in order to prevent a reconciliation between the two countries.⁴⁵

It appears that the administration did not weigh its policy options very long, despite its investigation into the assassination plot. President Clinton received the joint CIA and FBI report regarding the investigation on June 24, 1993. Both the Pentagon and the CIA argued that a state conspiracy against the life of a former President required forceful action against the Iraqi government.⁴⁶ Senior administration officials further indicated that the Department of Justice (DOJ) and the CIA had no doubts that Iraqi intelligence had conceived an assassination plan against former President Bush.⁴⁷

A senior administration official claimed that after the evidence was presented, "there was absolutely no question about whether to respond."⁴⁸ On June 25, President Clinton made the decision to bomb the Iraqi intelligence headquarters.⁴⁹ The President claimed that there was no prospect for a peaceful solution. Based upon Iraq's disregard for international law, the administration felt that no diplomatic or economic measures could deter Iraq from attempting further assassinations in the future.⁵⁰

While the circumstantial evidence tying Iraq to the assassination attempt was sufficient to justify the administration's decision, the unresolved factual issues in the administration's investigation present problems for a legal evaluation of the raid. Although the issue of the level of proof needed for a legally valid military strike is one consideration in evaluating whether the raid was justifiable, more interesting is the tension that exists between national security

would receive in coming days. *Id.* at 83.

44. *Id.* at 81-82 (citing Martin Indyk, senior director of the National Security Council Division of Near East and South Asian Affairs).

45. *See id.* at 81-83.

46. Douglas Jehl, *U.S. Cites Evidence in a Plot on Bush*, N.Y. TIMES, May 9, 1993, § 1, at 9.

47. *See Jehl, supra* note 14.

48. *See Jehl, supra* note 46.

49. *See Ifill, supra* note 10, at 12.

50. Elaine Sciolino, *Clinton Overstates Impact of Raid, His Aids Warn*, N.Y. TIMES, June 29, 1993, at A6.

concerns as a legitimate basis for retaliation and the need for international accord in enforcement actions. The administration held back information in its public responses and post-action statements to the Security Council, citing national security concerns. Although these concerns may be valid, they represent a major obstacle to an effective international review of the raid. It is simply more difficult to mount an effective review if evidence is missing. In the present state-centered international order, such an obstacle, however, may be inevitable.

III. LEGAL ASPECTS OF THE RAID ON BAGHDAD

The legal validity of the U.S. raid is questionable because of the strike's unilateral nature and the lack of U.S. coordination with the United Nations. However, the United States justified the right to use unilateral force on grounds that the bombing was a defensive reaction in response to an attack on the United States.⁵¹ Such defensive action is, as the United States suggests, sanctioned under article 51 of the U.N. Charter.⁵²

Unilateral military actions engender a wide range of legal questions. Forceful means used unilaterally must be defensive and accepted as such by the international community. Furthermore, the responding nation's actions must be seen in the context of historical state practice to similar threats. The following parts of this Note address these issues.

A. The Security Council Meeting of June 27, 1993

In accordance with article 51, President Clinton called for an emergency meeting of the Security Council to report on the Iraqi

51. *Clinton's Address: Message is "Don't Tread on Us,"* N.Y. TIMES, June 27, 1993, § 1, at 13. President Clinton asserted that the attempted Iraqi plot was in retaliation for President Bush's actions as president. Thus, it was an attack on the American people. The President concluded, "[w]e could not . . . let such action against our nation go unanswered." *Id.* The President cited four specific bases for military action. First, President Clinton stated that by replying to the threat to kill a former leader, the administration was protecting U.S. sovereignty. Second, the raid was an attempt to deter those, such as Saddam Hussein, who were engaged in state-sponsored terrorism. Third, the President promised to "work to head off emerging threats." Concomitant to deterring terrorism, the President aimed to prevent further violence against Americans. Finally, in response to Iraq's repeated violations of international law, the raid on Baghdad attempted to enforce a norm of civilized behavior amongst nations. *Id.*

52. *Ifill, supra* note 10. Article 51 is the Charter's self-defense provision. It allows states to use force in response to an "armed attack." U.N. CHARTER art. 51.

provocation and the subsequent U.S. attack against Iraq.⁵³ At this meeting U.S. Ambassador to the United Nations, Madeleine Albright, did not ask the Council for formal approval of the U.S. action.⁵⁴ Instead, the United States used the session as an opportunity to present evidence of the Iraqi assassination plot.⁵⁵ Accordingly, Ambassador Albright offered evidence of Iraqi complicity in the attempted attack on former President Bush, including evidence concerning the origin of the bomb.⁵⁶ Ambassador Albright compared large photographs of car bombs and their circuitry known to have been used by Iraqis in earlier attempted terrorist attacks with evidence of the bomb used in this situation. The Ambassador also cited FBI findings that remote control firing mechanisms, plastic explosives, blasting caps, and circuitry and wiring in the Kuwait University bomb were of the type found only in devices used by Iraqi terrorists.⁵⁷

Ambassador Albright argued that nations are permitted to make certain assumptions under the circumstances of an assassination attempt on a former leader. Specifically, she argued that member states may regard an attack against a former leader as an attack against the state itself, and react accordingly.⁵⁸ Thus, the attempted attack on former President Bush, as an attack on the United States, gave the United States the right to respond directly under article 51.⁵⁹ In presenting the U.S. position, the ambassador also emphasized the importance of forcing a nation to obey international law. She stated, "[w]e ignore a crime of this magnitude at our collective peril as members of an international society that seeks to uphold the rule of law."⁶⁰

53. See Hersh, *supra* note 18, at 83-84. Article 51 requires that self-defense measures "shall be immediately reported to the Security Council." U.N. CHARTER art. 51.

54. U.N. SCOR, 48th Sess., 3245th mtg. at 3, U.N. Doc. S/PV.3245 (1993).

55. Ambassador Albright explained the context in which the U.S. action took place, citing acts of terror by Iraq against U.N. convoys and aid workers in Iraq. *Id.* at 7. The ambassador further asserted that Iraq repeatedly violated Security Council resolutions. *Id.* at 8.

56. *Id.* at 4-6. Iraqi Ambassador Hamdoon claimed the plot to assassinate Bush was a fabrication of Kuwaiti government. *Id.* at 11.

57. *Id.* at 4-5.

58. *Id.* at 3.

59. *Id.* at 6.

60. *Id.* at 9.

B. International Reaction

The majority of Security Council members accepted the U.S. position that the raid was a justified act of self-defense.⁶¹ Although this acceptance may be explained by the disparity in political power between the United States and Iraq, it is nonetheless of importance in establishing whether the United States complied with international law.⁶² Many members cited the evidence presented to them as a reason for their support.⁶³ Great Britain, in particular, sought to place the U.S. raid in context, pointing to Security Council Resolution 687 of 1991⁶⁴ in which Iraq pledged to cease its practice of state terrorism.⁶⁵

Governments supporting the U.S. action—outside of the Security Council—justified the Baghdad raid, under international law, as either a necessary response to terrorism or as an unavoidable result of a threatened assassination. British Prime Minister John Major termed the action a “justified act of self-defense” because of the intolerable situation created by a threat against former President Bush’s life.⁶⁶ Masamichi Hanabusa, Chief Spokesman of the Japanese Foreign Ministry, stated, “Japan is of the view that there existed an unavoid-

61. See, e.g., statement of the ambassador of the Russian Federation, Mr. Vorontsov, U.N. SCOR, *supra* note 54, at 22. The only nation critical of the U.S. action was China. Ambassador Li Zhaoxing stated that China would not endorse any action that aggravated tension in the region. *Id.* at 21.

62. One measure of an act’s compliance with international law is its acceptance by other nations as legal. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1986) (“For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation.”).

63. The French representative cited the importance of the evidence laid before the Council. See statement of Ambassador MÉRIMÉE, U.N. SCOR, *supra* note 54, at 13. The Japanese ambassador noted compelling evidence of Iraqi aggression. Japan saw an “unavoidable situation” in which the United States had to act. See statement of Ambassador Hatano, *id.* at 16. Brazil indicated the clear evidentiary link with Iraq as a reason for supporting the U.S. action. *Id.* at 18. New Zealand stated that the “professionalism” of U.S. law enforcement agencies lent particular credibility to Ambassador Albright’s presentation. New Zealand Ambassador Keating claimed that any country faced with this sort of act “would feel obliged to consider responding with force.” See *id.* at 23.

64. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. at 9, U.N. Doc. S/RES/687 (1991). *Inter alia*, this resolution required “Iraq to inform the Security Council that it will not commit or support any act of international terrorism . . . and to condemn unequivocally and renounce all acts, methods and practices of terrorism . . .” *Id.* at ¶ 32.

