

Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism after the September 11 Attacks

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NOTE

HERE, THERE, AND EVERYWHERE: ASSESSING THE PROPORTIONALITY DOCTRINE AND U.S. USES OF FORCE IN RESPONSE TO TERRORISM AFTER THE SEPTEMBER 11 ATTACKS

Michael C. Bonafede[†]

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"Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, in order to assure the survival and the success of liberty."

—President John F. Kennedy
January 20, 1961¹

From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime. . . . I will not forget this wound to our country and those who inflicted it. I will not yield; I will not rest; I will not relent in waging this struggle for freedom and security for the American people.

— President George W. Bush
September 20, 2001²

INTRODUCTION

These words by Presidents Kennedy and Bush are separated by four decades of international history, conflict, and political transformation. However, their purpose is the same: to prepare the United States for long periods of global battle. But unlike the Cold War,³ the "War on Terrorism"⁴ is not directed against an easily identifiable and

¹ John Fitzgerald Kennedy, *Inaugural Address* (1961), reprinted in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO RICHARD MILHOUS NIXON 1969, at 268 (1969).

² President's Address to Joint Session of Congress, 37 WEEKLY COMP. PRES. DOC. 1347, 1349, 1351 (Sept. 20, 2001).

³ The Cold War period lasted from the mid-1940s (starting after the Second World War) until the end of the 1980s (with the collapse of the Soviet Union). See *Cold War in 3 THE NEW ENCYCLOPAEDIA BRITANNICA* 444 (15th ed. 1994).

⁴ Under the "Frequently Asked Questions" heading on the White House website, the Bush Administration defines the "War on Terrorism" as follows:

What is the War on Terrorism?

Nineteen terrorists hijacked four commercial airplanes on September 11, 2001 and crashed two of the planes into the twin towers of the World Trade Center in New York City, and one into the Pentagon in Washington, D.C. A fourth plane crashed in Pennsylvania. As a result, thousands of innocent individuals from more than 80 nations lost their lives.

The evening of Sept. 11, President Bush spoke to the American people from the Oval Office in a nationally televised address:

"The pictures of airplanes flying into buildings, fires burning, huge structures collapsing, have filled us with disbelief, terrible sadness, and a quiet, unyielding anger. These acts of mass murder were intended to frighten our nation into chaos and retreat. But they have failed; our country is strong.

"A great people has been moved to defend a great nation. Terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America. These acts shattered steel, but they cannot dent the steel of American resolve.

locatable enemy.⁵ Rather, the United States now finds itself in the unenviable position of swinging mightily at hidden bands of loosely connected international terrorist networks, and at even smaller individual terrorist cells in locations worldwide.⁶

“America was targeted for attack because we’re the brightest beacon for freedom and opportunity in the world. And no one will keep that light from shining.”

These terrorist attacks were an act of war against the United States.

In a meeting on September 12 with his National Security Team, President Bush said, “The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war. This will require our country to unite in steadfast determination and resolve. Freedom and democracy are under attack.

“The American people need to know that we’re facing a different enemy than we have ever faced. This enemy hides in shadows, and has no regard for human life. This is an enemy who preys on innocent and unsuspecting people, then runs for cover. But it won’t be able to run for cover forever. This is an enemy that tries to hide. But it won’t be able to hide forever. This is an enemy that thinks its harbors are safe. But they won’t be safe forever.

“This enemy attacked not just our people, but all freedom-loving people everywhere in the world. The United States of America will use all of our [sic] resources to conquer this enemy. We will rally the world. We will be patient, we will be focused, and we will be steadfast in our determination. This battle will take time and resolve. But make no mistake about it: we will win.”

Frequently Asked Questions About the War on Terrorism at Home and Abroad, at <http://www.whitehouse.gov/response/faq-what.html> (last visited Sept. 7, 2002).

⁵ See Thom Shanker, *Rumsfeld’s Search for a Way to Fight a New Type of Foe*, N.Y. TIMES, Sept. 3, 2002, at A1.

The deadliest strength of America’s new adversaries is their very fluidity, Defense Secretary Donald H. Rumsfeld believes. Terrorist networks, unburdened by fixed borders, headquarters or conventional forces, are free to study the way this nation responds to threats and adapt themselves to prepare for what Mr. Rumsfeld is certain will be another attack.

....

Al Qaeda, for example, has leaders and budgets and command-and-control and has proved it can inflict terrible damage, yet it cannot be attacked in a traditional battle.

Mr. Rumsfeld . . . focuses on maneuvering a steel-and-circuitry military so its forces can better fight a “virtual enemy.”

Id.; see also Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 2 (2002) (“It is a new kind of war, a war against stateless, networked individuals. The goal of this war is not economic advantage, territorial gain, or the submission of another state. It is to bring individuals to justice and to punish and deter the states that harbor them.” (citation omitted)).

⁶ See Mike Boettcher, *Al Qaeda Forming New Cells Worldwide*, CNN.com, at <http://www.cnn.com/2002/US/07/31/al.queada.super.cells/index.html> (July 31, 2002) (“Al Qaeda members who fled Afghanistan after the U.S.-led counter-terrorism offensive began last fall are forming what anti-terror coalition intelligence analysts are calling ‘super cells’ in locations stretching from North Africa to Southeast Asia.”); Danny Hakim, *4 Are Charged with Belonging to a Terrorist Cell*, N.Y. TIMES, Aug. 29, 2002, at A1 (“The government indicted four . . . men in federal court here today, saying they were part of a terrorist cell operating in the Detroit area and were planning attacks in the United States, Jordan and Turkey.”); Nic Robertson & Mike Boettcher, *Tapes Give Evidence of Al Qaeda’s Global Reach*, CNN.com, at <http://www.cnn.com/2002/US/08/22/terror.tape.main/index.html> (Aug. 23, 2002) (“A careful examination of an al Qaeda video archive . . . shows . . . evidence of the terror-

By the winter of 1961, the Cold War was already in its sixteenth year. Soon after President Kennedy's inauguration, tensions between the United States and the Soviet Union escalated rapidly with the Cuban Missile Crisis,⁷ the Berlin Wall Crisis,⁸ and eventually, the steady intensification of the Vietnam Conflict.⁹ Similarly, the U.S. combat against international terrorism¹⁰ is far from a new undertaking, as the United States has previously responded to terrorist attacks against its interests.¹¹ However, before the end of its first year, the Bush Administration faced a nightmare come true: the terrorist attacks of September 11, 2001. In responding to this new crisis, the Bush

ist network's global reach and links to other groups. . . . 'It gives a comprehensive picture of al Qaeda's strategic gift, of al Qaeda's global reach. . . . It . . . clearly demonstrates that al Qaeda is waging a universal jihad campaign.'" (quoting Rohan Gunaratna, an expert on al Qaeda).

⁷ The tense moments of the Cuban Missile Crisis began on October 16, 1962 and subsided on October 28, 1962. See *Cuban Missile Crisis* in 3 THE NEW ENCYCLOPAEDIA BRITANNICA 774 (15th ed. 1998).

⁸ The confrontation known as the Berlin Wall Crisis spanned from June to August, 1961. See generally NORMAN GELB, THE BERLIN WALL: KENNEDY, KHRUSHCHEV, AND A SHOW-DOWN IN THE HEART OF EUROPE (1986) (discussing in depth the Berlin Wall Crisis).

⁹ The Vietnam Conflict lasted from 1955 to 1975. See *Vietnam War* in 12 THE NEW ENCYCLOPAEDIA BRITANNICA, *supra* note 7, at 361-63.

¹⁰ It is very difficult to define "terrorism":

It is virtually impossible to arrive at a comprehensive and definitive definition of the term "terrorism," basically for two reasons: first, the term is employed to denote a wide variety of acts; and secondly, States differ in their perception of what constitutes terrorism. "The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose. . . . [T]he intentional use of violence or the threat of violence by the precipitators (sic) against an instrumental target in order to communicate to a primary target a threat of future violence. The object is to use intense fear or anxiety to coerce the primary target into certain behavior or to hold its attitude in connection with a demanded power (political) outcome."

ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 393-94 (Clive Parry et al. eds., 1986) (citations omitted). In the context of foreign intelligence surveillance, international terrorism is defined as activities that:

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any other State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended—

- (A) to intimidate or coerce a civilian population;
- (B) to influence the policy of a government by intimidation or coercion; or
- (C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

50 U.S.C. § 1801(c) (2000).

¹¹ See, e.g., *infra* Part II (discussing the 1986 bombing of Libya during the Reagan Administration and the 1998 cruise missile strikes against Sudan and Afghanistan during the Clinton Administration).

Administration is testing the resolve of an international legal system that was designed to address dilemmas vastly different from those that currently exist in the post-Cold War world.

Accordingly, U.S. policymakers must be mindful of the very real and lasting precedential effects of their chosen course for the War on Terrorism. Indeed, the U.S. response to the heinous attacks of September 11 may forever alter the international rules governing state responses to terrorist attacks, especially with regard to the proportionality of such responses. This may be due in large part to the fact that there has never been any authoritative definition of what is and what is not a proportional state response to a terrorist attack.¹²

So now, in the wake of the deadliest terrorist strikes in U.S. history,¹³ the Bush Administration is filling this void with its own rules and ideas about what is proportional and appropriate. According to the Bush Administration, the United States—like no other nation in the modern era—has a clear and justified mandate to use whatever means it deems necessary to combat and defeat all forms of international terrorism.¹⁴ Adding credence to President Bush's policies to combat terrorism, the American public in large part believes that terrorism is a serious issue that the United States must address.¹⁵ Clearly,

¹² See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 184 (3d ed. 2001) (“[Proportionality] is frequently depicted as ‘of the essence of self-defence’, although it is not always easy to establish what proportionality entails. . . . [As such,] the principle of proportionality must be applied with some degree of flexibility.” (citations omitted)); Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L. L. 391, 405 (1993) (“Proportionality is a complex concept to apply to particular cases and there will inevitably be differences of opinion.” (citation omitted)).

¹³ One year after the attacks, the death toll was more than 3,000 killed or missing:

In the first chaotic weeks after the Sept. 11 attacks, the list of missing and presumed dead soared to nearly 7,000. . . .

As the tally now stands, 3,025 people were killed on Sept. 11, or in the weeks that followed, as a result of the terrorist attacks. That list, excluding the 19 hijackers, consists of 2,801 killed or still missing from the World Trade Center, 184 killed at the Pentagon and 40 killed on Flight 93, which crashed near Shanksville, Pa. That combined loss of life will still record that day as the second bloodiest day in the United States history, with the Civil War battle of Antietam maintaining the miserable honor of first place.

Eric Lipton, *Death Toll Is Near 3,000, but Some Uncertainty over the Count Remains*, N.Y. TIMES, Sept. 11, 2002, at G47.

¹⁴ This mandate is found in language like the following:

Our war on terror is well begun, but it is only begun. This campaign may not be finished on our watch; yet it must be and it will be waged on our watch. We can’t stop short. If we stop now, leaving terror camps intact and terrorist states unchecked, our sense of security would be false and temporary. *History has called America and our allies to action, and it is both our responsibility and our privilege to fight freedom’s fight.*

President’s State of the Union Address, 38 WEEKLY COMP. PRES. DOC. 133, 135 (Jan. 29, 2002) (emphasis added).

¹⁵ A 2001 Chicago Council on Foreign Relations survey of public opinion regarding foreign affairs found that “Americans cited international terrorism more often than any other issue as a ‘critical threat to U.S. vital interests.’” PAUL R. PILLAR, *TERRORISM AND U.S.*

the Bush Administration plans to use this sentiment as the foundation for its eventual expansion of the War on Terrorism to targets outside of Afghanistan.¹⁶

However, before the United States marches onto the global battlefield, U.S. policymakers should consider whether the actions they undertake in response to September 11 are proportional to the events that transpired that terrifying morning in New York, Pennsylvania, and Washington, D.C. Furthermore, they should consider the precedent their actions are setting for the world community, as well as the substantial impact and redefining force that that precedent will have upon international law and the doctrine of proportionality. Though Bush Administration officials warn that the War on Terrorism will be long and could include many U.S. actions all over the world,¹⁷ the first step in a proportionality analysis must focus on Afghanistan. Quite simply, the question is: Do the events of September 11 justify the extent of the U.S. military intervention in Afghanistan? More specifically, was the United States acting within the bounds of self-defense when it toppled the Taliban regime in an effort to reach and bring to

FOREIGN POLICY 1 (2001). Furthermore, in that same poll, "79 percent of the public (and 74 percent of a smaller sample of opinion leaders) said that combating international terrorism should be a 'very important' goal of the United States." *Id.*

¹⁶ The Bush Administration has made clear almost from the start that it plans to expand the War on Terrorism beyond Afghanistan. In his State of the Union Address, President Bush said,

[T]ens of thousands of trained terrorists are still at large. These enemies view the entire world as a battlefield, and we must pursue them wherever they are. So long as training camps operate, so long as nations harbor terrorists, freedom is at risk. And America and our allies must not and will not allow it.

President's State of the Union Address, *supra* note 14, at 134.

¹⁷ See President's Address to Joint Session of Congress, *supra* note 2, at 1349 ("Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle but a lengthy campaign, unlike any other we have ever seen."); *Meet the Press* (NBC television broadcast, Sept. 16, 2001) (transcript on file with author). Vice President Dick Cheney stated:

It's also important for [the American] people to understand that this is a long-term proposition. It's not like, well, even Desert Storm where we had a buildup for a few months, four days of combat, and it was over with. This is going to be the kind of work that will probably take years because the focus has to be not just on any one individual, the problem here is terrorism.

Id.; see also *infra* notes 168, 189 and accompanying text (discussing the Bush Administration's plan to conduct a global war against international terrorism).

justice Osama bin Laden and his al Qaeda¹⁸ terrorist network¹⁹ Few deny the horrors of September 11. However, under the current system of international law, the acuteness of that horror alone is not dispositive of whether the complete overthrow of the Taliban was a proportionate response. Moreover, if the United States claims that it can retain the right to self-defense²⁰ throughout the many months and years of its war against terrorism,²¹ is that assertion consistent with the doctrine of proportionality?²²

In simple situations where extreme retaliatory responses are not warranted, the concept of proportionality is intuitive. For example, imagine two young boys on a playground. If one boy shoves the other in the back, does the boy who was shoved have the right to respond by using deadly force against the boy who shoved him? Of course not. Killing a person, even if he or she is the initial aggressor in a fight, is not a proportionate response to a simple shove. Therefore, a lethal response would be unjustified. Unfortunately, however, in the realm of international relations, proportionality assessments are never this simple. If the boys in this scenario are analogized to states, and the playground to the global arena, the legal assessment of proportionate responses becomes far more complex and susceptible to political maneuvering.²³

¹⁸ Al Qaeda, the name designation for the international terrorist network headed by Osama bin Laden, is an Arabic word meaning "the base." Judith Miller & Don Van Natta, Jr., *In Years of Plots and Clues, Scope of Qaeda Eluded U.S.*, N.Y. TIMES, June 9, 2002, at 1.

Al-Qaeda had its origins in the long war against the Soviet occupation of Afghanistan. After Soviet troops invaded the country in 1979, Muslims flocked to join the local *mujahedin* in fighting them. In Peshawar, Pakistan, which acted as the effective headquarters of the resistance, a group whose spiritual leader was a Palestinian academic called Abdallah Azzam established a service organization to provide logistics and religious instruction to the fighters. The operation came to be known as al-Qaeda al-Sulbah—the "solid base." Much of its financing came from bin Laden, an acolyte of Azzam's who was one of the many heirs to a huge Saudi fortune derived from a family construction business.

Michael Elliott, *Hate Club*, TIME, Nov. 12, 2001, at 58, 61.

¹⁹ Prior U.S. uses of force have been criticized as excessive and disproportionate. See, e.g., Gardam, *supra* note 12, at 405 ("It appears that more was done than was proportionate to expelling Iraq from Kuwait. As Walzer argues, these attacks indicate an illegitimate and unjust aim, the overthrow of the Iraqi regime, and thus lose their legitimacy as actions in self-defense." (citing MICHAEL WALZER, *JUST AND UNJUST WARS*, at xx (2d ed. 1992))).

²⁰ See *infra* note 68.

²¹ See *infra* note 81 and accompanying text.

²² See *infra* note 55 and accompanying text.

²³ For example, as in the cases of the U.S. cruise missile strikes in response to the 1998 embassy bombings in Kenya and Tanzania and the U.S. bombing of Libya in 1986, both of which are discussed in greater detail in Part II of this Note.

The concept of proportionality is inherently wedded to the right of self-defense.²⁴ Indeed, proportionality can be seen as a sub-doctrine of self-defense that limits the severity and duration of actions taken by states in self-defense.²⁵ After the terrorist attacks of September 11, however, a shift in state practice appears to be developing that allows for a loosening of the proportionality regulation on the right to self-defense in the context of responses to international terrorism.²⁶ This Note assesses the need for and the desirability of this shift in state practice, and analyzes the impact that this shift will have on the U.S. use of force in response to international terrorism in the post-September 11 world.

Part I briefly outlines the history and development of the proportionality doctrine, including a discussion of the *Caroline* incident and Article 51 of the United Nations (U.N.) Charter.²⁷ Part II focuses on prior U.S. uses of force in response to terrorist actions—more specifically the 1986 bombing of Libya and the 1998 cruise missile strikes against Sudan and Afghanistan—and comments on reactions to these incidents. Part III analyzes the proportionality of the U.S. military intervention in Afghanistan as well as the larger War on Terrorism, proposes an international terrorism exception to the proportionality limitation on the right to self-defense, and discusses the importance of addressing the root causes of terrorism. This Note concludes that the September 11 attacks demonstrate that an exception to the proportionality doctrine, narrowly tailored to combat the growing threat of international terrorism, has now become necessary. The need for this exception is evidenced by the current shift in state practice that is relaxing the traditional norms which regulate the right to self-defense

²⁴ See PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 316 (7th ed. 1997) (“[F]orce used in self-defence must be necessary, immediate and *proportional to the seriousness of the armed attack.*” (emphasis added)).

The concept of proportionality has its roots in domestic self-defense law. See, e.g., N.Y. PENAL LAW § 35.15 (McKinney 1998) (“A person may . . . use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person . . .”).

²⁵ See MALANCZUK, *supra* note 24, at 316.

²⁶ See *infra* notes 260–62, 268, 299 and accompanying text.

²⁷

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

U.N. CHARTER art. 51.

with regard to the use of force in response to international terrorism. This is due in large part to the complicated structure of international terrorist organizations and the non-traditional nature of the threat they present. However, in order to avoid a wholesale uprooting of the proportionality doctrine as a limitation on the right to self-defense in all contexts, U.S. policymakers must clearly articulate that this exception relates specifically to combating international terrorism. Such articulation, if coupled with serious diplomatic and political attempts to reevaluate U.S. foreign policy and address the root causes of terrorism in the Arab and Muslim world, will enable the United States to most effectively and completely wage a successful campaign against international terrorism.

1

THE ORIGINS OF THE PROPORTIONALITY DOCTRINE

A. Early Developments and the Laws of Armed Conflict

The application of the concept of proportionality to international uses of force dates back hundreds of years.²⁸ The Christian “just war”²⁹ theory³⁰ embraced a conception of the doctrine of proportionality that was little more than an evaluation of whether the overall

²⁸ See *infra* notes 29–30.

²⁹ For many centuries, Western European attitudes towards the legality of war were dominated by the teachings of the Roman Catholic Church. One of the first theologians to write on the subject was St. Augustine (AD 354–430):

“Just wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. Further, that kind of war is undoubtedly just which God Himself ordains.”

MALANCZUK, *supra* note 24, at 306 (quoting St. Augustine). As one commentator has noted,

These ideas continued to be accepted for over 1,000 years. War was regarded as a means of obtaining reparation for a prior illegal act committed by the other side (the reparation sought had to be proportional to the seriousness of the illegality). In addition, wars against unbelievers and heretics were sometimes (but not always) regarded as being commanded by God.

Id. (citations omitted).

³⁰ For a detailed description of the just war theory, see REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE 1–20 (Michael A. Meyer & Hilaire McCoubrey eds., 1998) [hereinafter REFLECTIONS ON LAW AND ARMED CONFLICTS]. “[F]or the natural order which seeks the peace of mankind ordains that the monarch should have the power of undertaking wars if he thinks it advisable, and that soldiers should perform their military duties on behalf of the peace and security of the community.” *Id.* at 14 (quoting St. Augustine); see also ROLAND H. BAINTON, CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION (1960) (describing the just war theory); JAMES TURNER JOHNSON, IDEOLOGY, REASON, AND THE LIMITATION OF WAR: RELIGIOUS AND SECULAR CONCEPTS 1200–1740 (1975) (same); FREDERICK H. RUSSELL, THE JUST WAR IN THE MIDDLE AGES (1975) (same).

good that a war would cause outweighed its overall evil.³¹ Once the cause of a war was considered just, any methods or means used to bring about the objectives of that war were also permissible.³² This concept is vastly different from the way in which most nations of the world today view the doctrine of proportionality in the context of international uses of force.³³

The modern view began to form as the nation-states of the nineteenth century abandoned the just war theory and instead began to see war as an essential element of national policy.³⁴ As a result, it was during this period that the modern nation-states³⁵ began to develop in earnest the laws regulating international armed conflict, culminating in the adoption of the Geneva Conventions of 1949.³⁶ These laws designate which practices of warfare are acceptable, including, for example, the protection of civilian lives and the prohibition of certain banned weapons and tactics.³⁷ As the laws of armed conflict were formulated and codified, so too emerged the modern formulation of the proportionality doctrine.³⁸ This formulation of the proportionality doctrine dictated that "belligerents do not have an unlimited choice of means to inflict damage on the enemy."³⁹ Prior to the First World War, the relevance of this principle of proportionality was almost entirely confined to combatants, since wars during the nineteenth cen-

³¹ See Gardam, *supra* note 12, at 395.

³² See *id.*

³³ *Id.* ("The emphasis of Christian just war theory . . . was on the requirement of a just cause rather than on proportionality. Moreover, there was no independent doctrine of the *jus in bello* as exists in international law today." (citation omitted)).

With regard to the above quotation from Gardam, it is important to note here the two separate categories of action that are governed by the laws of war: the *jus ad bellum* and the *jus in bello*. *Jus ad bellum* refers to the rules governing the decision to resort to armed conflict, while *jus in bello* relates to the rules that govern the actual conduct and behavior of combatants once an armed conflict has begun (this category, also known as international humanitarian law, can be thought of as the balance that is to be struck between the achievement of a military goal and the cost in terms of casualties). See ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW, *supra* note 10, at 200-01 (defining, in part, *jus ad bellum* as "[t]he right to resort to war," and *jus in bello* as "the corpus of the laws and customs of war").

³⁴ Gardam, *supra* note 12, at 396.

³⁵ The "nation-state" is defined as "[a] state structure in which a nation resides and exists (ideally) to protect and promote the interests of that nation." STEVEN L. SPIEGEL, WORLD POLITICS IN A NEW ERA, at B-14 (1995). "[During the period from 1648 to 1890, t]he change in the nature of world politics from relations between rulers to relations between nations was a historical development of tremendous importance." *Id.* at 31.

³⁶ See Gardam, *supra* note 12, at 396-97. For the historical background and general principles of the Geneva Conventions of 1949, see REFLECTIONS ON LAW AND ARMED CONFLICTS, *supra* note 30, at 54-62.

³⁷ See Gardam, *supra* note 12, at 397 ("[M]uch of the law of the means and methods of warfare was codified between the middle of the nineteenth century and the Hague Conferences of 1899 and 1907.").

³⁸ *Id.*

³⁹ *Id.* at 402.

ture were primarily waged by professional soldiers on the battlefield, and civilians were for the most part uninvolved.⁴⁰ However, this quickly changed as aerial bombing began to develop as a method of warfare during the First World War (1914–1918) and the Spanish Civil War (1936–1939).⁴¹ Because the destruction caused by aerial bombing could be incredibly indiscriminate between military and civilian targets, its emergence demanded an increased scrutiny of the relationship between civilian casualties and military necessity in armed conflicts.⁴² Due to the extreme vulnerability of civilians to this form of warfare, the primary focus of the modern proportionality doctrine rests on the protection of civilian lives.⁴³

In addition to the laws of armed conflict, the proportionality doctrine plays a central role in regulating the use of force in self-defense. This particular aspect has a somewhat separate and distinct history. Any discussion of the general rules regarding the use of force in self-defense must begin with the *Caroline* incident.⁴⁴

B. The *Caroline* Incident and Article 51 of the United Nations Charter

During the Canadian Rebellion of 1837, many U.S. nationals living along the U.S.-Canadian border sympathized with and actively supported the Canadian rebels in their struggle against British rule.⁴⁵ Despite the U.S. government's attempts to prevent its citizens from supporting the Canadian rebellion, on December 29, 1837, the U.S. steamboat *Caroline* made trips between New York and Canada carrying men and weapons in support of the rebellion.⁴⁶ The British observed the *Caroline's* activity and decided to destroy the steamer to prevent it from further reinforcing the rebels.⁴⁷ The British attacked the ship while she was docked in Fort Schlosser, New York.⁴⁸ The *Caroline* was burned and sent over Niagara Falls, killing two U.S. nationals.⁴⁹ Claiming no wrongdoing, the British defended their use of force against the *Caroline* as an act of self-defense and self-preservation.⁵⁰

⁴⁰ See *id.* at 397.

⁴¹ See *id.* at 399.

⁴² See *id.*

⁴³ *Id.* at 400.

⁴⁴ For a more detailed account of the *Caroline* incident, see 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 217, at 409–14 (1906), and R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82–92 (1938).

⁴⁵ See Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325, 328 (1999).

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.* at 328–29.

The United States immediately protested the affair.⁵¹ But it was not until 1841 that the *Caroline* incident became one of the hallmarks of customary international law regarding the right to self-defense and the doctrine of proportionality.⁵² This came about by way of a letter, dated April 24, 1841, written by U.S. Secretary of State Daniel Webster to Henry Fox, the British Minister in Washington, D.C.⁵³ The letter contained language that is now commonly referred to as the "*Caroline* doctrine." In response to the British claim of self-defense, Webster wrote that in order to be justified, the use of force in self-defense must be *necessary*⁵⁴ and *proportionate*,⁵⁵ taking into consideration the circumstances of the particular case.⁵⁶

The *Caroline* doctrine was soon accepted as the standard rule of customary international law regulating all uses of force by a state acting in self-defense.⁵⁷ As such, the *Caroline* doctrine has had a major impact on how a state's resort to the use of force in self-defense is

⁵¹ See Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493, 496 (1990) (stating that U.S. Secretary of State John Forsyth sent a note of protest to the British Minister in Washington, D.C., Henry Fox).