65. U.N. SCOR, *supra* note 54, at 22.

66. Chris Moncrief, *Major Gives Full Backing for Attack on Baghdad*, F.B.I.S. (WEU-93-122), June 28, 1993, at 9.

able situation where the U.S. could not but take the recent action."⁶⁷ Citing article 51, Belgian Foreign Affairs Minister Willy Claes maintained that "retaliatory measures were justified" since the U.S. government had sufficient evidence to implicate Iraq in the assassination plot.⁶⁸ German Chancellor Helmut Kohl labelled the action "a justified reaction to a detestable attempted act of terrorism."⁶⁹

Nations critical of the raid were less concerned with international law than with a perceived double standard. For example, several Islamic nations were unconvinced by U.S. attempts to rationalize the raid. If the raid was in response to Iraqi transgressions of international law, the actions were a dramatic departure from previous U.S. responses to similar situations in other parts of the world. As these nations pointed out, the United States showed no inclination to bomb Serbia despite Belgrade's extreme obstinacy in the face of U.N. resolutions.⁷⁰ In fact, Turkey's Prime Minister Tansu Ciller spoke of the attack as a precedent for action against Serbia.⁷¹ Egypt's Foreign Minister Amr Musa also expressed the hope that the United States would be as firm toward Bosnia as it had been toward Iraq.⁷²

67. *Japan Offers Tepid Support*, N.Y. TIMES, June 28, 1993, at A6. This somewhat lukewarm endorsement of the attack was matched by French Foreign Minister Alain Juppe. He claimed that "[K]illing a former head of state is something which deserves a reaction and a strong reaction." See *French Ministers, Politicians View Raid on Iraq*, LE MONDE (Paris), June 29, 1993, at 5 translated in F.B.I.S. (WEU-93-122), June 29, 1993, at 24. Neither Japan nor France expressed the opinion that the action was either justified or unjustified as a means of self-defense.

68. *Claes: Baghdad Attack "Clear Signal" to Serbia*, F.B.I.S. (WEU 93-126), July 2, 1993, at 10. Foreign Affairs Minister Claes also cited worldwide frustration with the Iraqi leader: "Saddam has evidently not learned any lessons from the past." *Belgium "Provisionally" Approves U.S. Attack*, DE MORGEN (Brussels), June 28, 1993, at 2, translated in F.B.I.S. (WEU-93-126), July 2, 1993, at 10. In line with this notion of enforcing international law through force, Claes mentioned the raid as a precedent for dealing with Serbian violations of law in Bosnia. *Id.*

69. *Kohl: U.S. Attack on Baghdad Justified*, F.B.I.S. (WEU-93-122), June 28, 1993, at 11. Italy also considered the U.S. reaction justified in fighting terrorism. See *Foreign Ministry Supports U.S. Attack on Iraq*, F.B.I.S. (WEU-93-122), June 28, 1993, at 34. In Australia, Foreign Minister Gareth Evans called the bombing an "understandable" and proportionate reaction to terrorism. See *Minister: U.S. Attack on Iraq 'Understandable'*, F.B.I.S. (EAS-93-122), June 28, 1993, at 71.

70. See Youssef Ibrahim, *Islamic Nations See Double Standard in U.S. Raid*, N.Y. TIMES, June 29, 1993, at A6.

71. *Ciller Addresses Party on U.S. Raid, Azerbaijan*, (TRT Television Network, Turkey, June 29, 1993) translated in F.B.I.S. (WEU-93-124), June 30, 1993, at 40.

72. *Musa Comments on U.S. Air Strike on Baghdad*, F.B.I.S. (NES-93-122), June 28, 1993, at 13.

C. Unilateral as Opposed to Collective Security

Some foreign leaders indicated a concern with the United States's assertion of a unilateral right to employ force. The Clinton administration could have sought Security Council approval prior to the bombing, rather than pursuing a unilateral action and then making after-the-fact justifications for the action.⁷³ For example, Canadian Prime Minister Kim Campbell attempted to limit the precedential value of the U.S. action by stating that the raid was "justifiable under the context," but that the perceived need by the United States for a unilateral response demonstrated the inability of the United Nations to deal with the type of threat posed by Iraq's assassination attempt.⁷⁴ Prime Minister Campbell went on to argue that without reforms, powerful nations would have an ability to employ unilateral measures and then justify such measures afterwards.⁷⁵ The French newspaper *Le Monde* considered more expeditious reasons for avoiding the Security Council, suggesting that the action was taken without U.N. support because the connection to a failed assassination attempt taking place two months earlier would not be convincing.⁷⁶

One German columnist perceived a special place in international law for unilateral action, holding such action to be as legitimate as multilateral measures. Josef Joffe questioned the Security Council's ability to examine objectively the threat from Iraq: "The five big shots in the Security Council are not 'lay assessors' who unbiasedly weigh justice against injustice and do so as unselfconsciously as the judicial authorities. They are states that first and foremost pay tribute to . . . [their] very own interests."⁷⁷

73. Using U.N. procedures before taking legally justified self-defense actions is not compelled by article 51.

74. Campbell: *U.S. Strike 'Justifiable,' UN Needs Reform* (Montreal Radio Canada International, June 28, 1993), available in F.B.I.S. (WEU-93-125), July 1, 1993, at 13.

75. *Id.*

76. *An Eye for an Eye*, LE MONDE (Paris), June 29, 1993, at 1, translated in F.B.I.S. (WEU-93-123), June 29, 1993, at 26.

77. Josef Joffe, *Does the 'Law of the Jungle' Prevail?*, SUEDEUTSCHE ZEITUNG (Munich), June 29, 1993, at 4, translated in F.B.I.S. (WEU-93-124), June 30, 1993, at 1; accord Jacques Jacquet-Francillon, *Warning Shot*, LE FIGARO, (Paris) June 28, 1993, at 1, translated in F.B.I.S. (WEU-93-123), June 29, 1993, at 25 ("it was high time that someone took the trouble of firing a new warning shot to let Saddam Husayn[sic] and others know that state terrorism could not go unpunished forever. If Washington had not made that decision, who would? The Community in Brussels?").

Perhaps the central reason for bypassing the Security Council was the belief that the protection of a nation's past or present leaders is an inherent element of sovereignty. Ultimately, the decision to respond to a threat against a nation's leader must come from the nation itself. Had the United States approached the Security Council with the request for action, and been refused, the Clinton administration would have been faced with the untenable choice between acting unilaterally in the face of international opposition or acquiescing and allowing Saddam Hussein to escape liability.⁷⁸ Seeking pre-strike approval—in its essence, collective security—undermines the argument that the protection of a nation's leaders is a unilateral right of sovereignty. Beyond these issues and from a practical perspective, proceeding to the Security Council first would have alerted the Iraqis to the raid—thereby frustrating both the effectiveness and deterrence aspects of the bombing.

D. State Practice with Regard to Assassinations

State-sponsored attacks on another state's leaders violates international law. Professor William O'Brien of Georgetown University asserts that "[the] general practice of belligerents . . . raises a blanket moral presumption against assassinations."⁷⁹ This moral factor has been endorsed in numerous international and domestic pronouncements. For example, the U.N. General Assembly explicitly states that measures should be taken to prevent assassinations of diplomatic personnel and to ensure prosecution of such crimes.⁸⁰ In 1981, U.S. President Jimmy Carter signed an executive order prohibiting assassinations by persons acting on behalf of the U.S. government.⁸¹

Actions in response to assassination attempts are driven by the specific geopolitical circumstances of the nations involved. For example, South Korea responded to North Korea's 1983 attempt on the life of South Korean President Chun Doo Hwan with great

78. It is conceivable that China would have vetoed an effort by the United States to seek Security Council approval for forceful action against Iraq. Others may have been hesitant to give approval as well because of the effort on the part of the Security Council to have Iraq grant access to U.N. inspectors.

79. WILLIAM V. O'BRIEN, *LAW AND MORALITY IN ISRAEL'S WAR WITH THE PLO* 168 (1991).

80. *The Convention on Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents*, G.A. Res. 3166, U.N. GAOR, 28th Sess., Supp. No. 30, UN Doc A/9030 (1973), 28 U.S.T. 1975.

81. Exec. Order No. 12,333, §2.11, 3 C.F.R. 200 (1981), reprinted in 50 U.S.C. § 401 (1988).

restraint, reflecting the tenuous political climate between the two countries. Although the bomb used in the attempt killed nineteen people, including two close advisors to the President and four cabinet ministers, South Korea refrained from directly responding.⁸²

South Korea did openly blame the North for the attack.⁸³ President Chun claimed that it was a "carefully premeditated plot" on his life.⁸⁴ South Korea also made vague threats of reprisal against North Korea.⁸⁵ However, and perhaps in response to U.S. admonitions of restraint and fearing that retaliation would lead to a second Korean war, South Korea did not respond with force.⁸⁶

South Korea subsequently sought worldwide sanctions against the North,⁸⁷ and sent a delegation to the United Nations to discuss how to prevent further terrorist acts.⁸⁸ Furthermore, in response to the attack, Burma severed diplomatic relations with North Korea and submitted a report to the United Nations one year later, implicating North Korea in the bombing.⁸⁹

IV. THE LAW OF SELF DEFENSE

Put simply, self-defense exists where a state meets an unlawful use of force with lawful force.⁹⁰ Theories of self-defense have attempted to define the scope of the right to use force unilaterally. This section presents both customary international law and U.N.

82. Clyde Haberman, *Bomb Kills 19, Including 6 Key Koreans*, N.Y. TIMES, Oct. 10, 1983, at A1. President Chun escaped death only because he was delayed in traffic and did not reach the Mausoleum until after the bomb exploded.

83. *Inquiry by Seoul Blames North for Bombing*, N.Y. TIMES, Oct. 16, 1993, at A4. After an investigation, the Burmese authorities sentenced two North Korean army officers to death for the incident. North Korea has always denied its involvement in the bombing. *Burma Decrees Death for 2 North Koreans*, N.Y. TIMES, Dec. 10, 1983, § 1, at 7.