⁵² See Kearley, *supra* note 45, at 328-29.

⁵³ The most relevant language from that letter is found in an excerpt that appeared in a later letter sent by U.S. Secretary of State Webster to Lord Ashburton. See THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 104-11 (New York, Harper & Bros. 1848).

⁵⁴ *Id.* at 110 ("It will be for [the British] government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."). The necessity prong of the self-defense doctrine will not be analyzed in this Note. Furthermore, for purposes of the proportionality analysis provided here, this Note assumes that the U.S. use of force in self-defense to combat international terrorism satisfies the necessity requirement. However, it must be noted that the question of necessity in the context of the U.S. War on Terrorism is fertile ground for further study.

⁵⁵ *Id.* ("It will be for [the British government] to show, also, that . . . [it] did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.").

⁵⁶

But the extent of this right [to self-defense] is a question to be judged of by the circumstances of each particular case; and when its alleged exercise has led to the commission of hostile acts within the territory of a power at peace, nothing less than a clear and absolute necessity can afford ground of justification.

Id. at 105.

⁵⁷ There is wide support for this view. See, e.g., DINSTEIN, *supra* note 12, at 219 ("The language used in Webster's correspondence, in the *Caroline* incident, made history. It came to be looked upon as transcending the specific legal contours of extra-territorial law enforcement, and has markedly influenced the general *materia* of self-defence."); I OPPENHEIM'S INTERNATIONAL LAW 420 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) ("[T]he basic elements of the right of self-defence were aptly set out in connection with the *Caroline* incident in 1837 . . ."); ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW, *supra* note 10, at 361 ("Under customary international law, it is generally understood that the correspondence between the USA and UK of 24 April 1841, arising out of the *Caroline* Incident . . . expresses the rules on self-defense . . ."); Rogoff & Collins, *supra* note 51, at 498 ("This formulation, known as the *Caroline* doctrine, asserts that [the] use of force by

viewed under international law.⁵⁸ But in the world today—beyond the often intangible norms of customary international law—the modern rules of international law, including those relating to the use of force by states, are collected and enshrined in the Charter of the United Nations. Article 2, paragraph 4 of the U.N. Charter⁵⁹ imposes a ban on virtually all international uses of force (otherwise known as the non-intervention principle).⁶⁰ Article 51 is one of two exceptions to the ban, allowing uses of force if taken pursuant to the inherent right of individual or collective self-defense.⁶¹ These are the rules for the international use of force that, in theory, hold the greatest authority in the modern global arena.

It is widely accepted that Webster's *Caroline* doctrine, and the principles of necessity and proportionality contained therein, remain the norm of customary international law⁶² and, in fact, heavily influenced the formulation of Article 51 of the U.N. Charter. As one scholar has stated:

[M]any commentators believe that the "inherent right of self-defense" referred to in Article 51 of the Charter consists of the right of self-defense as it existed in customary international law at the time the Charter was drafted. Under this theory, the *Caroline* doctrine

one nation against another is permissible as a self-defense action only if force is both necessary and proportionate.").

However, not all commentators believe that the *Caroline* doctrine should be so broadly interpreted as to regulate all uses of force in self-defense. See Kearley, *supra* note 45, at 329–30 (arguing that in applying the *Caroline* doctrine in its proper context, Webster only intended the highly restrictive conditions of necessity and proportionality to apply to "uses of force by one state within the territory of another state which had violated no international legal obligations to the first state that might have justified that first state's use of force[,] and that Webster clearly "had no intention of creating any general rules for the use of force by a state in self-defense").

⁵⁸ For an interesting discussion of the use of the *Caroline* doctrine within the context of the Judgment at Nuremberg in 1946—rejecting a self-defense claim by Germany in defense of its invasion of Norway in 1940 and condemning the invasion as a "crime against peace"—see Rogoff & Collins, *supra* note 51, at 504–05.

⁵⁹ U.N. CHARTER art. 2, para. 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

⁶⁰ See G.A. Res. 103, U.N. GAOR, 36th Sess., Supp. No. 51, at 79, U.N. Doc. A/36/51 (1981) ("Recognizing that full observance of the principles of non-intervention and non-interference in the internal and external affairs of sovereign States and peoples, whether direct or indirect, overt or covert, is essential to the fulfilment of the purposes and principles of the Charter of the United Nations. . . ."); Slaughter & Burke-White, *supra* note 5, at 1 ("In 1945, the nations of the world, concerned about the continuing threat of interstate aggression, committed to a basic principle of not using force in interstate relations. The principle was articulated in Article 2(4) of the U.N. Charter . . .").

⁶¹ See U.N. CHARTER art. 51. The other exception to Article 2, paragraph 4 is Article 53, which permits the use of force if directly authorized by the United Nations Security Council. See U.N. CHARTER art. 53.

⁶² See *supra* note 57 and accompanying text.

also is part of Charter law and should be applied as such. Moreover, even if the drafters of Article 51 did not intentionally incorporate the *Caroline* doctrine, the doctrine remains influential in the interpretation of Article 51, as customary international law generally influences any interpretation of the Charter. Therefore, . . . the *Caroline* doctrine is of considerable significance.⁶³

Accordingly, the doctrine of proportionality—the notion that a state may not respond to a use of force in any manner “unreasonable or excessive”⁶⁴—is firmly established as an integral aspect of both customary international law and, by extension, Charter law.⁶⁵ Indeed, there is no doubt concerning the status of the proportionality doctrine in Charter law, given its authoritative status in many U.N.-sponsored documents.⁶⁶

⁶³ Kearley, *supra* note 45, at 327 (citations omitted). However, it should be noted again that Kearley argues that current customary international law and Article 51 Charter law incorrectly take the *Caroline* doctrine out of context by applying it to *all* uses of force. See *supra* note 57. Nonetheless, there is still a majority of support for the proposition expressed in the material quoted here. See, e.g., Rogoff & Collins, *supra* note 51, at 506 (“Article 51 words ‘inherent right’ refer to customary international law extant in 1945, when the Charter was drafted. Customary law relating to self-defense is best expressed in Webster’s 1841 note to Fox [which constitutes the *Caroline* doctrine language].” (citation omitted)). Moreover, Rogoff and Collins note that “[s]tudents of international law relating to use of force by one nation against another regularly encounter references to the *Caroline* incident, both in scholarly writings and in statements by government officials.” *Id.*

⁶⁴ See *supra* note 55.

⁶⁵ See Gardam, *supra* note 12, at 391 n.3, 403 (“Proportionality as an element of self-defense is uncontroversial.”); John W. Head, *Essay: The United States and International Law After September 11*, 11 KAN. J.L. & PUB. POL’Y 1, 4–5 (2001); Louis Henkin, *The Use of Force: Law and U.S. Policy, in RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 45 (1989); Paul S. Reichler & David Wippman, *United States Armed Intervention in Nicaragua: A Rejoinder*, 11 YALE J. INT’L L. 462, 471 (1986); Eugene V. Rostow, *Agora: The Gulf Crisis in International and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT’L L. 506, 514 (1991); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94, 103 (June 27).

In the *Nicaragua* case, the International Court of Justice stated:

[Article 51 of] the [U.N.] Charter, having itself recognized the existence of [the natural or inherent right of self-defense], does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. . . . [Therefore,] customary international law continues to exist alongside [Charter] law.

1986 I.C.J. at 94. “With regard to the characteristics governing the right of self-defence . . . [t]he Parties also agree . . . that whether the response to [an] attack is lawful depends on observance of the criteria of the necessity and the proportionality of the measures taken in self-defence.” *Id.* at 103.

⁶⁶ See, e.g., Kevin C. Kenny, *Self-Defence*, in 2 UNITED NATIONS: LAW, POLICIES AND PRACTICE 1162, 1167, at ¶ 18 (Rüdiger Wolfrum & Christiane Philipp eds., new rev. English ed. 1995) (stating with respect to self-defense that “[i]n addition to the specific requirements of Article 51 [of the U.N. Charter], several other elements are universally accepted as required by customary international law: immediacy, *proportionality* and necessity [as first mentioned by Webster in the *Caroline* incident]” (emphasis added)); Ronald St. John MacDonald, *The Use of Force by States in International Law*, in INTERNATIONAL LAW: ACHIEVEMENTS

Having analyzed the relevant law and doctrines, a brief description of how a state, under Charter law, can validly use force in response to an attack by claiming Article 51 self-defense is helpful. This is presently of particular relevance, given that the United States is justifying its actions in the War on Terrorism as a function of its "inherent right"⁶⁷ to self-defense.⁶⁸ In a perfect world free of conflict, Article 2, paragraph 4 of the U.N. Charter dictates that no state is *ever* to threaten or use force against the "territorial integrity or political independence of any [other] state."⁶⁹ A use of force in contravention of Article 2, paragraph 4 will most assuredly be a breach of the "non-intervention principle"⁷⁰ under customary international law.⁷¹ Unfortunately, however, we live in a world that is far from perfect, in which states threaten or use force against other states all too frequently.⁷²

AND PROSPECTS 717, 721 (Mohammed Bedjaoui ed., 1991) (indicating that the Article 51 right to self-defense includes the *Caroline* doctrine, which pertains to a state's permissible response to an attack).

⁶⁷ See U.N. CHARTER art. 51.

⁶⁸ See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) ("Whereas [the acts of September 11] render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad . . ."); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001) ("Reaffirming . . . [the Security Council's] unequivocal condemnation of the terrorist attacks . . . on 11 September 2001, . . . [r]eaffirming the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations."); Steven Erlanger, *Russian Aide Warns U.S. Not to Extend War to Iraq*, N.Y. TIMES, Feb. 4, 2002, at A10 ("[D]eputy secretary of defense, Paul D. Wolfowitz [said that] . . . the United States has the right to defend itself . . . 'We were attacked, and . . . we need to take action to defend [ourselves].'"); Frederic L. Kirgis, *The American Society of International Law (ASIL) Insights: Israel's Intensified Military Campaign Against Terrorism*, at <http://www.asil.org/insights/insigh78.htm> (Dec. 2001) ("The United States has relied on its right of self-defense in using military force to respond to the September 11 attacks."); cf. Press Release, NATO, *Statement by the North Atlantic Council*, available at <http://www.nato.int/docu/pr/2001/p01-124e.htm> (Sept. 12, 2001) (stating that "[t]he Council agreed that . . . [the September 11 attacks] shall be regarded as an action covered by Article 5 of the Washington Treaty" and that "[t]he commitment to collective self-defence embodied in the Washington Treaty was first entered into in circumstances very different from those that exist now, but it remains no less valid and no less essential today, in a world subject to the scourge of international terrorism").

⁶⁹ See U.N. CHARTER art. 2, para. 4.

⁷⁰ See G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 123, U.N. Doc. A/8028 (1970).

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

Id.

⁷¹ See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 109-10 (June 27).

⁷² The U.N. Charter does contain a system for the peaceful resolution of disputes among states. See U.N. CHARTER arts. 33-38. However, once a state takes any action that is

When a state determines that it has become the victim of an "armed attack,"⁷³ that state may respond with force against the aggressor state.⁷⁴ However, even after an armed attack occurs, the Article 51 right to self-defense is further limited⁷⁵ by the requirements of necessity,⁷⁶ immediacy,⁷⁷ and proportionality.⁷⁸ Therefore, to be allowed under Article 51 of the U.N. Charter, a use of force taken in self-defense must: (1) be in response to an armed attack, (2) be of necessity,⁷⁹ (3) meet the immediacy requirement,⁸⁰ and (4) meet the proportionality requirement. It should be further noted that there is considerable dispute as to how long and under what circumstances the Article 51 right to self-defense continues to exist once invoked.⁸¹

One of the major goals of the U.N. Charter system is the regulation of the use of force by states in order to maintain international

interpreted as a threat to international peace or an act of aggression, a more serious and forceful response is provided for under the Charter. See U.N. CHARTER arts. 39–51.

⁷³ See U.N. CHARTER art. 51. This Note assumes that the events of September 11, 2001, constituted an armed attack on the United States, though this issue is deserving of further analysis in another study. There is no consensus as to whether terrorist attacks can or should be categorized as armed attacks for Article 51 self-defense purposes. See, e.g., *Nicaragua*, 1986 I.C.J. at 103 (requiring "action by regular armed forces . . . [or] 'the sending by . . . a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' . . . an actual armed attack conducted by regular forces"); Head, *supra* note 65, at 3 ("[T]he language [of whether an armed attack occurs] is not on its face limited to [an attack on a state by another state]; and it does not seem unreasonable to apply the language broadly to encompass the terrorist acts of September 11 . . ."); see also Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 Hous. J. INT'L L. 25, 38–40 (1987) (discussing the scope of the requirement of an armed attack in the context of an Article 51 claim of self-defense in response to a terrorist action).

⁷⁴ See U.N. CHARTER art. 51; *Nicaragua*, 1986 I.C.J. at 110–11, 122–23; DINSTEIN, *supra* note 12, at 165 ("Article 51 permits self-defence solely when an 'armed attack' occurs."); Henkin, *supra* note 65, at 48; Reichler & Wippman, *supra* note 65, at 470 ("Self-defense under [Article 51] may be exercised only in response to 'an armed attack.'").