84. *Seoul Condemns Bombing as Plot by North Korea*, N.Y. TIMES, Oct. 11, 1983, at A1.

85. *Id.* at A12.

86. Bernard Gwertzman, *U.S. Urges Seoul to Exercise Restraint on Killings*, N.Y. TIMES, Oct. 13, 1983, at A8. The Reagan administration seemed to think that North Korea was responsible. *Id.* The bombing followed a pattern of North Korean assassination attempts. In January 1968, North Korean agents had been caught near the Blue House (the presidential residence in Seoul) on an assassination mission. *Id.*

87. THE KOREA TIMES (Seoul), Nov. 8, 1993, at 1, reprinted in *Worldwide Sanctions Sought Against North*, F.B.I.S. (South Korea), Nov. 8, 1983, at E4-5. Sanctions never materialized.

88. TONG-A ILBO (Seoul), Dec. 1, 1983, at 1, translated in *Government to Seek U.N. Support Against N. Korea*, F.B.I.S. (South Korea), Dec. 1, 1983, at E1.

89. YONHAP (Seoul), Oct. 3, 1984, reprinted in *Report Submitted on Rangoon Bombing to UN*, F.B.I.S. (Burma), Oct. 3, 1984, at G1.

90. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 165 (1988).

doctrines of self-defense and analyzes their applicability with regard to terrorism in general and the Baghdad raid in particular.

A. Customary International Law

The customary international law of self-defense derives from the *Caroline* incident.⁹¹ As a threshold matter, self-defense may be used only against states that have breached international law.⁹² The *Caroline* guidelines further require, "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."⁹³ That is, the *necessity* of self-defense "presupposes the absence of any alternative means of protection for certain essential rights of the state which are endangered."⁹⁴ The danger to these essential rights must be both serious and imminent.⁹⁵ Finally, only "reasonable" actions may be taken in self-defense, restrained by the necessity of protecting the state's essential rights and thus proportional⁹⁶ to the danger at hand.⁹⁷ The essence of the customary law of self-defense is that it should be protective, not punitive in character. It should thus not serve as a justification for the aggressive use of force.⁹⁸

91. The *Caroline* was a ship used by Canadian rebels in an insurrection against Britain in 1837. Although the United States maintained neutrality during the British-Canadian conflict, it found its position compromised by the activities of the Canadian ship *Caroline*. The ship was used to travel between rebel camps along the U.S.-Canadian border. The ship was destroyed by British soldiers while on the New York side of the Niagara River. In a series of letters to the British Government, Secretary of State Daniel Webster articulated what became the common law interpretation of self-defense. See INTERNATIONAL LAW 1221-22 (Barry Carter & Phillip Trimble eds., Little, Brown and Company) (1991).

92. Professor Bowett explained, "The essence of self-defence is a wrong done, a breach of a legal duty owed to the state acting in self-defence." D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 9 (1958).

93. Letter from Secretary of State Daniel Webster to British Ambassador Fox (Apr. 24, 1841), reprinted in Carter & Trimble, *supra* note 91, at 1219.

94. BOWETT, *supra* note 92, at 269.

95. *Id.* The stipulation of immediacy has come under heavy criticism in the modern context of terrorist violence. Since the victim states are often unsure of the identity of the attacker (or whether the attackers were state-supported), they must have time to examine their potential response. More so than in a clear, isolated, state-to-state border incident, political questions emerge in countering a continuous terrorist threat. See, e.g., DINSTEIN, *supra* note 90, at 209-10.

96. Secretary Webster's concept of necessity implied a proportional response. He wrote that "[t]he act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it." Letter from Secretary of State Daniel Webster to British Ambassador Fox (Apr. 24, 1841), reprinted in Carter & Trimble, *supra* note 91, at 1219.

97. See BOWETT, *supra* note 92, at 269.

98. See *id.*

History manifests a concern about expanding the idea of self-defense beyond the notion of a protective use of force. Professor Ian Brownlie argues that defining self-defense punitively would be a step backwards in the development of international law to a time when nations could use force to enforce various legal rights. Before 1920 self-defense was synonymous with self-preservation, the right to use force to redress wrongs.⁹⁹ States could use force in self-defense for a variety of reasons, not just in response to belligerent aggression.¹⁰⁰

Self-preservation is distinguished from self-defense in that the traditional claim of self-preservation was not premised upon a state being the victim of a legal breach.¹⁰¹ According to Brownlie, any expansion of the definition of self-defense to include reactions other than responses to armed aggression returns to the language of self-preservation. Such a regression would be disastrous: "It can hardly be possible to select particular parts of the old doctrines of necessity, self-preservation, or intervention and attach them to a category of self-defence which has evolved in the context of considerable changes in the attitude of the law towards the use of force."¹⁰² In the period of 1920-1929 the use of force as a legitimate instrument of foreign policy faded.¹⁰³ Professor Brownlie states, "[I]n state practice both before and after the Second World War, resort to force by virtue of the right of self-defence . . . [was] almost without exception associated with the idea of reaction against the use of force."¹⁰⁴

B. The Justification for the Baghdad Raid Under Customary International Law

Contrary to accepted norms of customary international law, the administration's legal rationale seems to include elements of punishment as well as protection. Indeed, despite the customary international law norm that actions in self-defense rest on principles of protec-

99. See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 42-45, 240 (1991).

100. *Id.* at 240.

101. *Id.*

102. *Id.* at 255; see also DINSTEN, *supra* note 90, at 172-73 (citing the *Nicaragua* decision, *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27) (Merits), in which the International Court of Justice used the concept of an "armed attack" to restrict the right of self-defense in customary international law).

103. BROWNLIE, *supra* note 99, at 251.

104. *Id.* at 255.

tion rather than punishment, all actions in self-defense combine the two.¹⁰⁵

The Clinton administration's action was protective in that it was aimed maintaining credibility in the face of a serious threat to U.S. political independence and punitive because it came two months after the assassination plan was aborted. It was *both* protective and punitive in seeking to enforce a norm of international law.¹⁰⁶ In a narrow sense, military action was not necessary to protect either the United States or former President Bush from an immediate danger. An expanded examination reveals the strike's plausible necessity.

First, protection of a nation's elected officials is an essential right of sovereignty.¹⁰⁷ Second, the assassination attempt occurred in the extended wake of a war with Iraq. Further, since the war's end, Iraq had continually interfered with U.N. inspectors and threatened force against its own population. Passivity on the part of the United States would have merely encouraged Saddam Hussein to continue to test the resolve of the international community, possibly through another assassination attempt. In this atmosphere, searching for a peaceful solution could have been perceived as pointless. There did not seem to be any reasonable basis for negotiating a dispute concerning an aggressor's threat to kill a former U.S. president.

The customary international law criterion of immediacy presented a problem for the administration. This specific assassination attempt had been aborted and no longer presented a threat. Professor Yoram Dinstein, however, contends that a time lag between action and reaction should not deprive a defensive use of force of its protective character.¹⁰⁸ According to Dinstein, the "necessity" criterion is sufficient for determining whether there exists a present danger to the responding state significant enough to warrant the use of force. Requiring an absolute need for immediacy limits the involvement of the political branches. The U.S. raid, in fact, serves as an example of the propriety of dispensing with the immediacy prong altogether when contemplating responses to terrorism. Considering the initial doubts

105. See *infra* notes 191-196 and accompanying text.

106. Assassination attempts contravene U.N. Charter provisions prohibiting the use of force, U.N. CHARTER art. 2, ¶ 4, and mandating the peaceful settlement of disputes. *Id.* at art. 2, ¶ 3.

107. U.N. CHARTER art. 2, ¶ 4.

108. DINSTEIN, *supra* note 90, at 209. In fact, Secretary of Defense Les Aspin stated that the time lag between the attempted assassination and the U.S. response was due to the joint FBI-CIA investigation. *Pentagon Statements on the Missile Attack*, N.Y. TIMES, June 27, 1993, at A12.

about Iraqi culpability, the U.S. decision to delay its response in order to conduct a thorough investigation was proper.¹⁰⁹ Whereas one purpose of the "immediacy" provision is to deter an indeterminate use of force, the investigative delay in this situation helped to ensure a precise use of force.

One factor that weighs in favor of the Clinton administration's self-defense justification was the nature of the U.S. response to the Iraqi aggression. The responding operation was proportionate to the Iraqi threat and aimed at a target with a direct connection to the plot against former President Bush.¹¹⁰ Furthermore, American goals were also aimed at deterrence—to damage Iraq's ability to carry out future acts of terrorism.¹¹¹

However, the Clinton administration failed to specify the future threats that were to be deterred by the raid. Merely asserting that the attack was aimed at deterring future threats does not add credibility to the U.S. position. Unspecified future threats do not constitute "aggression" in the sense that a manifest assassination plot is aggressive. Meeting indefinite future threats with force comes too close to the line of a purely punitive use of force. Allowing military actions against unspecified future threats encourages the unilateral use of force and may potentially eradicate the need for multilateralism. The administration, despite its concern for national security, should have specified the additional threats which the raid meant to deter. It is precisely the indefinite nature of future threats that necessitates an objective international review of the responding state's evidence.

C. The U.N. Charter

The provisions of the U.N. Charter regulating the use of force should be interpreted in light of the goals of the United Nations. One central goal is to remove the need for states to use war as an instrument of foreign policy by promoting the peaceful settlement of disputes.¹¹² The United Nations was originally envisioned as a

109. There are certain benefits to an "immediacy" prong. This incident manifests the ability of the press to put pressure on a president to take action. The longer the time lag between the provocation and the action, the greater the opportunity for public pressure to build, notwithstanding legal considerations.

110. U.N. SCOR, *supra* note 54, at 6. General Colin Powell explained that the Intelligence Headquarters was selected because "it [was] the closest thing related to the provocation." *Raid on Baghdad; Pentagon Statements on the Missile Attack*, N.Y. TIMES, June 27, 1993, § 1, at 12.

111. U.N. SCOR, *supra* note 54, at 6.

112. See generally U.N. CHARTER art. 1.

means through which the community of nations would ensure international security. Collective action was to replace unilateral responses to aggression.

At the inception of the United Nations there was a widespread feeling that these goals were achievable. The essential goal was to give this global organization a virtual monopoly on the use of force.¹¹³ After the experience of the two World Wars, a belief existed that modern technology had made war so destructive that the use of force had become an unrealistic policy option.¹¹⁴ Consequently, the creation of a collective security system that could deter or suppress threats to the peace seemed not only desirable, but necessary.

The United Nations provides a centralizing mechanism for the application of international law.¹¹⁵ In particular, two provisions of the U.N. Charter work in tandem to prohibit the aggressive use of force and ensure the peaceful resolution of disputes. Article 2(3) mandates the peaceful resolution of disputes, stating: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."¹¹⁶ Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."¹¹⁷

The absolute language of these two Charter provisions is tempered by later provisions. For situations in which a state must defend itself from aggressive action by other states, article 51 recognizes that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council

113. O'BRIEN, *supra* note 79, at 88; see also U.N. CHARTER art. 43.

114. O'BRIEN, *supra* note 79, at 87-88.

115. BOWETT, *supra* note 92, at 6. With a centralizing mechanism, states should not be able to act as the sole judge and jury of their actions.

116. U.N. CHARTER art. 2, ¶ 3.

117. U.N. CHARTER art. 2, ¶ 4. Specifically in regard to terrorism, the General Assembly clarified member's obligations: "Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State . . ." *The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, Oct. 1970, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123, U.N. Doc A/8028 (1971).

has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹¹⁸

Thus, article 51 explicitly recognizes and legitimizes the use of self-defense as right of sovereign nations.

Article 51 contemplates two phases for reviewing the use of force. At the first stage, a state decides for itself whether or not to employ force. Ideally, this subjective decision is tempered by the considered and disinterested judgement of the Security Council.¹¹⁹ However, Security Council consideration does not preclude the right of a nation to use self-defense. Article 51 specifies the continuation of self-defense rights "until the Security Council has taken the measures necessary to maintain international peace and security."¹²⁰

Interpreters disagree about the conditions in which a state can make the initial determination to use self-defense. The debate centers around two questions: (1) whether the concept of an "inherent" right of self-defense is specifically limited by an "armed attack," and, (2) if so, what constitutes an "armed attack"? The answers to these questions determine whether the administration's self-defense theory represents a departure from generally accepted interpretations of article 51.

Professor D.W. Bowett provides an alternative to traditional notions of self-defense under the Charter. He permits the Clinton administration to avoid altogether the question of whether a failed assassination plot constitutes an armed attack.¹²¹ Under Bowett's thesis, the administration may contend that assassination plots infringe

118. U.N. CHARTER art. 51.

119. DINSTEN, *supra* note 90, at 192-94.

120. U.N. CHARTER art. 51. The preservation of self-defense rights has an adverse effect when a politically powerful nation can delay Security Council consideration of an issue in order to undertake unilateral action according to that state's preserved self-defense rights.

121. Bowett's argument that violations of a nation's political independence may trigger a response in force could potentially grant a legal basis to uses of force in response to non-forcible provocations (e.g. economic embargoes may be said to violate a nation's political independence). A common sense solution would limit forcible self-defense to those situations in which a violent breach of international law occurs. See Bowett, *supra* note 92, at 130, 43, 45, 92.

upon essential rights. Once such rights are violated, the victim state may respond in force, consistent with international law.¹²²

Bowett maneuvers around the definition of armed attack by advocating an expansive view of the self-defense right. He considers the article 51 provision for the inherent right of self-defense to implicate general international law,¹²³ thereby overriding the article 51 limitation of an armed attack.¹²⁴ Professor Bowett's interpretation of article 2(4) does not restrict the customary right of self-defense. This reading is particularly significant because, according to Bowett, the customary right of self-defense is not limited by an armed attack.¹²⁵ Accordingly, states are permitted to respond in force to other forms of aggression besides an armed attack.¹²⁶

Bowett maintains that article 51's focus on aggression in a territorial sense obscures alternative forms of aggression that trigger the right to self-defense. Other interests of states, at least one of which is specified in article 2(4) (the right to political independence),¹²⁷ are as significant as territorial integrity.¹²⁸ In the absence of the peremptory requirement of an armed attack, self-defense is only limited by traditional criteria. The violation of international law provoking a response must be of the same character as an armed attack.¹²⁹

Other commentators disagree with Bowett's interpretation of article 51. Professors Dinstein and Brownlie contend that article 51 uses the armed attack requirement to restrict the right of self-defense, although they differ about what constitutes an "armed attack." Their argument, to the extent of its agreement, rests on the drafters' intent to restrict the use of force. Professor Brownlie considers article 2(4)

122. *Id.*

123. See also Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 919 (1986) (contending that article 51's "inherent" right is an affirmation of customary international law).

124. BOWETT, *supra* note 92, at 184-85. Under this construct, members have those rights under general international law except for those rights which they have specifically given up under the Charter.

125. *Id.* at 188. However, Professor Brownlie contends that by 1945, customary international law allowed use of force only in response to force and thus implicitly limited the use of force to responses to "armed attack." See BROWNIE, *supra* note 99, at 274.

126. BOWETT, *supra* note 92, at 192.

127. Bowett defines political independence as the right to conduct foreign relations. *Id.* at 43, 45. Attempting to murder a president because of actions he took while in office certainly violates this right.

128. *Id.* at 30.

129. For instance, self-defense in protection of political independence depends upon the breach of the duty of non-intervention. *Id.* at 51.

a wide-sweeping prohibition on the use of force and thus, in his view any exceptions would be narrow.¹³⁰ Dinstein argues that any provision for using force under the guise of self-defense should be limited by the plain language of the Charter.¹³¹ Thus in the view of both professors, for the U.S. action against Baghdad to have been valid, the Iraqi assassination attempt must have constituted an armed attack.

Under the Dinstein and Brownlie analyses, the assassination plot, though aborted, could constitute an armed attack. The importance of the Iraqi assassination plot lay in its conception and initiation, not in its final execution. It is not required that an article 51 attack be a large scale military action.¹³² As Professor Dinstein stated, "It would be absurd to require that the defending State should sustain and absorb a devastating . . . blow, only to prove an immaculate conception of self-defense."¹³³ Consequently, when the suspects set off with their bomb-laden land-cruiser, Iraq can be said to have launched an armed attack against the United States.

Furthermore, others have indicated that terrorist incidents of "sufficient gravity" may be classified as armed attacks.¹³⁴ The *Case Concerning Military and Paramilitary Activities in and against Nicaragua* provides support for this view. In 1986 the ICJ held that dispatching armed bands into another state for a particularly "grave"¹³⁵ use of force of "scale and effects" constituted an armed attack.¹³⁶ Similarly, sending a bomb into Kuwait in order to attempt the assassination of a former president of a country is sufficiently "grave" and of appropriate "scale and effects" to qualify under the ICJ's requirements.

It is not necessary that the aggressor state cross the defending state's borders for a terrorist attack to qualify as an armed attack. In considering the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, the ICJ likened the takeover of the U.S.

130. BROWNIE, *supra* note 99, at 424.

131. DINSTEIN, *supra* note 90, at 174-75.

132. *Id.* at 181.

133. *Id.* at 179.

134. See Vernon Cassin et al., *The Definition of Aggression*, 16 HARV. INT'L L.J. 589, 607-08 (1975).

135. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27) (Merits).

136. *Id.* at 103.

Embassy and its staff to an "armed attack."¹³⁷ A strong analogy exists between the role of a former president as an emissary of the United States and the role of an embassy. A U.S. embassy is the official representative of the United States on foreign soil. A former president serves a similar purpose in both representing the United States and pursuing diplomatic relations. In this light, attempting to attack former President Bush on a state visit to Kuwait may be conceptualized as an attack on the United States.

Professor Brownlie, representing the traditional interpretation of article 51, does not support an expansion of the definition of armed attack to terrorist attacks. He fears expanding the permissible use of force under article 51 to such a degree that article 2(4) becomes meaningless.¹³⁸ Brownlie limits the definition of armed attack to situations where "there is a control by the principal, the aggressor state, and an actual use of force by its agents."¹³⁹ Thus, Brownlie characterizes armed attacks as trespasses or invasions,¹⁴⁰ not as terrorist incidents. Applied to the Baghdad situation, an assassination attempt against a former president would not rise to the level of an armed attack. Furthermore, the abortion of the assassination mitigates against classifying this incident as an armed attack. Professor Brownlie contends that, "[it] is a rare instance in which a use of force may be justified although no actual attack has occurred."¹⁴¹

Therefore, the traditional interpretation of article 51 leads to the conclusion that an unsuccessful assassination attempt on a former U.S. president which took place outside of the United States would not be an armed attack. The question remains whether new conditions, unforeseen by the U.N. Charter's drafters, suggest a limited expansion of the armed attack provision in article 51.