⁷⁵ See DINSTEIN, *supra* note 12, at 183–85.

⁷⁶ *Id.* at 184 ("[T]here exists a necessity to rely on force (in response to the armed attack) because no alternative means of redress is available.").

⁷⁷ *Id.* at 183 ("[T]he two conditions of necessity and proportionality are accompanied by a third condition of immediacy.").

⁷⁸ *Id.* at 184 ("It is perhaps best to consider the demand for proportionality in the province of self-defence as a standard of reasonableness in the response to force by counter-force.").

⁷⁹ The necessity of the U.S. actions in Afghanistan, and the U.S. response to September 11 in general, can be challenged. Again, this issue deserves further study but is beyond the scope of this Note.

⁸⁰ As with necessity, whether the U.S. use of force in Afghanistan complies with the immediacy requirement may also be challenged.

⁸¹ See Abram Chayes, *The Use of Force in the Persian Gulf*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 5–6 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); Thomas M. Franck & Faiza Patel, *U.N. Police Action in Lieu of War: "The Old Order Changeth"*, 85 AM. J. INT'L L. 63, 63–64, 70, 73–74 (1991); Rostow, *supra* note 65, at 508–12.

peace and security.⁸² The United States, of course, stands as the hegemon of the international realm. But has the United States been playing by the rules laid down by the U.N. Charter in its uses of force in response to terrorist activities?⁸³ More importantly, can the U.S. War on Terrorism be waged within the permissible bounds of international law and, specifically, the doctrine of proportionality?

II

ANALYZING PROPORTIONALITY IN PAST U.S. RESPONSES TO TERRORISM

The United States used force in response to terrorist activities with the 1986 bombing of Libya⁸⁴ and the 1998 cruise missile attacks against Sudan and Afghanistan.⁸⁵ As further described below, the American public generally approved of these uses of force, despite the many in the United States and abroad who criticized these strikes as excessive and misguided. For the purposes of this analysis, however, these events are most noteworthy for their similarities with the current U.S. campaign against international terrorism.

A. The 1986 Bombing of Libya

On December 27, 1985, twenty civilians, including five Americans, were killed and eighty injured when bombs ripped through airline offices in Rome and Vienna.⁸⁶ Although no evidence directly linked Libya with the attacks, the terrorists had passports that traced back to Libya, and Libya's leader, Colonel Muammar el Qadhafi, was credited with describing the attacks as "heroic."⁸⁷ On March 24, 1986, U.S. Navy fighter aircraft and Libyan military forces exchanged fire while the U.S. fighters were engaging in a naval exercise over what Libya considered its territorial waters.⁸⁸ Thus, tensions were high be-

⁸² Under the U.N. Charter, the U.N. Security Council is the primary international entity entrusted with the maintenance of international peace and security. See FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* 501 (2d ed. 1993).

⁸³ For an interesting discussion of this question, see Paul H. Kreisberg, Comment, *Does the U.S. Government Think that International Law Is Important?*, 11 *YALE J. INT'L L.* 479 (1986).

⁸⁴ See discussion *infra* Part II.A.

⁸⁵ See discussion *infra* Part II.B.

⁸⁶ W. Michael Reisman, *International Legal Responses to Terrorism*, 22 *HOUS. J. INT'L L.* 3, 30 (1999).

⁸⁷ *Id.*

⁸⁸ *Id.* at 31; see also William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 *VA. J. INT'L L.* 421, 463 (1990) (describing in more detail the U.S.-Libyan confrontations in the Gulf of Sidra preceding the U.S. bombing of Libya).

tween the United States and Libya⁸⁹ in the spring of 1986,⁹⁰ and Qadhafi reacted by threatening terrorist attacks against U.S. nationals and interests.⁹¹ It was in this context that terrorists struck again, this time in West Berlin. On April 5, 1986, terrorists bombed the La Belle discotheque, a dance club frequented by U.S. service personnel.⁹² Among the dead were two U.S. soldiers, and 229 people (including seventy-eight U.S. nationals) were injured.⁹³ Qadhafi exulted in the attack and declared, "We shall escalate the violence against American targets, civilian and non-civilian, throughout the world."⁹⁴ On April 14, 1986, the United States, claiming to have intelligence linking Libya to the La Belle discotheque terrorist attack and many other terrorist attacks around the world,⁹⁵ launched air strikes against targets in Libya⁹⁶ that were directly related to terrorist training, support, and operations, as well as against a Libyan Air Force airfield.⁹⁷ The Pentagon hailed the strikes as a rousing success.⁹⁸ Though his personal residence was bombed, Qadhafi escaped unharmed.⁹⁹

⁸⁹ See George J. Church, *Targeting Gaddafi: Reagan Readies Revenge on a "Mad Dog"*, TIME, Apr. 21, 1986, at 18 ("The world watched something it had never seen before: the U.S. Navy moving into position so that the Commander in Chief could have the option of militarily punishing another nation for its sponsorship of international terrorism.").

⁹⁰ See Reisman, *supra* note 86, at 31. For a detailed discussion of the critical events leading up the U.S. air strikes against Libya, see Gregory Francis Intocchia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177, 182-86 (1987).

⁹¹ See O'Brien, *supra* note 88, at 463.

⁹² See *id.*

⁹³ *Id.*

⁹⁴ *Id.* (citation omitted).

⁹⁵ See Alan D. Surchin, Note, *Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad*, 5 DUKE J. COMP. & INT'L L. 457, 483-85 (1995) ("The United States bombed Libya because of its continuous sponsorship of terrorist attacks."). In later years, some doubt arose as to whether Libya was indeed behind the terrorist attacks that prompted the U.S. bombing of Libya. See, e.g., Francis A. Boyle, *Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 287, 290 (1987) ("It is now very clear from even a cursory examination of the world press that Qadhafi was not responsible for the attacks in Rome and Vienna. Indeed, the Ministers of the Interior from both Italy and Austria have stated as much publicly.").

⁹⁶ Robert J. Beck & Anthony Clark Arend, "Don't Tread On Us": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 185 (1994) ("On April 14, 1986, American armed forces launched Operation 'El Dorado Canyon.' The half-hour bombing raid struck five terrorist-linked targets in Tripoli and Benghazi . . ."); Jeffrey Allen McCredie, *The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?*, 19 CASE W. RES. J. INT'L L. 215, 215 (1987) ("On April 14, 1986, United States Air Force F-111's and Navy . . . A-6 and A-7 fighter planes launched a strategic bombardment of five targets in Libya . . . An estimated thirty-seven Libyans, including civilians, were killed; ninety-three sustained injuries." (citations omitted)); Sage R. Knauft, Note, *Proposed Guidelines for Measuring the Propriety of Armed State Responses to Terrorist Attacks*, 19 HASTINGS INT'L & COMP. L. REV. 763, 785 (1996) ("American F-111 [fighter/bombers] took off from bases in Great Britain . . . As a result of the attack, thirty-seven people were killed and ninety-three were injured." (citations omitted)).

⁹⁷ O'Brien, *supra* note 88, at 463-64.

⁹⁸ See Intocchia, *supra* note 90, at 179.

⁹⁹ *Id.*

The Reagan Administration claimed self-defense to justify the bombing of Libya.¹⁰⁰ Shortly after the attacks, President Reagan delivered to the American public the now familiar sound bite: "Today, we have done what we had to do. If necessary, we shall do it again."¹⁰¹ Reagan stated further, "When our citizens are abused or attacked anywhere in the world, on the direct orders of a hostile regime, we will respond Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight."¹⁰² U.S. Ambassador Vernon A. Walters was charged with the task of reporting the bombing to the United Nations.¹⁰³ While stating that the United States had "compelling evidence of Libyan involvement"¹⁰⁴ in terrorist attacks directed against U.S. interests, he told the assembly of nations, "In light of this reprehensible act of violence—only the latest in an ongoing pattern of attacks by Libya—and clear evidence that Libya is planning a multitude of future attacks, the United States was compelled to exercise its rights of self-defense."¹⁰⁵ Thus, the Reagan Administration went to great lengths to make its case that the Libyan bombing conformed to the international legal norms regulating self-defense.¹⁰⁶

Regardless of the legal justifications, the attack was overwhelmingly supported by the American public¹⁰⁷ and the U.S. Congress.¹⁰⁸ The reaction from around the world, however, was far from warm.

¹⁰⁰ Reisman, *supra* note 86, at 34 (stating that both the U.N. General Assembly and U.N. Security Council rejected the Reagan Administration's invocation of Article 51 self-defense as justification for the Libya bombing).

¹⁰¹ *Reagan: 'We Have Done What We Had to Do'*, WASH. POST, Apr. 15, 1986, at A23 (reprinting President Reagan's address to the Nation on Apr. 14, 1986).

¹⁰² *Id.*

¹⁰³ See Intocchia, *supra* note 90, at 191.

¹⁰⁴ *Security Council Considers U.S. Self-Defense Exercise*, 86 DEP'T OF STATE BULL., June 1986, at 18, 19.

¹⁰⁵ *Id.*

¹⁰⁶ See Intocchia, *supra* note 90, at 191–92. Thus, the legal grounds used to justify the air strike cited in the various statements made by President Reagan, Vice President Bush, and Ambassador Walters may be broadly outlined as follows:

- (1) Libya incurred liability because of its commission of terrorist acts against Americans.
- (2) The American bombing of Libya constitutes legitimately imposed sanctions or retaliation for Libyan-supported terrorism. Moreover, retaliation serves to deter future terrorist acts.
- (3) Alternatively, an ongoing threat of Libyan-supported terrorism necessitated *self-defensive* measures.

Id. (emphasis added).

¹⁰⁷ *Id.* at 187 ("A poll taken by the *New York Times* and the Columbia Broadcasting System found that seventy-seven percent of the American public supported the bombing of Libya" (citation omitted)).

¹⁰⁸ *Id.* "American Congressional reaction overwhelmingly supported the decision to bomb Libya. Even Congressional members who ordinarily [were] quite critical of Reagan administration policies supported the strike." *Id.* (noting that Democrats Thomas "Tip" O'Neil and Edward Kennedy had supported the raid even before President Reagan addressed the nation from the Oval Office).

Indeed, the bombing was met with immediate and substantial criticism from the international community.¹⁰⁹ Arab nations denounced the attack,¹¹⁰ the U.N. Security Council did not support it,¹¹¹ and even U.S. allies responded rather harshly.¹¹² The Soviet Union canceled a conference that was to be held the following May between U.S. Secretary of State George Shultz and Soviet Foreign Minister Eduard Shevardnadze, and Soviet Premier Mikhail Gorbachev characterized the strike on Libya as indicative of a "militaristic and aggressive" policy that threatened to damage U.S.-Soviet relations.¹¹³ Despite the initial round of criticism from the world community, however, international opposition, especially from the Western nations, lessened considerably in the weeks following the bombing.¹¹⁴ This was due to a consensus that was forming among the Western allies concerning the "extent to which terrorism posed a threat to the international community and the manner in which to deal with state-sponsored terrorism."¹¹⁵

However, that sentiment did not abate criticism of the attacks from international legal scholars.¹¹⁶ Those critical of the Reagan Ad-

¹⁰⁹ See *id.* at 177; Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. VA. L. REV. 933, 933 (1987).

¹¹⁰ Intoccia, *supra* note 90, at 177.

¹¹¹ *Id.* at 189. A newspaper report of the United Nation's reaction stated the following: In the United Nations, reaction to the air strike was decidedly against the United States. The United States, Great Britain and France vetoed a Security Council resolution that would have "condemn[ed] the armed attack by the United States of America in violation of the Charter of the United Nations." The resolution was sponsored by the Congo, Ghana, Madagascar, Trinidad and Tobago, and the United Arab Emirates. Also voting in favor of the resolution were Bulgaria, China, the Soviet Union, and Thailand.

Id. (citation omitted).

¹¹² See *id.* at 187-88.

West Germany[, the nation that suffered the terrorist attack which was the impetus for the U.S. bombing of Libya,] asserted that "a violent solution will not be successful and is not very promising." Tens of thousands of demonstrators marched and burned American flags in West Germany, Italy, Sweden, and Great Britain.

Id. (citing Manning, *In Western Europe, Strains Among Friends*, U.S. NEWS & WORLD REP., Apr. 28, 1986, at 24-25).

¹¹³ *Id.* at 189.

¹¹⁴ See *id.* at 177, 188-89.

¹¹⁵ *Id.* at 177-78 (citation omitted).