D. Terrorism's Effect on the Definition of Armed Attack Under Article 51

Qualifying only those attacks that involve a cross-border transgression as armed attacks manifests an anachronistic conception

137. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 29, 42 (May 24) (Merits).

138. BROWNIE, *supra* note 99, at 274.

139. *Id.* at 373.

140. *See id.*

141. *Id.* at 374. Professor Brownlie offers as an example of a "rare instance" the downing of a bomber thought to be carrying nuclear weapons.

of aggression. Because the U.N. Charter is based upon the state system, traditional forms of state-to-state violence were the drafters' major concerns.¹⁴² The Charter did not comprehend the forms of violence which characterize modern terrorism. As new forms of aggression manifest themselves, the conception of appropriate defenses against such behavior must be expanded. Former Secretary of State Frank B. Kellogg long ago noted the dangers of strict rules of self-defense in an international environment marked by flux. Kellogg stated: "[I]t is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense since it is far too easy for the unscrupulous to mold events to accord with an agreed definition."¹⁴³ Thus, adherence to doctrinal formality serves the interests of the lawless, not the lawful.

Since international law generally reflects states' consensus on legal principles,¹⁴⁴ the pertinent question is whether states consider terrorism the equivalent of traditional forms of aggression.¹⁴⁵ When reacting to the Baghdad raid, many states mentioned the importance of fighting terrorism.¹⁴⁶ Thus, a large segment of the international community seems willing to entertain an expanded definition of "armed attack" which includes state sponsored terrorism targeting national leaders.

Including serious terrorist attacks within the ambit of the armed attack provision serves the interest of stability. Defensive actions against headquarters, facilities, and the terrorists themselves will possibly deter further terrorism by creating an unacceptable cost to aggressors.¹⁴⁷ Terrorist attacks reflect the post World War II trend toward replacing traditional engagement in war with low-level

142. Perhaps the most significant reason for the Charter's restrictions on the permissible use of force was the fear of escalating violence in a nuclear age. Professor Brownlie argued against allowing a wide breadth to use force to protect certain sovereign rights because of the nuclear capability of many states. BROWNIE, *supra* note 99, at 436.

143. Secretary of State Frank B. Kellogg, Address to the American Society of International Law (Apr. 28, 1928), *quoted in* BROWNIE, *supra* note 99, at 236.

144. O'BRIEN, *supra* note 79, at 82.

145. Former Secretary of State George Schultz saw the law not as an obstacle but as an aid against the arbitrary use of force that marks terrorism: "The UN Charter is not a suicide pact. The law is a weapon on our side, and it is up to us to use it to its maximum extent." Thus, "a nation attacked by terrorists is permitted to use force to prevent or preempt future attacks . . ." George Schultz, *Low Intensity Warfare: The Challenge of Ambiguity*, 86 DEP'T ST. BULL. Mar., 1986, at 15, 17.

146. See *supra* notes 66-69 and accompanying text.

147. O'BRIEN, *supra* note 79, at 22.

conflicts.¹⁴⁸ Stability may best be preserved by expanding the self-defense right to proportional responses to low level aggressive force, rather than limiting acceptable defensive use of force to situations of large scale assaults.

Limits on a new standard of self-defense will best be set by nations that encourage an effective international review of self-defense claims.¹⁴⁹ Unfortunately, the recent past leaves very little indication that the Security Council is up to this task.¹⁵⁰

E. The Role of the Security Council as a Reviewing Body

The Security Council's reviewing role is essential to keeping actions taken in self-defense defensive in nature as opposed to aggressive.¹⁵¹ Because "no one state can arrogate to itself the final right to determine unilaterally the question whether another state is in breach of established duties,"¹⁵² a right of self-defense without review by the United Nations defeats the fundamental basis of the Charter.¹⁵³ An international organ must decide whether a "threat to the protecting state's rights exists."¹⁵⁴ If the Security Council is not effective, individual members will step into the vacuum and determine for themselves when to use force.¹⁵⁵

However, the role of the Security Council is not that of a court. It is a political body¹⁵⁶ which deliberates about international political

148. During the years 1964-1993, the PLO-Israeli conflict was an unending series of terrorist and other attacks and Israeli responses. In this environment it was difficult to say what constituted a particular "armed attack." Realistically, a continuing state of low-level war may be a substitute for an "armed attack." *Id.* at 2. The important goal in any system is stability, which may be best achieved through proportional responses to attacks—not by passive defense. *Id.*

149. Notwithstanding political considerations, by not seeking Security Council approval for the Baghdad strike, even after the event, the Clinton administration missed an opportunity to further the development of self-defense law.

150. Witness the problems encountered by the Council in regard to Bosnia, Somalia, and Haiti. See generally *President Bill Clinton Addresses the General Assembly of the United Nations*, Federal News Service, White House Briefing, Sept. 27, 1993, available in LEXIS, NEWS Library, CURNWS File.

151. The International Military Tribunal at Nürnberg noted: "[W]hether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced." Cited in BROWNIE, *supra* note 99, at 239.

152. BOWETT, *supra* note 92, at 262.

153. *Id.* at 273.

154. *Id.* at 260.

155. Georg Schwarzenberger, *The Fundamental Principles of International Law*, 87 *Recueil des Cours d'Academie de Droit International* [R.C.A.D.I.] 195, 338 (1955).

156. See *supra* note 77 and accompanying text.

events involving aggression. Although the Security Council is now undergoing a period of introspection and revision,¹⁵⁷ its actions since inception indicate an inability to serve as an objective body for review.

When considering the use of force through terrorism, the Security Council was unwilling to counter those states whose notions of "justice" excused violence,¹⁵⁸ even though the Western world, upon whose ideals the Charter was based, claimed that aggressive force could not be justified for any reason.¹⁵⁹ For example, Chinese Ambassador Chuang stated: "[T]he violence used by the aggressors and oppressors is unjust, while the violence used by the victims of aggression and the oppressed to resist aggression and win liberation is just."¹⁶⁰ At the same time, the Council was quite prepared, however, to condemn those who took belligerent counteractions against terrorism.¹⁶¹

F. The Bombing of Libya in 1986

The 1986 U.S. military action against Libya is the paradigmatic response of the state to terrorism and an excellent example of what an expanded conception of article 51 would allow. In regard to the Baghdad raid, the bombing of Tripoli reveals a continuity in U.S. thinking about confronting criminal states. Most noteworthy, though, is the generally favorable international reaction to the 1993 Baghdad raid, a factor absent from the atmosphere surrounding President Reagan's attack on Libya seven years earlier.¹⁶²

The United States bombed Libya because of its continuous sponsorship of terrorist attacks.¹⁶³ The immediate impetus for the

157. See *supra* note 151.

158. See William O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 472-73 (1990) (describing the Third World and Communist support for PLO guerilla activities).

159. See *id.* at 478.

160. U.N. SCOR, 29th Sess., 1769th mtg. at 5, U.N. Doc. S/PV.1769 (1974).

161. See generally O'BRIEN, *supra* note 79 (describing the Council's consistent practice of condemning Israeli counterterror actions while ignoring Arab terrorism).

162. The Cuban ambassador compared the Reagan administration to the "Hitler Clique," an outburst that led the French ambassador to publicly rebuke Cuba's representative. See U.N. SCOR, 41st Sess., 2675th mtg. at 38, U.N. Doc. S/PV.2675 (1986) and 2676th mtg. at 4, U.N. Doc. S/PV.2676 (1986). The General Assembly condemned the attack in Cold War terms, regretting the "disinformation campaigns" carried out against Libya. G.A. Res. 41/38, U.N. GAOR, 41st Sess., Supp. No. 51, at 34, U.N. Doc. A/41/51 (1986).

163. Military targets in Libya were bombed. Such targets included air fields and barracks at Tripoli and Benghazi. Gregory F. Intoccia, *American Bombing of Libya: An International*

U.S. action was an explosion at the LaBelle disco in Berlin¹⁶⁴ and a threatened attack in Paris.¹⁶⁵ U.S. intelligence sources alleged that Libya, under the leadership of Colonel Muammar el-Qaddafi, had been involved in these attacks, as well as at least thirty others.¹⁶⁶ The Reagan administration had cautioned Qaddafi, who responded with the disco bombing. The United States felt the necessity to respond, in order to maintain a credible deterrence capability.¹⁶⁷

During the ensuing Security Council debate, the United States argued that Libya's acts of terrorism, as a violation of article 2(4)'s prohibition on the use of force, precluded the country from claiming immunity from a defensive response. The United States argued that its action was an inherently defensive and forceful response under article 51. In support of this position, United States Ambassador to the United Nations, Vernon Walters linked Qaddafi's threats to attack the United States with evidence of past and future terrorist attacks by Libya in order to establish that Libya's actions were a violation of article 2(4).¹⁶⁸ Proving that Qaddafi had a plan of terrorism was crucial, because it lent credence to the view that the U.S. action was motivated by deterrence.

The legal arguments supporting the U.S. position were best expressed by the British Representative to the United Nations, Sir John Thomson.¹⁶⁹ Thomson contended that self-defense includes the right to weaken an opponent.¹⁷⁰ Stating that "state-directed terrorism is in fact war by another name,"¹⁷¹ he supported the U.S. contention that the action against Libya was part of a continuing

Legal Analysis, 19 CASE W. RES. J. INT'L L. 177, 179 (1987).