¹¹⁶ Though the purpose of this subpart is to discuss the critical responses to the 1986 bombing of Libya, it should be noted that there were a number of scholars who supported the action as an effective response to terrorism. See, e.g., Baker, *supra* note 73, at 47 (arguing that the Libyan bombing was neither disproportionate nor excessive); David P. Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT'L & COMP. L. 45 (1994) (defending the Reagan Administration's interpretation of international law regarding its use of force); Intoccia, *supra* note 90, at 212 ("In sum, the United States legitimately acted in self-defense when it responded to ongoing Libyan-supported terrorism by striking targets within Libya, which had some connection to Libya's capabilities to engage in additional terrorist acts."); Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 96, 104-05 (1989) ("The U.S. is committed to using force in its self defense only . . . to the

ministration concluded that the Administration's self-defense claim to justify the 1986 bombing of Libya was not a permissible use of Article 51 of the U.N. Charter.¹¹⁷ According to some scholars, the abrogation of the U.N. Charter included a violation of the proportionality doctrine.¹¹⁸ It was also observed that one of the key objectives of the Libyan bombing was long-term deterrence, intending to "persuade Libya and any other similarly inclined actors in the international community that the support of terrorist activities against the United States is bound to trigger an American response prohibitively costly to such actors."¹¹⁹ However, after the Libyan raid, critics asserted that using force for *deterrence* violated the international legal requirement of proportionality.¹²⁰ Furthermore, critics argued that for a use of force taken in self-defense to be valid under international law, the degree of force used cannot be excessive.¹²¹ Yet, the bombing of Libya prompted the question: "'excessive' in relation to what?"¹²² One critic argued that the excessiveness and proportionality of the Libyan bombing should have been measured "in relation to those threatened attacks which were believed to be imminent at the time of the raid, rather than in relation to Libyan terrorist activity, past and future, taken as a whole."¹²³ However, this argument continued, the U.S. government's refusal to disclose to the public the details of the terrorist attacks that it claimed Libya was planning made it rather difficult to determine whether the air strike met the proportionality requirement.¹²⁴ Despite this difficulty, the argument concluded that the U.S. air raid on Libya was indeed disproportionate: "[T]he United States would need to have had evidence that Libya was about to mount an attack upon United States nationals and targets of such ferocity that a highly destructive air strike which caused heavy casualties could reasonably be regarded as a proportionate response."¹²⁵

Even if not addressing proportionality directly, the bombing of Libya has been criticized as a clear violation of the generally accepted

extent it is proportionate to the threat defended against. [The U.S.'s] uses of force during the Reagan Administration met these tests."); Knauff, *supra* note 96, at 785-86 ("Qadhafi promised that future attacks on American citizens would occur. Therefore, . . . given the level of state support for the terrorists and the larger pattern of terrorist aggression, the United States response can be seen as justified.").

117 See, e.g., *infra* notes 126, 128-29 and accompanying text.

118 See, e.g., *infra* note 125 and accompanying text.

119 Alberto R. Coll, *Military Responses to Terrorism: The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 297, 299 (1987).

120 See *id.*

121 See Greenwood, *supra* note 109, at 946.

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

rules and norms of international law.¹²⁶ One scholar observed: "The bombing of Libya by the United States was widely condemned and the claimed justification widely rejected."¹²⁷ In agreement with this view, others have argued that the Reagan Administration abused the already uncertain doctrine of anticipatory self-defense¹²⁸ and far exceeded the permissible bounds of force allowable in self-defensive actions.¹²⁹

An interesting critique of the Reagan Administration's attack on Libya and its potentially damaging effects on the doctrines governing the international use of force comes from the "Great Power Veto" theory.¹³⁰ As this concept has been described in the Libyan bombing context (as well as in the context of other U.S. uses of force), the United States wields its U.N. Security Council veto power as a means to "frustrate the limits on self-defense as established by Article 51 and U.N. practice."¹³¹ According to those who espouse this theory, a pattern of U.S. behavior has emerged as follows: Once the United States believes that an aggressor state poses a serious threat to its national security, it first responds with unilateral military force, citing Article 51 self-defense as a justification. Thereafter, the United States uses its veto power to kill any draft resolutions in the U.N. Security Council condemning its use of force.¹³² This more or less reflects the series of events that took place in the Libyan bombing context.¹³³ "Thus," the

¹²⁶ See Fidler, *supra* note 116, at 45, 47-48 (stating that "[t]he Reagan Administration has been severely criticized for the attitude it displayed towards international law on the use of force[.]" and noting that "[p]ublicists . . . charge that the Reagan Administration violated the prohibition on the use of force in the United States' . . . bombing of Libya").

¹²⁷ Henkin, *supra* note 65, at 46.

¹²⁸ See John Quigley, *The New World Order and the Rule of Law*, 18 SYRACUSE J. INT'L L. & COM. 75, 106 (1992). Professor Quigley argued,

[S]elf-defense in anticipation of an attack is a disputed doctrine, because the U.N. Charter requires an 'armed attack' for invocation of self-defense. Publicists who support the doctrine, and states invoking it, have said that the force anticipated must be imminent. The Reagan . . . [Administration], however, routinely ignored the requirement of imminence in invoking self-defense. In the bombing of Libya . . . they did not claim that the attacks they purported to anticipate from [Libya] would occur imminently.

Id. (citations omitted); see also Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1073 (1998) ("[I]t is difficult to articulate the instant and overwhelming need to resort to force [after the alleged Libyan terrorist bombings in Europe] had taken place." (citations omitted)).

¹²⁹ See Quigley, *supra* note 128, at 105.

¹³⁰ See Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT'L L. 259, 263-64 (1989); Robert F. Teplitz, Note, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 591-92 (1995).

¹³¹ Teplitz, *supra* note 130, at 591.

¹³² See *id.*

¹³³ See *supra* note 111. Note, however, that the United States was *not* able to thwart a resolution condemning the bombing of Libya in the U.N. General Assembly. See Intocchia,

argument concludes, "understanding the scope of the veto power is important because of its potential to vitiate international restrictions on the use of force in national self-defense."¹³⁴

Beyond the aforementioned condemnations of the U.S. bombing of Libya, perhaps the most far-reaching and complete rejection of the legitimacy of the bombing is the following:

The Reagan Administration ordered the bombing of the Libyan capital as retaliation for Libya's terrorist activities against the United States and other Western countries. Customary international law does not condone the use of force for purposes of retaliation or deterrence. It permits the use of force only in self-defense and perhaps, under some circumstances, in preemptive or anticipatory self-defense. But the strikes against Libya were for purely retaliatory purposes. No matter what justifications the Reagan Administration gave for its action or how effective it has been in counteracting Libyan-supported terrorism, the bombing was clearly a deviation from the accepted international rules concerning the use of force by one state against another.¹³⁵

Many international observers agree that if the Libyan bombing and similar uses of force are considered retaliatory actions or reprisals, then they are unacceptable uses of force under Article 51 of the U.N. Charter.¹³⁶

However, Reagan is not the only U.S. president to be charged with playing fast-and-loose with the Article 51 self-defense justification. Furthermore, the Reagan Administration is not the only U.S. administration to receive criticism after launching military strikes in response to terrorist actions. As described below, many of these very same dilemmas plagued the Clinton Administration as it, too, struggled to respond effectively to international terrorist activity while at the same time justifying those responses as within the confines of international law.

supra note 90, at 189 ("The [U.N. General] Assembly adopted a resolution condemning the American raid by a vote of 79 to 28, with 33 abstentions.").

¹³⁴ Teplitz, *supra* note 130, at 591-92.

¹³⁵ Stuart S. Malawar, *Reagan's Law and Foreign Policy, 1981-1987: The "Reagan Corollary" of International Law*, 29 HARV. INT'L L.J. 85, 102 (1988) (citations omitted).

¹³⁶

President Reagan on April 16, 1986 issued a statement indicating that the United States took action against Libya under Article 51 of the United Nations Charter; i.e., he stated that it was an act of anticipatory self-defense in the face of clear and imminent danger. *To some, if not most, in the international community this action more closely resembled an act of reprisal, an action not as universally accepted under international law.*

Commander Byard Q. Clemmons & Major Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 225 (1998) (emphasis added).

B. The 1998 Cruise Missile Attacks on Sudan and Afghanistan

At 10:30 a.m. on the morning of August 7, 1998, two large explosives were detonated within minutes of each other inside the compounds of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania.¹³⁷ In the carnage that resulted from those blasts, thousands were injured and twelve Americans were among the dead.¹³⁸ The U.S. government immediately suspected that Osama bin Laden was responsible for the attacks.¹³⁹ The United States responded quickly. Citing what Clinton Administration officials described as “the strongest evidence ever obtained in a major terrorist case[,]”¹⁴⁰ the United States struck back by launching seventy-nine Tomahawk cruise missiles¹⁴¹ from U.S. warships, directed at bin Laden’s terrorist training camp in Afghanistan and a Sudanese pharmaceutical plant¹⁴² that the Administration suspected was producing chemical weapons components with bin Laden’s funding.¹⁴³

¹³⁷ See Maureen F. Brennan, Comment, *Avoiding Anarchy: Bin Laden Terrorism, the U.S. Response, and the Role of Customary International Law*, 59 LA. L. REV. 1195, 1195 (1999) (“The twin blasts dismembered pedestrians and incinerated passengers on three buses, killing 258 people and injuring more than 5,400 others, including the U.S. Ambassador to Kenya.” (citation omitted)).

¹³⁸ *Id.*

¹³⁹ From the day of the explosions, U.S. officials suspected that Saudi Arabian terrorist Osama bin Laden had orchestrated the attacks. The United States said bin Laden participated in other attacks against U.S. interests, including the 1996 bombing of an American military base in Dhahran, Saudi Arabia. Officials believed he managed his terrorist operations from a training camp in Afghanistan, where he established his headquarters after his expulsion from Sudan in 1996.

Id. (citations omitted)

¹⁴⁰ James Risen, *U.S. Says It Has Strong Evidence of Threat Justifying Retaliation*, N.Y. TIMES, Aug. 21, 1998, at A1.

¹⁴¹ See Reisman, *supra* note 86, at 47.

¹⁴² Many critics later raised doubts about the quality of the evidence relied upon by the Clinton Administration in its decision to strike the Sudanese pharmaceutical plant. For a discussion of such doubts, see Sara N. Scheideman, *Standards of Proof in Forcible Responses to Terrorism*, 50 SYRACUSE L. REV. 249, 257–60 (2000).

¹⁴³ Brennan, *supra* note 137, at 1195. It should be noted that Clinton’s reasons for striking Afghanistan and Sudan (in an effort to reach bin Laden) are analogous to Reagan’s reasons for attacking Libya (in an effort to reach Qadhafi). As Brennan explains:

[Though a]dmitting that the bin Laden terrorist “network” was not sponsored by any state, Clinton outlined four reasons for the action: 1) overwhelming evidence showed bin Laden “played the key role in the embassy bombings”; 2) his network had been responsible for past terrorist attacks against Americans; 3) officials had “compelling information” that bin Laden was planning future attacks and 4) his organization was attempting to obtain chemical weapons. In a second statement, President Clinton carefully characterized the strikes as necessary to defend against the threat of “imminent” and “immediate” future attacks, and not as retribution or punishment.

Id. at 1195–96 (quoting President William J. Clinton, Remarks on Military Strikes Against Afghanistan and Sudan, PUB. PAPERS 1460, 1460 (Aug. 20, 1998)).

In his address to the nation, President Clinton told the American people that the strikes against the “terrorist-related facilities in Afghanistan and Sudan” were necessary because of the “imminent threat they presented to [U.S.] national security.”¹⁴⁴ Thus the Clinton Administration, like the Reagan Administration before it, justified its response to terrorist strikes by claiming self-defense. Indeed, when Bill Richardson, the then-U.S. Ambassador to the United Nations, wrote the letter notifying the U.N. Security Council of the U.S. missile attacks on Afghanistan and Sudan, he clearly laid out the U.S. arguments in support of the attacks in the familiar language of self-defense.¹⁴⁵ Clinton’s Secretary of Defense, William S. Cohen, went further by warning terrorist organizations that the United States would not limit itself to “passive defense” when faced with choosing either to “fight or fold in pathetic cowardice.”¹⁴⁶

Many of the same critiques of the Reagan Administration’s bombing of Libya also apply to the Clinton Administration’s cruise missile attacks in Afghanistan and Sudan, leading many observers to conclude that the cruise missile attacks violated the rules of international law.¹⁴⁷ Indeed, one commentator suggested that the Clinton Administration foresaw this criticism: “The care with which . . . President [Clinton] and U.S. officials characterized the justification for the missile attacks show[ed] their concern that the actions of the United States could be

¹⁴⁴ President William J. Clinton, Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, PUB. PAPERS 1460, 1460 (Aug. 20, 1998).

¹⁴⁵ Ambassador Richardson’s letter to the President of the U.N. Security Council, dated August 20, 1998, stated in part:

“These attacks were carried out only after repeated efforts to convince the Government of Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the bin laden organization. That organization has issued a series of blatant warnings that “strikes will continue from everywhere” against American targets, and we have convincing evidence that further such attacks were in preparation from these same terrorist facilities. The United States, therefore, had no choice but to use armed force to prevent these attacks from continuing. *In doing so, the United States has acted pursuant to the right of self-defence confirmed by Article 51 of the Charter of the United Nations.* The targets struck, and the timing and method of attack used, were carefully designed to minimize risks of collateral damage to civilians and to comply with international law, including the rules of necessity and *proportionality*.”

Reisman, *supra* note 86, at 48–49 (quoting Letter from Bill Richardson, the Permanent Representative of the United States of America to the United Nations, to the President of the Security Council of the United Nations (Aug. 20, 1998), U.N. Doc. S/1998/780, *available at* http://www.undp.org/missions/usa/s1998_780.pdf) (emphasis added).

¹⁴⁶ See Scheideman, *supra* note 142, at 250.

¹⁴⁷ See, e.g., Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT’L L. 537, 557 (1999) (“[T]he August 20 missile strikes represent the assertion of imperial might and arrogance [by the United States] in opposition to international law.”); see also *infra* notes 149, 152–53 and accompanying text (discussing various scholars’ arguments that the cruise missile attacks violated international law).

perceived as a violation of international law.”¹⁴⁸ But, of course, such care did not insulate the Clinton Administration from scrutiny by international legal scholars.