164. The LaBelle Disco bombing killed 2 U.S. servicemen and wounded 229 persons, including 78 Americans. O'BRIEN, *supra* note 79, at 114.

165. SOFAER, *supra* note 123, at 921. Chancellor Kohl reported to the Bundestag that Libya was responsible for the LaBelle bombing. See BRIAN DAVIS, QADDAFI, TERRORISM, AND THE ORIGINS OF THE U.S. ATTACK ON LIBYA 116 (1990).

166. SOFAER, *supra* note 123, at 921. Prior to the bombing, Libya was suspected of masterminding a plot to kidnap a U.S. ambassador in Africa. An April 6, 1986 explosion near the U.S. embassy in Beirut was thought to implicate Libya as well. See DAVIS, *supra* note 165, at 121.

167. DAVIS, *supra* note 165, at 122. The raid was not an attempt to kill Qaddafi, however desirable that may have been to the Reagan administration. The U.S. forces simply did not have the ordnance sufficient to kill Qaddafi in his bunker at Bab al-Aziziyya. *Id.*

168. U.N. SCOR, 41st Sess., 2764th mtg. at 16, U.N. Doc. S/PV.2764 (1986).

169. Public supporters of the U.S. action included Great Britain, Israel, Dominica, St. Lucia, Grenada, Honduras, Chad, South Africa, Singapore, Canada, and maybe Australia. DAVIS, *supra* note 165, at 146.

170. U.N. SCOR, 41st Sess., 2679th mtg. at 27, U.N. Doc. S/PV.2679 (1986).

171. *Id.* at 18.

conflict. Therefore, given the probability or perceived probability of continuing terrorism, the action of the United States was a justified method of deterring future terrorism. Evidence of continuing attacks itself gave the Reagan administration the right of self-defense under article 51. As stated by British Prime Minister Margaret Thatcher: "[W]e [Great Britain] would support action directed against specific Libyan targets demonstrably involved in the conduct and support of terrorist activities."¹⁷²

With the exception of Great Britain, the international reaction to the 1986 bombing was largely negative.¹⁷³ Thailand claimed that such reprisals were not "valid substitute[s]" for multilateralism.¹⁷⁴ Yemen also criticized the United States for bypassing the United Nations, noting that the United States, as a superpower, had a special responsibility for promoting world peace.¹⁷⁵ Other states recognized the need to stop terrorism but disagreed with the means. Based on a perceived case of disproportionality, Denmark "deeply deplore[d]" the action taken by the United States.¹⁷⁶

In general, European reaction was difficult to gauge because of widespread concerns about future terrorism. Some U.S. officials believed that the Europeans strongly supported the U.S. action, but in private. As one U.S. State Department official characterized Europe's concerns, "A lot of them are worried that if they support the U.S. in public, they will get a grenade up their kazoos."¹⁷⁷ German Chancellor Helmut Kohl exemplified the European predicament of wanting to support counterterror measures, but not in terms that would increase the likelihood of terror striking Europe. Although Kohl publicly stated that he disagreed with the U.S. response, he also criticized Libyan terrorism: "Whoever continually preaches and practices violence, as Qaddafi does, must count on the victims defending themselves."¹⁷⁸ Spain saw Libya's threats as

172. *Id.* at 28.

173. Great Britain's reaction marked a change in attitude towards reprisals. Three months before the raid, British Prime Minister Margaret Thatcher claimed that retaliatory or preemptive strikes for purposes of punishing or preventing terrorism were "against international law" and would result in "a much greater chaos." Karen DeYoung, *Thatcher: Reprisal Strikes Illegal*, WASH. POST, Jan. 11, 1986, at A1.

174. See U.N. SCOR, 41st. Sess., 2682nd mtg. at 41, U.N. Doc. S/PV.2682 (1986).

175. U.N. SCOR, 41st Sess., 2675th mtg. at 44-45, U.N. Doc. S/PV.2675 (1986).

176. U.N. SCOR, *supra* note 174, at 32.

177. See DAVIS, *supra* note 165, at 146.

178. See *id.* at 152-53.

"intolerable and inadmissible,"¹⁷⁹ but disagreed with the U.S. response. France remained ambivalent, neither condoning nor disapproving of the action.¹⁸⁰

In considering the generally favorable reaction to the Baghdad raid, it is clear that the international community has become more accepting of forceful responses to state-sponsored terrorism, at least if the terrorist act is targeted against a nation's former leader. This may mean that the international community accepts an expanded definition of self-defense. It almost makes more favorable the international reaction to reprisals, which the next section considers in detail.

V. THE LAW OF REPRISALS

The law of reprisals presents an alternative to, and expansion of, traditional self-defense theory.¹⁸¹ Reprisals are "countermeasures that would be illegal if not for a prior illegal act of the state against which they are directed."¹⁸²

The U.N. Charter generally prohibits *armed* reprisals.¹⁸³ The illegality of reprisals also finds support in customary international law; in fact, the view that reprisals are illegal has been supported as have few other notions in international law.¹⁸⁴ International aversion to

179. See *id.* at 152.

180. See *id.* at 154.

181. According to customary international law, reprisals are legal under certain conditions. The customary law of reprisals was defined in the *Naulilaa* case of 1928. See Sir Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 458-460 (1952 vol. II), reprinted in Carter & Trimble, *supra* note 91, at 1223-24. Defined by the tribunal in *Naulilaa*, reprisals are: "[A]cts in retaliation for acts contrary to international law on the part of the offending State, which have remained unredressed after a demand for amends." *Id.* Reprisals, to be legal, must be based upon a prior violation of international law. Legal reprisals, as explained by *Naulilaa*, could be preventative and punitive measures, serving as incentives for the offending state to follow the law in the future. *Naulilaa*, reprinted in Carter & Trimble, *supra* note 91, at 1224.

The criteria for legal reprisals under customary international law mirrors those of self-defense. Reprisals must be necessary—the violated state needs first to look for peaceful solutions. There must be some element of immediacy to the response, as it is impermissible to retaliate for an event in the remote past. Lastly, the offended state must also seek a proportionality between its counterforce and the force used in provocation. *Id.*

182. Oscar Schachter, *International Law in Theory and Practice*, 178 R.C.A.D.I. 9, 168 (1982).

183. BROWNIE, *supra* note 99, at 265.

184. D.W. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1 (1972); see also BROWNIE, *supra* note 99, at 223 ("Unambiguous prohibition of forcible reprisals was finally accomplished by the Charter of the United Nations"). The prohibition on belligerent reprisal tactics has been reiterated by the General Assembly—"States have a duty to refrain

recognizing the legality of reprisals stem from two concerns. First, the allegedly punitive nature of armed reprisals comports neither with the Charter's provision for the peaceful settlement of disputes,¹⁸⁵ nor with its prohibition on the use of force.¹⁸⁶ Second, harm to international stability in addition to physical harm has already been committed by the initial provocation (recognized as illegal under international law).¹⁸⁷ These concerns entail a narrow conceptualization of the use of force that looks at each illegal provocation as a discrete act.

Several commentators, have proposed various theories of reasonable reprisals,¹⁸⁸ and argued for recognition of their validity under international law.¹⁸⁹ From these various theories a general doctrine of reasonable reprisals emerges. A reasonable reprisal can be characterized as a deterrent action against a violent breach of international law in the context of a continuing conflict. In many respects, the Clinton administration's legal rationale followed the theory of reasonable reprisals. Administration officials spoke of a continuing threat from Iraq and of a belief that the bombing would serve as a deterrent to these threats.¹⁹⁰ Furthermore, the U.S. raid may be viewed as part of a continuing conflict with Iraq, a direct result of the Gulf War. The following sections will attempt to distinguish reprisal theory from traditional self-defense theory, analyze the system of reasonable reprisals in practice, establish methods for limiting the use of force in reprisal, and analyze the Baghdad raid as a defensive reprisal action.

A. Distinguishing Reprisals from Actions Taken in Self-Defense

Reprisals, undertaken by the victim state after an attack, are allegedly punitive. They seek to force the target state to follow the law in the future. Traditionally, actions taken in self-defense, undertaken by the victim state while it is under attack, serve to protect essential rights such as territorial integrity.¹⁹¹ Reprisals and

from acts of reprisal involving the use of force." *The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States*, *supra* note 117.

185. U.N. CHARTER art. 2, ¶ 3.

186. U.N. CHARTER art. 2, ¶ 4; *see also* BOWETT, *supra* note 92, at 13.

187. DINSTEIN, *supra* note 90, at 207.

188. *See infra* notes 217-26 and accompanying text.

189. The terms "reasonable" and "defensive" reprisal will be used interchangeably.

190. *See supra* note 111 and accompanying text.

191. Bowett would add political independence. BOWETT, *supra* note 92, at 3.

actions taken in self-defense are both means of unilateral action.¹⁹² However, reprisals have historically been categorized as punitive and consequently, illegal, whereas actions taken in self-defense have historically been considered protective in nature and therefore, legal.