For example, one scholar charged that a “very strong argument” could be made that the U.S. cruise missile strikes in Afghanistan and Sudan violated the customary international law norm regarding proportionality.¹⁴⁹ In characterizing the cruise missile strikes as more like a “retaliation rather than legitimate self-defense[,]”¹⁵⁰ critics took issue with the fact that the targets of the attacks in both Afghanistan and Sudan had no direct link to any “imminent” attack against the United States.¹⁵¹ Another observer agreed that, far more likely than not, the destruction of the terrorist training camps in Afghanistan, and certainly the leveling of the pharmaceutical plant in Sudan, did not meet the proportionality requirement regulating uses of force in self-defense.¹⁵² This analysis further concluded that, no matter how the Clinton Administration chose to justify the attacks—whether as retaliation or as self-defense—the equation simply did not add up to an acceptable use of force under international law.¹⁵³ Indeed, these criticisms highlight the same sticky “damned if you do, damned if you don’t” conundrum also faced by the Reagan Administration in its decision to bomb Libya in 1986: The overwhelming historical and politi-

¹⁴⁸ See Brennan, *supra* note 137, at 1197.

¹⁴⁹ See *id.* at 1209.

¹⁵⁰ *Id.* at 1210.

¹⁵¹ As Brennan noted:

The United States also did not respond proportionally to the attacks or to so-called “imminent” attacks. In the attack on Libya in 1986, Professor Paust criticized the United States for striking Libyan bombers and training facilities because those targets did not seem directly related to “imminent” threats or attacks in process, but rather involved Libya’s long-term capabilities. The same criticism applies to the Sudan and Afghanistan strikes. In addition, even if the evidence about the Sudanese pharmaceutical plant was accurate, could chemical weapons *components* be used in an “imminent” attack leaving no moment for deliberation? The same is true of the Afghan training camps. Though the United States quickly noted that it believed a meeting of terrorist leaders occurred at the time of the strikes, the United States revealed no evidence that additional attacks were so imminent that it was forced to strike Afghan territory to prevent them. The strikes may also have not met the immediacy requirement. In 1986, the United States received criticism for waiting ten days before striking Libya. In the recent strikes the United States took action after fourteen days. This longer delay renders the strikes even more suspect as actions in reprisal than did the delay of ten days before the Libyan strikes.

Id. at 1209–10 (citations omitted).

¹⁵² See Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1095 (2000).

¹⁵³ See *id.* at 1096 (“If the purpose of the strikes was retaliatory, it contravened conventional international law. If the strikes were motivated by self-defense, it appears that the necessary elements [an armed attack, necessity, immediacy, and proportionality] were not present.”).

cal pressure to respond to terrorist attacks with force, inhibited by the equally extreme difficulty of legally justifying such military acts.¹⁵⁴

As alluded to previously, “Self-defense is a nebulous concept with fluid boundaries.”¹⁵⁵ The rationales used to justify the 1986 bombing of Libya and the 1998 cruise missile strikes in Sudan and Afghanistan, and the subsequent debates they engendered, certainly illustrate that point. Thus, as the United States heads into its War on Terrorism, U.S. policymakers are yet again thrust into the murky waters surrounding the international legal norms of the self-defense and proportionality doctrines. As the Reagan and Clinton Administration case studies demonstrate, the United States is certainly susceptible to further criticism for its forcible responses to the September 11 terrorist attacks. Inevitably, U.S. policymakers will become entangled in a thorny debate over the justifications for its efforts toward eradicating global terrorism. Therefore, the time is ripe to ask:

III

IS THE U.S. RESPONSE TO THE SEPTEMBER 11 ATTACKS PROPORTIONAL?

The U.S. military’s targeting and toppling of the ruling Taliban and the evisceration of the al Qaeda terrorist network in Afghanistan¹⁵⁶ raise many questions about whether the United States responded proportionately to the September 11 attacks. First, a brief overview of the facts is needed to better consider these questions of proportionality: A loosely-knit band of terrorists, hailing from several countries,¹⁵⁷ hijacked four U.S. passenger aircraft. Two of the airliners crashed into each of the twin World Trade Center towers in New York City, causing both towers to collapse.¹⁵⁸ Another aircraft de-

¹⁵⁴ See Federica Bisone, Comment, *Killing a Fly with a Cannon: The American Response to the Embassy Attacks*, 20 N.Y.L. SCH. J. INT’L & COMP. L. 93, 113 (2000) (“[W]hile a historical argument for state responses to terrorist attack supports American involvement in Afghanistan and Sudan, legally justifying the military action presents problems.”).

¹⁵⁵ Sanya Popovici, *Deterrence, Defense, and the Requirements of an Effective Counterterrorism Strategy*, 3 ALB. L.J. SCI. & TECH. 315, 319 (1993); see also *supra* note 12 (describing the requirement of proportionality as susceptible to differing opinions).

¹⁵⁶ Though the military activities in Afghanistan against al Qaeda and the Taliban were, and continue to be, mostly performed by U.S. personnel using U.S. military equipment, other nations have contributed military assets to assist in the effort, including the United Kingdom, Canada, Australia, the Czech Republic, France, Germany, Italy, Japan, New Zealand, Poland, Russia, and Turkey. See THE COALITION INFORMATION CENTERS, *THE GLOBAL WAR ON TERRORISM: THE FIRST 100 DAYS 12* (2001), <http://www.whitehouse.gov/news/releases/2001/12/100dayreport.html> [hereinafter GLOBAL WAR].

¹⁵⁷ See Peter Finn, *Hijackers Depicted as Elite Group*, WASH. POST, Nov. 5, 2001, at A1 (“Of the [September 11] hijackers, [fifteen] were from bin Laden’s homeland, Saudi Arabia, two hijackers were from the United Arab Emirates, one was from Lebanon and one from Egypt . . .”).

¹⁵⁸ See ‘A National Tragedy’: *Terrorism Hits New York and Washington*, WASH. POST, Sept. 12, 2001, at C16.

stroyed one wing of the Pentagon in Washington, D.C.¹⁵⁹ The final hijacked jet hurtled to the earth, crashing in a Pennsylvania field.¹⁶⁰ The attack resulted in the deaths of over 3,000 people,¹⁶¹ the vast majority of whom were American civilians.¹⁶² In response, the United States launched a massive military strike in Afghanistan against the al Qaeda terrorist network and the ruling Taliban regime that harbored and supported them, resulting in weeks of sustained bombing and the eventual crumbling and displacement of the Taliban government.¹⁶³ The United States justified the military strikes by arguing that the al Qaeda terrorist network organized and carried out the September 11 attacks, and that the Afghanistan-ruling Taliban harbored and supported al Qaeda.¹⁶⁴ Accordingly, the United States claimed, it had the right to respond in self-defense.¹⁶⁵ As described above, such a claim entails meeting the requirements of: (1) an armed attack, (2) necessity, (3) immediacy, and (4) proportionality.¹⁶⁶

Detached from the horrors of September 11, this situation may be analogized to the aforementioned hypothetical scenario of the children on the playground. If the strict standards of Webster's *Caroline* doctrine are applied,¹⁶⁷ then the U.S. response was unreasonable and excessive, and therefore disproportionate: the terrorists crashed airplanes into three buildings, and in response the United States used a vast and crushing display of its military might to destroy and overthrow an entire government almost a month after the precipitating

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *supra* note 13.

¹⁶² In addition to the Americans killed, individuals from 80 different nations died in the terrorist attacks of September 11. GLOBAL WAR, *supra* note 156, at 5.

¹⁶³ See *id.* at 11.

¹⁶⁴ See George W. Bush, Address to the Nation Announcing Strikes Against Al Qaida Training Camps, 37 WEEKLY COMP. PRES. DOC. 1432, 1432 (Oct. 7, 2001). After initiating the strikes in Afghanistan, President Bush stated the following:

[T]he United States military has begun strikes against al Qaeda terrorist training camps and military installation of the Taliban regime in Afghanistan. These carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime.

. . .

More than 2 weeks ago, I gave Taliban leaders a series of clear and specific demands: Close terrorist training camps; hand over leaders of the al Qaeda network . . . None of these demands were met. And now the Taliban will pay a price. By destroying camps and disrupting communications, we will make it more difficult for the terror network to train new recruits and coordinate their . . . plans.

Id.

¹⁶⁵ See *supra* note 68.

¹⁶⁶ See DINSTEIN, *supra* note 12, at 183–85 (describing the conditions precedent to the exercise of self-defense).

¹⁶⁷ See *supra* notes 54–56.

attack.¹⁶⁸ Such actions fly in the face of the conventional interpretation of the proportionality doctrine. However, no clear international legal rule requires the application of this strict understanding of proportionality.¹⁶⁹ Indeed, there remains considerable debate over exactly what proportionality means, and which standard should apply in regulating responses to terrorism.¹⁷⁰ The following debate highlights the three most prevalent definitions of proportionality in this context.

A. The Debate over How to Calculate the Proportionality of Responses to Terrorist Attacks

Though international scholars generally agree that the use of force in response to a terrorist attack must be proportionate to the initial precipitating attack, no consensus among them exists as to how to properly calculate proportionality.¹⁷¹ Three different approaches to measuring the proportionality of responses to terrorism have been proposed: (1) the “tit-for-tat,” or “eye-for-an-eye” approach,¹⁷² (2) the “cumulative proportionality” approach,¹⁷³ and (3) the “eye-for-a-tooth” or “deterrent proportionality” approach.¹⁷⁴

In an article analyzing the Libyan bombing, the “tit-for-tat” approach was promoted as one that limited the right to self-defense by requiring that the amount of force used be proportionate to the threat and not exceed the force necessary to repel the threat.¹⁷⁵ Fur-

¹⁶⁸ The proportionality of the U.S. response to September 11, under the strict *Caroline* guidelines, comes into further question if the United States fulfills its promise to hunt down and destroy all forms of global terrorism wherever it exists around the globe and to engage in such activities, including the use of force, for an indefinite period of time. The United States claims that the mandate of September 11 requires no less. See Bush, *supra* note 164, at 1432. In his address to the nation announcing the attacks in Afghanistan, President Bush declared:

Today we focus on Afghanistan, but the battle is broader. Every nation has a choice to make. In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril.

Id.; see *supra* note 16 and accompanying text; *infra* note 249 and accompanying text.

¹⁶⁹ See *supra* note 12; *infra* Part III.A.

¹⁷⁰ See *infra* note 171 and accompanying text.

¹⁷¹ See Beck & Arend, *supra* note 96, at 206.

¹⁷² See *id.* (stating that this approach requires that the “victim state . . . respond proportionately to the *specific prior act* of terrorism” (quoting Oscar Schachter, *The Extra-Territorial Use of Force Against Terrorist Bases*, 11 *HOUS. J. INT’L L.* 309, 315 (1989) (emphasis added))). “The U.N. Security Council in several cases, most involving Israel, has judged proportionality by comparing the response on a quantitative basis to the *single attack* which preceded it.” *Id.* (emphasis added).

¹⁷³ *Id.* (describing this theory of proportionality as one in which “the victim state’s forcible measures should be proportionate to an aggregation of past illegal acts”).

¹⁷⁴ *Id.* (characterizing this approach as one in which “the victim state’s use of force must be proportionate to the overall terrorist threat faced by the state,” and adding that this third approach is “future-directed”).

¹⁷⁵ See Intoccia, *supra* note 90, at 205.

thermore, “a claim of self-defense must be rejected if the nature and amount of force used is disproportionate to the character of the initiating coercion.”¹⁷⁶ Thus, any response to an act of aggression that uses more force than is strictly necessary to “counter any continuing immediate threat” is not allowable under the “tit-for-tat” approach.¹⁷⁷ Applied to the U.S. actions in Afghanistan, the “tit-for-tat” approach would require one to balance all of the U.S. uses of force in Afghanistan against the September 11 terrorist attacks, and any other immediate terrorist threats faced by the United States, and ask: Did the United States do more than necessary to negate the threats it faced? The answer to this question—given the severity of the September 11 strikes and the very real fear that similar attacks were on the way—is not clear, and certainly reasonable people may disagree.

The “cumulative proportionality” approach posits that “[r]ough equivalence in the number of deaths and extent of property damage remains the *sine qua non* of proportionality.”¹⁷⁸ Under this approach, states can use the accumulation of smaller prior events, such as minor terrorist acts, to justify single, larger-scale responses under certain circumstances.¹⁷⁹ Thus, under the “cumulative proportionality” theory, the United States could factor into the equation not only September 11, but also other terrorist strikes such as the 1993 attempt to topple the World Trade Center towers,¹⁸⁰ the 1998 African embassy bombings,¹⁸¹ and the deadly attack on the *U.S.S. Cole* in 2000.¹⁸² But exactly how far back can the United States go? And did not the United States *already* respond to some of those attacks, for instance, when it launched cruise missiles against Afghanistan and Sudan?

Despite significant rejection by many international legal scholars, some still advance the “deterrent proportionality” approach.¹⁸³ One

¹⁷⁶ *Id.* at 206.

¹⁷⁷ *See id.*

¹⁷⁸ Guy B. Roberts, *Self-Help in Combatting State-Sponsored Terrorism: Self Defense and Peace-time Reprisals*, 19 CASE W. RES. J. INT'L L. 243, 281 (1987).

¹⁷⁹ *See id.* at 282.

¹⁸⁰ *See* Malcolm Gladwell, *At Least 5 Die, 500 Hurt as Explosion Rips Garage Under World Trade Center*, WASH. POST, Feb. 27, 1993, at A1; Malcolm Gladwell, *Sheik, 9 Others Convicted in N.Y. Bomb*, WASH. POST, Oct. 2, 1995, at A1 (“[T]he Feb. 26, 1993, World Trade Center bombing . . . killed six people, injured more than 1,000 and did \$500 million worth of damage.”).

¹⁸¹ *See supra* Part II.B.

¹⁸² *See* Susan Page, *A Decade of Terrorism*, USA TODAY, Nov. 12, 2001, at 9A (stating that the blast caused by a terrorist attack against the *U.S.S. Cole* killed seventeen U.S. sailors).

¹⁸³ Supporters of the “cumulative proportionality” approach have specifically rejected the “deterrent proportionality” approach:

If an unfounded expectation of a massive enemy attack or a series of attacks can justify a massive anticipatory thrust to deter the imagined onslaught, then the rule of law would be irrelevant. Furthermore, proportionality would have no meaning since preventive application of force . . . provides no ready reference point for the calculation of a proportional response.

scholar has argued, "Counterterror measures should be proportionate to the purposes of counterterror deterrence and defense, viewed in the total context of hostilities as well as the broader political-military strategic context."¹⁸⁴ In a 1987 American Society of International Law panel, another commentator agreed with this view: "Even though deterrence is incompatible with strict proportionality, . . . [a]n appropriate standard would be that the violence threatened or actually used in deterring an adversary should be the minimum necessary to persuade him not to undertake aggression in the future."¹⁸⁵ To further confuse the issue, some scholars have even promoted a combination of the "cumulative" and "deterrent proportionality" approaches by suggesting that uses of force in self-defense should be weighed against all immediately preceding attacks as well as the probability and size of future attacks.¹⁸⁶

Clearly, the theory that best suits the U.S. response to September 11, both in Afghanistan and on the grand scale, is the "deterrent proportionality" approach, or perhaps the suggested combination of the "cumulative" and "deterrent proportionality" approaches. But even if U.S. policymakers chose one of these approaches, who would judge if they were right? Would their decision be based on convenience or actual legal contemplation? As this survey of the different measures for calculating proportionality demonstrates, attempting to reach a universal and binding definition for proportionality is essentially an academic exercise, the result being that the issue will likely remain unresolved as the debate rages on.

B. Can the War on Terrorism Fit Within the Rules of Self-Defense?

Recall the statement: "[B]elligerents do not have an unlimited choice of means to inflict damage on the enemy."¹⁸⁷ The right to self-defense under international law is *not* a blank check to destroy one's enemy; indeed, self-defense is limited by the requirements of an armed attack, necessity, immediacy, and proportionality.¹⁸⁸ This standard dictates that the right to self-defense exists only as a mechanism for self-preservation, and only lasts as long as it takes the victim of the

Making justifications for reprisal on the basis of a future wrong is difficult since the wrong supposedly justifying the retaliatory response has yet to occur.

Roberts, *supra* note 178, at 282.

¹⁸⁴ O'Brien, *supra* note 88, at 477.

¹⁸⁵ Coll, *supra* note 119, at 299.

¹⁸⁶ See Baker, *supra* note 73, at 47 ("[W]hen responding to a continuing series of attacks, . . . self-defensive measures should be weighed against all attacks immediately prior to the response, and, more importantly, the probability and size of future attacks.").

¹⁸⁷ Gardam, *supra* note 12, at 402.

¹⁸⁸ See *supra* notes 75–81 and accompanying text.

attack to address the immediate threat to that self-preservation. But how do these academic standards translate into the real world, especially in the face of the ever-growing menace of international terrorism? Can the rules of self-defense, with the doctrine of proportionality chiefly among them, adapt to this changing threat?

If the Bush Administration is correct—that the only way to address and defeat international terrorism is to engage it wherever it is found¹⁸⁹—then that mission is far beyond the scope of any response to an attack that any nation has ever attempted during peacetime. The debates concerning proportionality discussed above suggest that a significant number of international legal observers would most likely conclude that such a response violates the doctrine of proportionality.¹⁹⁰ Many would probably reach that conclusion even if they applied an expanded view of the current international rules regulating the right to self-defense.¹⁹¹ Does this automatically mean that the United States has no other option but to risk shattering international legal norms in order to respond to terrorism in the way it currently thinks necessary? Possibly not, since there are also those who would likely argue that the current U.S. actions in Afghanistan and the larger War on Terrorism do not violate international law.¹⁹² However, such conclusions do not appear to actually conform to the standards of international legal doctrine regarding the use of force in self-de-

¹⁸⁹ See *supra* note 16; see also President's State of the Union Address, *supra* note 14, at 134 (“[O]ur war against terror is only beginning. . . . Thousands of dangerous killers, schooled in the methods of murder, often supported by outlaw regimes, are now spread throughout the world . . .”).

¹⁹⁰ See *supra* notes 175–79 and accompanying text; see also *infra* note 214 and accompanying text (providing the opinions of critics who believe that the Bush Administration's stated goals for the U.S. War on Terrorism violate international law).

¹⁹¹ See *supra* notes 175–82 and accompanying text.

¹⁹² See, e.g., Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 589 (2002) (“While some [have criticized] America's previous uses of force against terrorist supporting states, the case for America's forcible response to the September 11 attacks as being fully consistent with the inherent right of self-defense under customary international law and Article 51 of the U.N. Charter is very strong.”); Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT'L & COMP. L.Q. 401, 410 (2002) (noting that “[h]aving seized the opportunity to establish self-defense as an accepted basis for military action against some terrorist attacks, the U.S. will now be able to invoke it again—even when the circumstances are less grave,” and therefore “[i]t is . . . plausible to regard the choice of justification as, in part, a strategic decision directed at loosening the legal constraints on the use of force to the ongoing advantage of the U.S.”); cf. Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan and Beyond*, 35 CORNELL INT'L L.J. (forthcoming 2002) (arguing that the U.S. use of force in Afghanistan against Osama bin Laden and al Qaeda members was permissible under international law, *but* the U.S. military action directed at the Taliban regime was *not* permissible).

fense, but rather seem to make the case for an exception to the rules.¹⁹³

After September 11, global terrorism is undeniably a very real and serious threat to U.S. national security, and the United States is learning that some responses to terrorism better serve its security interests than others. For instance, launching cruise missiles against a terrorist training camp that can be rebuilt or relocated within a month is no longer an effective strategy for combating global terrorism, if indeed it ever was. As such, the United States is now presiding over an extraction of the proportionality limitation from the self-defense doctrine that it regulates. In the past, policymakers went to great lengths to make elaborate justifications for U.S. uses of force in recognition of the fact that the right to self-defense is a limited one.¹⁹⁴ Yet, this time around, the United States seems to believe it has a mandate to go the distance, regardless of the international legal standards.¹⁹⁵ And, in what threatens the conventional standards of the proportionality doctrine even more, it seems to many in the United States (and arguably to many in nations allied with the United States as well) that the United States did not overreact in Afghanistan at all.¹⁹⁶ For those concerned with adherence to international legal

¹⁹³ The law has played—and must continue to play—an important role in marking the limits and conditions on measures used to protect our national security against state-sponsored terror. Many proposed military actions were considered and rejected during recent years on legal grounds. That must and will continue to occur. But the law must not be allowed improperly to interfere with legitimate national security measures. In important respects, it is doing so today. . . . [When] unwarranted limitations are . . . imposed on counter-terrorist actions [] under . . . international law . . . such limitations may pose [dangers].

Sofaer, *supra* note 116, at 90; *see also* Baker, *supra* note 73, at 47 (arguing that responses to terrorist attacks may not fit within Article 51, but are nevertheless justified, and thus an expansion of Article 51 is required); Malawer, *supra* note 135, at 102 (suggesting that the Libyan bombings will lead to a new set of rules applicable to cases in which a state uses force in response to terrorist attacks).

¹⁹⁴ *See, e.g.*, Risen, *supra* note 140 (providing President Clinton's justifications for the cruise missile strikes against Afghanistan and Sudan).

¹⁹⁵ *See supra* note 14 and accompanying text.

¹⁹⁶ *See infra* note 261 and accompanying text; *see also* Beard, *supra* note 192, at 559, 560 (noting that the international community's response "to the September 11 terrorist attacks on the United States and important factual and legal distinctions between the circumstances surrounding the September 11 attacks and previous attacks . . . demonstrate the propriety of the exercise of self-defense in this case under the U.N. Charter and customary international law."); Michael J. Kelly, *Understanding September 11th—An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283, 285 (2002) ("[T]he toppling of the repressive Taliban, pursuit of international terrorists and creation of conditions for a new coalition government in Afghanistan are certainly proportional to the massive loss of life in America coupled with the astounding physical destruction we suffered."); *EU Leaders Back Bombing Strategy*, CNN.com, at <http://www.cnn.com/2001/WORLD/europe/11/05/ret.europe.summit/index.html> (Nov. 5, 2001) ("German Chancellor Gerhard Schroeder says European Union leaders are united in their support of the U.S. military campaign in Afghanistan.").

principles, like those contained in the U.N. Charter, does this development mean that the proportionality limitation on the right to self-defense is now to be completely abandoned? Should the United States be free to do as it pleases after enduring the September 11 attacks?

It is unquestionable, indeed almost intuitive, that proportionality must remain an important limitation on international uses of force. In fact, precisely because the proportionality doctrine is currently being tested to its utmost limits is what makes it now more important than ever before. The concepts underlying the proportionality doctrine must hold together, or nations will be uninhibited from mounting excessive and overzealous campaigns against their enemies—so long as they can concoct some feasible, yet meritless, claim of self-defense after the fact. Areas of great volatility exist in every corner of the globe, and once terrorism is added into this equation, the potential outcomes become all the more deadly.

Therefore, although the United States wants to combat global terrorism effectively, U.S. policymakers should not let their War on Terrorism serve as a precedent for the wholesale abandonment of the proportionality doctrine. Other nations may use that precedent as a justification for unleashing their military might against hostile targets, distorting the concept of the right to self-defense. If that were to happen, the possibility exists that the right to self-defense may become, in practice, much more like the blank check that it is not supposed to be.

C. Proposal for an International Terrorism Exception to the Proportionality Doctrine

Now that the United States is faced with this critical problem, what is it to do? How can the United States fight its War on Terrorism and still preserve some semblance of the rule of international law? Despite U.S. national security interests, U.S. policymakers should not feel comfortable with a redefinition of the self-defense doctrine that does not include the proportionality limitation.

Instead of attempting to squeeze the U.S. War on Terrorism into a justification in which it does not fit, U.S. policymakers would be better served if they clearly articulated an expanded version of the proportionality doctrine as it relates to international terrorism. In order to more properly and logically address the current threats to U.S. national security, a revision of the proportionality doctrine—narrowly tailored to effectively address and combat international terrorism—would allow the United States to respond to the September 11 attacks in a manner beyond that which would normally be acceptable under the traditional notions of the right to self-defense. It is important to stress that this proportionality exception would be specifically limited

only to measures taken to combat international terrorism. The exception would *not* extend to the classic right of self-defense, that being a response to a military strike by one state upon the territorial integrity of another state,¹⁹⁷ nor would it cover conflicts normally considered to be civil wars or regional territorial disputes. By moving beyond the scope of traditional proportionality, this exception for international terrorism would increase the United States's ability to more adequately match its response to the September 11 attacks with the nature of the terrorist threat facing U.S. national security. Thus, the United States could legally seek out and disable the international terrorist infrastructure that has proven itself to be quite potent.¹⁹⁸

Calling for this exception to the proportionality doctrine is not to take lightly international legal standards; rather it is a recognition of the reality that is modern-day international terrorism. When Article 51 of the U.N. Charter was drafted in 1945 following the Second World War, its drafters could not have envisioned that international terrorist organizations would rise to the level of strength and sophistication that they possess today.¹⁹⁹ Because of this, the U.N. Charter

¹⁹⁷ See generally DINSTEN, *supra* note 12, at 192–213 (describing in detail self-defense in response to an armed attack by a state).

¹⁹⁸ This is not to suggest, of course, that the United States has free reign to use excessive or unreasonable force against terrorist targets:

[T]he use of force, as with the theory of self-defense, must be proportional. It can be sufficient to eliminate the threat, with perhaps some room to spare, but it cannot be grossly disproportionate to the threat presented by the terrorists. Further, in order for the use of force to be justified at all, the threat must be a serious one; i.e., one that threatens the loss of life or very substantial property damage.

Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 172 (2000).

The protections limiting collateral damage in uses of force under Protocol I of the Geneva Conventions of 1949 still apply under this exception. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, arts. 48, 51–52, 1125 U.N.T.S. 3, 25–27 [hereinafter Protocol 1 to the Geneva Convention]. This proportionality exception allows the United States the ability and flexibility to realistically answer the terrorist threat with necessary measures, given the very elaborate and multinational structure of terrorist organizations. See *infra* notes 203–04 and accompanying text. When combating international terrorists, the United States may need to take action against terrorist cells located all over the globe while receiving varying degrees of support for its actions from other states. Note, however, that this analysis does not speculate about the proportionality of any of the actual future uses of force taken by the United States against international terrorist targets. Rather, this proposal is limited to stating that the proportionality exception promoted herein would make it permissible under customary international law for the United States to take necessary actions wherever and whenever it has a valid need to strike an international terrorism-related target, so long as the target poses a credible and verifiable threat to U.S. national security (an evaluation which has changed considerably in the post-September 11 world) and the action taken in response to that threat is not excessive.