The distinction between actions taken in self-defense and reprisals fits into an international scheme in which punishment is a matter for society as a whole and defense is a matter for the individual state.¹⁹³ However, modern instances of low-level, continuing violence disrupt this distinction. The same military operation may complete several functions at one time: deterrence, prevention, and retaliation.¹⁹⁴ There is no way to draw the line between punishment and deterrence, because the latter results from the former. As Professor Bowett states:

[T]he dividing line between protection and retribution becomes more and more obscure as one moves away from the particular incident and examines the whole context in which the two or more acts of violence have occurred. Indeed, within the whole context of a continuing state of antagonism between states, with recurring acts of violence, an act of reprisal may be regarded as being at the same time both a form of punishment and the best form of protection for the future, since it may act as a deterrent against future acts of violence by the other party.¹⁹⁵

Thus, whether a unilateral action will be judged with regard to a particular incident or in the context of a continuing conflict will often determine its legality.¹⁹⁶

The contextual "accumulation of events" doctrine,¹⁹⁷ which considers the reprisal activity in relation to the prior actions that provoked a response, is based upon a more realistic view of the modern use of force within a continuing conflict. This doctrine affects the "necessity" prong of the customary law of self-defense. According to one commentator, the advent of terrorism has expanded the

192. *Id.*

193. *Id.*; see also R. Barsotti, *Armed Reprisals*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 82 and n.17 (A. Cassese ed., 1986) (noting that any notion of reasonable reprisals brings reprisals within the U.N. system and serves as an admission that the current system of collective security does not function).

194. O'BRIEN, *supra* note 79, at 21.

195. Bowett, *supra* note 184, at 3.

196. *Id.* at 4.

197. See DINSTEN, *supra* note 90, at 189.

meaning of necessity.¹⁹⁸ "Proportionality" is impacted as well. What are in fact responsive, protective actions may seem disproportionate with regard to the immediate provocation for which the victim state responds. In the context of a larger conflict, the actions may be appropriate.¹⁹⁹

B. The Security Council and Reprisals

The Security Council historically has denied the validity of contextual analysis,²⁰⁰ thereby ignoring the difficulties that many states face. One commentator stated: "[A] legal system which merely prohibits the use of force and does not make adequate provision for the peaceful settlement of disputes invites failure."²⁰¹ Examining an incident in isolation facilitates an easy judgement by the Security Council,²⁰² the Council does not have to engage in value based judgments concerning the totality of the conflict. However, the Council ends up characterizing as illegal reprisals those acts which, notwithstanding traditional self-defense theory, may in fact be legitimate protective measures.²⁰³ In modern times, terrorist activity gains an advantage if guerrillas can hit and strike against a state whose legal options are generally limited to self-defense within its borders.²⁰⁴ The Council's past insistence on analyzing reprisal actions case-by-case thus has restricted the legal options of countries seeking to defend themselves based upon intelligence information and the historical similarities of threats.²⁰⁵ The Council's reputation consequently suffers and its actions are perceived as unfair by the victim state.²⁰⁶

198. In reference to the changed circumstances since *Caroline*, Professor O'Brien stated: "Given the duration and magnitude of Israel's war with the PLO . . . the interpretation of necessity is very different from that in a singular incident along the U.S.-Canadian border in 1837." O'Brien, *supra* note 158, at 471.

199. Bowett, *supra* note 184, at 6.

200. *But see* note 66 and accompanying text.

201. Waldock, *supra* note 181, at 456.

202. Bowett, *supra* note 184, at 9.

203. *Id.*

204. *Id.*

205. O'BRIEN, *supra* note 79, at 103.

206. *See generally id.*; *see also* O'Brien, *supra* note 158. Israel has repeatedly criticized the Council for ineffectively dealing with terrorism while ignoring the legal basis of Israeli counterterror actions. The Council effectively lost any persuasive power it may have had on successive Israeli governments. Consequently, the extent to which the Council may have influenced the Israeli defensive regime diminished. Since the Council was unable to impose punishment on Israel (*see* Bowett, *supra* note 184, at 25) its effectiveness was limited to the role

According to Professor O'Brien, the Security Council is applying the prohibition on reprisals in a situation unforeseen by the Charter's drafters: "The systemic model reflected in the Security Council's handling of 'reprisals' is a pristine 1945 U.N. Charter model"²⁰⁷ which supposes that collective security will work. Realistically, however, if the Security Council does not take effective action against provocations to which states feel the necessity to respond, collective security will fail.

Perhaps the most publicized example of the Security Council's consideration of reprisal actions concerned Israeli responses to *fedayeen*²⁰⁸ border transgressions.²⁰⁹ Israel has advanced the view that her situation must be viewed in the context of a series of continuing confrontations.²¹⁰ The Security Council has not consistently denounced the Israeli responses as illegal.²¹¹ The Council has not articulated a theory of why Israeli actions are not legal as means of self-defense but are instead illegal reprisal actions.²¹² At times, the body has labeled Israeli action disproportionate and unprovoked, an unnecessary action if reprisals were considered illegal anyway.²¹³ Professor Bowett concluded that in the Arab-Israeli conflict "a proportionate reprisal will not incur condemnation."²¹⁴

of a public critic, a testament to the Council's impotence in regard to Arab terrorism and Israeli reactions thereto.

207. O'BRIEN, *supra* note 79, at 118.

208. *Fedayeen* is a well known term used to describe Arab guerilla activity against Israel.

209. The Israeli-PLO/Arab confrontation, differing from the Iraqi-American conflict in its longevity and frequency of belligerent actions, represents only one form of reprisal action taking place in a continuing conflict. It does not close the field.

210. Around the time of Bowett's article (1972), the Israeli justification for responding to attacks began to move away from punishment for prior acts to deterrence in a condition of continuing conflict. Bowett, *supra* note 184, at 10.

211. Nor have major powers on the Security Council been averse to term some "reprisal" actions defensive. When the British were involved in Yemen their U.N. Representative stated: "[I]t is clear that the use of armed force to repel or prevent an attack—that is, legitimate action of a defensive nature—may sometimes have to take the form of a counter-attack." U.N. SCOR, 19th Sess., 1109th mtg. at 5, U.N. Doc. S/PV.1109 (1964).

212. Bowett, *supra* note 184, at 7.

213. *Id.*

214. *Id.* at 12. Condemnations seemed to follow allegedly disproportionate action by Israel. *Id.* at 11. Even with condemnations, the Security Council has proved ineffective in halting reprisals. The expectation that reprisals will meet with no more than a formal condemnation does little to prevent them. *Id.* at 10.

C. A System of Reasonable Reprisals

A system of reasonable reprisals more closely matches modern state practice than does the traditional model of self-defense. Defensive reprisal actions are limited by guidelines of reasonableness. Ideally, these guidelines are taken into account by an international reviewing body cognizant of the factual circumstances at issue.²¹⁵

The argument for a "reasonable" standard to judge reprisals moves the focus of the reprisal controversy from a peremptory legal norm absolutely forbidding reprisals to a policy judgement. Although the Security Council has operated publicly under the belief that the use of force in response to violence breeds a cycle of violence,²¹⁶ the requirements for a legal reprisal could be tailored so as to limit the use of this doctrine. Professor Bowett derives three²¹⁷ requirements in order for a reprisal to be considered reasonable by the Security Council: First, has the state conducting the reprisal provoked the delictual activity by the target state?²¹⁸ Second, does the reprisal hurt chances of a peaceful settlement of the dispute?²¹⁹ Third, what actions has a state taken to limit the need for reprisals?²²⁰ When a state has not provoked delictual activity, nor hurt chances for peace, nor looked for force as a first resort, the Security Council has, at times, refrained from denouncing the state's actions as illegal reprisals.²²¹

Professor Dinstein takes a more liberal, and perhaps more pragmatic, approach. He dispenses with the formalities of labeling actions "reprisals" or "self-defense," maintaining that article 51 allows

215. *Id.* at 32.

216. *Id.* at 16.

217. Bowett would like to add another condition—specifically, why did self-defense theory not provide adequate protection for the responding state? *Id.* at 27-28. The self-defense issues in this case concern *Caroline's* "immediacy" provision and article 51's "armed attack" stipulation. The administration's legal rationale becomes easier to justify in reprisal theory because the requirement of immediate action is relaxed. The "armed attack" issue, concerning the provocation of a defensive action, remains equally controversial in reprisal theory.

218. *Id.* at 15. The United States did not provoke Iraq's delictual activity since prior political and military actions against Iraq were sanctioned by the United Nations. See S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg. ¶ 2, U.N. Doc. S/RES/678 (1990).

219. See Bowett, *supra* note 184, at 9. Underlying this question is the assumptions that the parties want a peaceful solution to their conflict and that such a solution is achievable. That does not seem to be the case in the U.S./Iraq conflict.

220. *Id.* at 20. This requirement, concerning the territorial defensive regime in the victim state, does not apply to an assassination attempt overseas.

221. See *supra* notes 211-14 and accompanying text.

defensive force, whether in reprisal or self-defense.²²² Defensive armed reprisals are "post attack measures of self-defense short of war."²²³ To be defensive, the deterrent nature of a reprisal action must be "future-oriented," in other words, those undertaking reprisal must expect that action provoking the reprisal will happen again.²²⁴ The Baghdad raid may be best characterized as a reprisal because it sought to compel future Iraqi compliance with international law.

Both Dinstein and Bowett emphasize "proportionality"²²⁵ as the major factor in determining the legality of reprisals. The proportionality requirement presents a particular difficulty for advocates of defensive reprisals because of its opportunity for abuse. Those who assert the legality of reprisals must lay down criteria to prevent the use of reprisals as a cover for aggressive action. Professor Bowett sets forth four criteria for judging the proportionality of reprisal actions: (1) force should not be used in order to enforce minor rights; (2) force should be used in the most humanistic way possible, thereby limiting collateral damage; (3) the use of force should not escalate the situation into a war; and, (4) the force used should be limited to obtaining redress for the wrong done.²²⁶

Arguably, the U.S. raid was, if anything, disproportionately tolerant compared with Iraq's provocation. The target chosen—Iraqi intelligence headquarters—was implicated in the threat on former President Bush's life.²²⁷ Furthermore, the prospect of another assassination attempt would have likely originated from the Mukhabarat. By bombing this specific target, the United States may be said to have gained redress for an Iraqi breach of international law. The extent of the force used in this incident was minimal and the timing was at night in order to reduce deaths.²²⁸ Most importantly, the threat from Iraq involved an essential right of sovereignty:

222. Professor Schachter as well holds "punitive" uses of force impermissible while "defensive retaliation" is not. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1638 (1984). See also DINSTEIN, *supra* note 90, at 207-08 (asserting that the use of protective force, even after an attack (e.g. in reprisal) is permitted under article 51).

223. DINSTEIN, *supra* note 90, at 209.

224. R.W. Tucker, *Reprisals & Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 586, 591 (1972); see also DINSTEIN, *supra* note 90, at 208 (contending that the goal of defensive reprisals is deterrence, plain and simple. Professor Dinstein stated: "[P]laying with fire constitutes a dangerous game and is what most armed reprisals are about.").

225. Dinstein defines proportionality as the "approximation in 'scale and effects' between unlawful force and lawful counterforce." DINSTEIN, *supra* note 90, at 216.

226. See Bowett, *supra* note 184, at 7, 11.

227. See *supra* note 110.

228. See *supra* note 11 and accompanying text.

a nation's right to conduct a political life without the life of its leaders being threatened.

However, by including indefinite future threats in the legal basis for its self-defense claim, the Clinton administration invited allegations that its military response was too weak.²²⁹ If the goal of the attack was to limit Iraq's capability to facilitate terrorism, the attack should have been much harsher. Columnist William Safire favored using air power to set Iraq's war machine back a couple of years while demonstrating to terrorists that the United States would respond powerfully against them.²³⁰

The difficulty with Safire's view is that it seeks to open up a virtual state of war under the cover of responding to a violation of international law. That would set a precedent of instability rather than a limited goal of continuing deterrence against threats of assassination. Proportionality demands that a reprisal have a sufficient nexus to the delictual conduct of the aggressor state. Legal considerations are different from policy choices, however desirable or workable those choices may appear.

Evaluating facts and standards necessitates the existence of an international body to review claims that reprisals are in fact defensive. A truly effective Security Council review may serve as a deterrent to aggressive behavior masquerading as a reasonable reprisal.²³¹ In this regard it is important that the reviewing body have some independent means of assessing the facts underlying the uses of force with regard to both the alleged provocation and the reaction. Professor Bowett stated: "[I]t is rarely satisfactory to rely entirely on the evidence adduced by the parties."²³² Unfortunately, there are many situations in which the states employing force will be the only ones who can effectively gather the facts, slanted though they may be.

VI. THE ALTERNATIVE OF UNITED NATIONS PROCEEDINGS

The U.N. Charter grants the Security Council a greater authority to make decisions on the use of force than is found in article 51. Under article 39,²³³ the Council may dictate the use of force which is

229. William Safire, *Slapping Saddam's Wrist*, N.Y. TIMES, June 28, 1993, at A17.

230. *Id.*

231. Bowett, *supra* note 184, at 29.

232. *Id.*

233. Article 39 of the U.N. Charter declares: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make

limited, in theory, only by the effectiveness of the Council's policy in maintaining international peace and security. Thus, the Clinton administration could have submitted its case to the Security Council, and if it had gained approval from the Security Council, bombed Baghdad without consideration as to whether the action was defensive under international law. In this case the United States could have chosen either a unilateral or multilateral response. Thus, the central question confronting a long-term analysis of this situation is whether the United States missed an opportunity to make the U.N. methods of dealing with threats to the peace more effective, especially with regard to terrorist activity.

The Clinton administration would have been limited had it gone to the Security Council. The central concern in not bringing politically intense incidents for the consideration of the Security Council is the political nature of the United Nations. From both a policy perspective, and a U.S. interpretation of international law, the United States does not want to limit its freedom of action based upon European, and especially Chinese, policy goals and legal interpretations. Furthermore, the desire to bomb Iraq that existed in the U.S. military, political, and even journalistic communities may reflect a feeling that there are elements of sovereignty that will not be given up in certain situations, one of which is the ability to respond unilaterally to assassination attempts on the state's past or present leaders.

However, certain long-range U.S. policy goals would be served by submitting the matter to the United Nations instead of taking unilateral action. First, because the Security Council has been effective in furthering U.S. policy towards Iraq in the past, bringing such matters to the attention of the Council would further the process of rehabilitating the Council's abysmal record of dealing with terrorist violence.²³⁴ Second, such action may encourage other nations to bring equally significant concerns to the Council's attention and therefore contribute to international stability. If an international forum is willing to authorize action, states will have less of an incentive to justify unilateral defensive reprisals. Lastly, the Security

recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39.

234. In fact, at the Security Council session following the bombing, Spain and Britain took notice of the wider context in which the attempted assassination took place. This represented a noticeable change from the Council's prior case-by-case analysis of reprisal actions. *See supra* note 66 and accompanying text.

Council's imprimatur would have given the administration's action added international credibility.

The Security Council may well have proved ineffective in acting against Iraq, either because of a Chinese veto or the concerns of U.S. allies. Iraq may have taken such inaction as the green light to further challenge U.S. and international concerns and, in effect, to try to create a wedge between the United Nations and the United States. If the administration then would have unilaterally bombed Baghdad it would have shown absolute disregard for the United Nation's decision-making ability. Therefore, the argument that the United States should have gone through the Security Council, but disregard any adverse decision, is plainly formalistic and unwise.

If it had chosen to submit its plan to the Security Council, the administration would have faced difficult choices in presenting evidence.²³⁵ Even after the raid, the administration allegedly held back its most damning evidence of Iraqi complicity in the assassination plot.²³⁶ In order to convince the Security Council of Iraq's culpability, the United States, in theory, would have been forced to be more forthcoming in releasing evidence.

However, security reasons may dictate against letting the members of the Council peruse classified material. For example, in the cold war atmosphere of the 1986 Council debates concerning the Reagan administration's bombing of Libya, there was little evaluation of evidence linking Libya to the LaBelle Disco bombing or the thirty other alleged Libyan terrorist attacks, despite the fact that Qaddafi's future terrorist activities constituted the primary U.S. justification for action. The Reagan administration also did not release classified evidence underlying its claim that Libya planned terrorist attacks around the world.

Without a means of gathering the underlying facts, the Security Council will be unable to evaluate objectively the legal rights of contending states. Professor Bowett, therefore, believes that the Security Council must have an independent fact-finding capability. However, unless the United Nations creates its own intelligence service, it seems that the Council will not have unimpeded access to classified material. The problem then is how to legally analyze what

235. Furthermore, the United States may be placed in the position of arguing novel legal theories. For instance, if the administration had more definite evidence of additional threats from Iraq, could the "accumulation of events" doctrine be used prospectively in order to justify a defensive reprisal?

236. Hersh, *supra* note 18.

may be done by a member if that member is the only one with the information necessary for analysis.

VII. CONCLUSION

Expanding the conditions under which legally permissible force may be used is no small matter. Professor Abram Chayes, Legal Advisor to the U.S. Department of State at the time of the Cuban Missile Crisis, commented on the danger of expanding the notion of self-defense: "[T]he normative atmosphere in which states act, though tenuous and impalpable perhaps, is affected by the earlier actions of others and their accompanying statements of what they take the governing law to be."²³⁷ In his particular example of state-to-state tension, Chayes warned of the danger of making "the occasion for forceful response essentially a question for unilateral national decision that would not only be formally unreviewable, but not subject to intelligent criticism, either."²³⁸

An expansion of self-defense rights thus manifests a need for both post-defense review and an incentive for pre-defense referral to the United Nations, even with a right of unilateral action. The practice of foreign relations, however, especially in the circumstances surrounding the United States's involvement with Iraq, does not lend itself to conclusive legal rules. The unspecified nature of future Iraqi terrorist activity and concerns about the veracity of Kuwait's allegations regarding the alleged bombing plot demonstrate the importance of a process in furthering multilateral goals.

Developing state practice reveals that controversial military actions, including reprisals, are becoming increasingly accepted as a means of fighting terrorism.²³⁹ Concomitant with an increased ability to use force under international law comes an increased need to define the limits of the permissible use of force. A new legal standard to deal with terrorist attacks must be restrained by substantive limits and procedural safeguards if the world is not to take a step backward to a time when the use of force was casually justified after the fact. Absolute legal doctrines are destined to fail under the weight of changing circumstances. Central importance should thus be given to the purpose of legal norms—to increase stability in international relations.

237. ABRAM CHAYES, *THE CUBAN MISSILE CRISIS* 63-66 (1974).

238. *Id.* at 65.

239. *See supra* note 162 and accompanying text.

Alan D. Surchin