¹⁹⁹ Beard, *supra* note 192, at 559 (“When representatives of fifty countries assembled in San Francisco in 1945 to draw up the United Nations Charter, modern threats of terrorism such as those posed by the Al Qaeda terrorist network were not yet known.”); Frederic L.

was not designed to specifically address state responses to international terrorist acts.²⁰⁰ The best one can do is to apply by analogy, when feasible, the principles of Article 51 self-defense to situations involving international terrorism. However, the viability of such an application very often breaks down, given that the type, scope, and form of the threat posed by international terrorism is so vastly different from that posed by a hostile state actor in the more traditional sense envisioned by the U.N. Charter.²⁰¹ Because the prevalence and deadliness of international terrorism have grown enormously over the past half century,²⁰² international legal norms must now be redesigned to deal with the very real threat international terrorism presents. Indeed, the very structure of international terrorist networks demonstrates the necessity of this alteration, given that their effectiveness directly stems from their complex and clandestine nature.²⁰³ For example, a single international terrorist strike can be planned in one country by terrorists hailing from a second country, executed against targets in a third country by terrorists recruited in a fourth country using weapons acquired in a fifth country that were manufactured in a sixth country, and supplied by a diplomat from a seventh, while financed with money from an eighth.²⁰⁴ This example demonstrates why the traditional notions of proportionality will not be effective in addressing the problems and dangers posed by international terrorism. Almost by definition, the War on Terrorism requires the United States to follow the evidence of terrorist activity wherever it leads, and then to determine a reasonable response to the threat once the target is identified. More likely than not, the traditional notions of proportionality, left unaltered, would not allow such an all-encompassing theater of operation.

Kirgis, *The American Society of International Law (ASIL) Insights: Terrorist Attacks on the World Trade Center and the Pentagon*, at <http://www.asil.org/insights/insigh77.htm> (Sept. 2001) ("If the party responsible for the attacks on the World Trade Center and the Pentagon is not the government of the country from which the terrorists operate, a question could arise whether use of armed force that causes injury to that country is lawful. *The U.N. Charter was not drafted with such situations in mind.*" (emphasis added)).

²⁰⁰ See *id.*

²⁰¹ See *supra* note 5; *infra* note 229; see also John D. Moore, *Intelligence, Policy and the New Terror*, 26 FLETCHER F. WORLD AFF. 167, 168 (2002) (reviewing PAUL R. PILLAR, *TERRORISM AND U.S. FOREIGN POLICY* (2001)) (noting the "decentralized, networked nature of Islamic terrorism," Moore states that "[u]nlike the hierarchical structures . . . of state military and security structures [and] mid-twentieth century guerrilla and Leftist-Marxist terrorist groups, actors such as Al-Qaeda are correctly characterized as either one or a group of nodes representing only a portion of the threat").

²⁰² See *infra* note 239.

²⁰³ See Campbell, *supra* note 152, at 1072-73.

²⁰⁴ See *id.*

Perhaps the strongest rationale supporting this proportionality exception is the threat of future terrorist attacks.²⁰⁵ Unfortunately, September 11 may not be an isolated incident,²⁰⁶ and a policy of inaction in the face of that possibility would simply be unacceptable for any U.S. administration after September 11.²⁰⁷ Though there are no fail-safe assurances, U.S. policymakers must take steps to prevent future large-scale terrorist attacks.²⁰⁸ There is evidence that the very real and ongoing threat of terrorism has become a daily reality. For example, if not for the quick actions of the flight attendants aboard American Airlines flight 63 en route from Paris, France to Miami, Florida, the alleged "shoe bomber," Richard Reid, might have succeeded in his plot to destroy that aircraft.²⁰⁹ In addition, officials in the Bush Administration have warned that, despite U.S. successes in Afghanistan, "terrorists may be operating in the United States, requiring the nation to stay on high alert for perhaps years."²¹⁰ And furthermore, Secretary of Defense Donald H. Rumsfeld stated that the United States must be ready to sustain terrorist attacks even worse than those suffered on September 11.²¹¹ Secretary Rumsfeld warned, "In the years ahead, it is likely we will be surprised again"; and moreover, "These attacks could grow vastly more deadly than those we suf-

²⁰⁵ See *infra* notes 209–13. In his 2002 State of the Union Address, President Bush highlighted the continuing terrorist threat:

Our discoveries in Afghanistan confirmed our worst fears and showed us the true scope of the task ahead. . . . We have found diagrams of American nuclear power-plants and public water facilities, detailed instructions for making chemical weapons, surveillance maps of American cities, and thorough descriptions of landmarks in America and throughout the world.

President's State of the Union Address, *supra* note 14, at 134.

²⁰⁶ See Beard, *supra* note 192, at 587–88 ("[T]he September 11 terrorist attacks [were not] isolated acts. Rather, they were part of an on-going terrorist campaign over many years that has been directed by the Al Qaeda terrorist network against the United States, and it is a campaign which Al Qaeda and Taliban leaders have insisted must and will continue until America capitulates or is destroyed." (citations omitted)).

²⁰⁷ When asked whether she thought that the Clinton Administration's decision to strike Afghanistan and Sudan in 1998 might backfire and spur radical groups to use more acts of terrorism, Clinton Secretary of State Madeline Albright responded, "While our actions are not perfect insurance [against future terrorism], inaction would be an invitation to further horror." Art Pine, *U.S. Targets Heart of Terror*, L.A. TIMES, Aug. 21, 1998, at A1 (alteration in original); see also Clinton, *supra* note 144, at 1461 ("But of this, I am also sure: The risks from inaction to America and the world would be far greater than action.").

²⁰⁸ In his January 29, 2002 State of the Union address, President Bush said:

[A]ll nations should know: America will do what is necessary to ensure our Nation's security. . . . Time and distance from the events of September the 11th will not make us safer unless we act on its lessons. America is no longer protected by vast oceans. We are protected from attack only by vigorous action abroad and increased vigilance at home.

President's State of the Union Address, *supra* note 14, at 135–36.

²⁰⁹ See Thomas B. Edsall, *Passenger Subdued on Plane: Bomb Fears Prompt Incident over Atlantic*, WASH. POST, Dec. 23, 2001, at A1.

²¹⁰ *AP News Capsules*, GOODLAND DAILY NEWS (Goodland, Kan.), Feb. 1, 2002, at 7.

²¹¹ See John Diamond, *Bush Teams Seeks Boost for Defense*, CHI. TRIB., Feb. 1, 2002, at 1.

ferred [on September 11].”²¹² Thus the threat of terrorism in the United States is very real and very substantial, and it will exist for quite some time.²¹³

Every aspect of the September 11 attacks—including the fact that they were on U.S. soil, their element of surprise, their alarming sophistication and precision, and the unprecedented level of violence that they achieved—signals that international terrorism is a serious threat to U.S. national security. However, pursuing the War on Terrorism to the full extent that the Bush Administration believes is warranted will be, in the opinion of many observers, viewed as disproportionate and in violation of international law.²¹⁴ Some may fear that this proposed alteration of international law is a slippery

²¹² *Id.*

²¹³ See John Diamond, *Spy Chiefs: Al Qaeda Is Still a Threat*, CHI. TRIB., Feb. 7, 2002, at 12 (“We know that terrorists have considered attacks in the U.S. against high-profile government or private facilities,” said CIA Director George Tenet. “We know that they will hurt us again, [and w]e have to minimize their ability to do so, because there is no such thing as perfect security in this business.”); James Risen & Patrick E. Tyler, *Interview with Bin Laden Makes the Rounds*, N.Y. TIMES, Dec. 12, 2001, at B5 (reporting that Osama bin Laden, in his only television interview since the war in Afghanistan began, declared that “the battle has been moved inside America, and we shall continue until we win this battle”); Nic Robertson, *Bomb-Making Video Reveals Scope of Al Qaeda Threat*, CNN.com, at <http://www.cnn.com/2002/US/08/21/terror.tape.main/index.html> (Aug. 21, 2002) (“An al Qaeda videotape obtained by CNN shows a level of sophistication in bomb making that would allow terrorists to arrive in a target city unarmed and easily put together high-explosive devices [from scratch] to carry out destructive attacks, experts who saw the tapes say.”).

²¹⁴ See, e.g., Head, *supra* note 65, at 7 (“[T]he campaign that President Bush has announced has other aims that extend well beyond self-defense for the United States.” (citation omitted)); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 27 (2002) (“The newly announced Bush Doctrine of declaring ‘war’ on global terrorist networks and the states who harbor them fits awkwardly with the positivistic, state-centric, U.N. Charter-focused understanding of the use of force that dominates international law.”); Paust, *supra* note 192, at 29; Tom J. Farer, Comment, *Beyond the Charter Frame: Unilateralism or Condominium?*, 96 AM. J. INT’L L. 359, 360 (2002) (“The Bush Doctrine, to the extent it implies unilateral action, cannot be contained within the U.N. Charter norms that have served as the framework of international relations for the past half century. It challenges a root principle of the Charter system—namely, the formal equality of states.” (emphasis omitted)); Jonathan Steele, *The Bush Doctrine Makes Nonsense of the UN Charter*, THE GUARDIAN, June 7, 2002, at 18, available at <http://www.guardian.co.uk/bush/story/0,7369,728870,00.html>; B. Welling Hall, *American Society of International Law (ASIL) Insights, Terrorist Attacks on the World Trade Center and the Pentagon: Addendum Relating to Self-Defense*, at <http://www.asil.org/insights/insigh77.htm> (Sept. 2001) (“[T]he suggested policy of holding entire nations accountable for the acts of a few would not appear to be lawful since collective punishment would, by definition, entail the unnecessary suffering of innocent populations.”); Kirgis, *supra* note 199 (“International law issues could arise if . . . the United States or any of its allies takes countermeasures against a country suspected of harboring the persons responsible for the terrorist acts of September 11. The issues would be particularly acute if the countermeasures are in the form of armed action.”); Michael Ratner & Jules Lobel, *An Alternative to the U.S. Employment of Military Force*, Center for Constitutional Rights, available at <http://www.humanrightsnow.org/alternative%20to%20force.htm> (last visited Sept. 4, 2002) (arguing for alternatives to the use of military force to prevent a unilateral and disproportionate U.S. response to the September 11 attacks); cf. Lobel, *supra* note 147, at 555 (“The legal justifications permitting nations to use force in

slope, leading to creative justifications for uses of force that would never have been allowed under the traditional norms. But this concern only further accentuates the need for a clear and prompt articulation of this modification to the proportionality doctrine. Such an articulation would allow U.S. counter-terrorism policies to comply with at least some rational—though novel—standard of international law.

D. What the Proportionality Exception Would Look Like

Once the need for the exception to the proportionality doctrine to combat international terrorism is established, it is necessary to describe how the exception would function in practice. Of course, no all-encompassing description of the exception is possible, given that as different situations arise, they will present unique challenges and consequences. Nevertheless, the following hypothetical situations are instructive.

For purposes of explanation, suppose the following scenario: The sovereign nation of Harmony is the victim of a large-scale terrorist attack perpetrated by a stateless international terrorist network known as “La Pravus.” After extensive investigation and reliable intelligence-gathering, Harmony discovers a La Pravus terrorist training camp located in a remote and isolated region of another sovereign nation, Prytania. Harmony contacts the government of Prytania seeking its support in eradicating the La Pravus terrorist operations within its territory. Prytania, however, is sympathetic to the La Pravus organization. There is no direct evidence that La Pravus members operate within the Prytanian government, or vice-versa, but because the government supports La Pravus’s cause, the government of Prytania casts a blind eye toward La Pravus’s operations on its soil. As a result, the Prytanians obstruct and delay any entreaties by Harmony to root out La Pravus in Prytania.

Under currently existing international legal norms, as pronounced by the International Court of Justice (I.C.J.) in the *Corfu Channel* case of 1949, no state is permitted to “‘knowingly [allow] its territory to be used for acts contrary to the rights of other States.’”²¹⁵ The I.C.J. further held, in the *Tehran* case of 1980,²¹⁶ that if the government of a state completely fails to take the appropriate steps to protect the interests of another state, so long as it has the capacity to do so, as required under international law, then that inactive state

response to terrorist attacks are premised on the efficacy of such military strikes. . . . However, the efficacy of such military strikes is as suspect as their legality.”)

²¹⁵ DINSTEN, *supra* note 12, at 214 (citing *Corfu Channel Case (Merits)*, 1949 I.C.J. 4, 22 (Apr. 9)).

²¹⁶ *United States Diplomatic and Consular Staff in Tehran*, 1980 I.C.J. 3 (May 24).

bears an international responsibility to the other state.²¹⁷ Thus, "If a host country permits the use of its territory as a staging area for terrorist attacks when it could shut those operations down, and refuses requests to take action, *the host government cannot expect to insulate its territory against measures of self-defense.*"²¹⁸ In connection with this point, Dinstein notes that just as one state has the right to exercise self-defense against an armed attack by another state, it is equally entitled to defend itself against attacks originating from armed bands or terrorists operating from within the territory of another state.²¹⁹ Therefore, in this situation, Harmony is entitled to take matters into its own hands and eradicate the La Pravus operations within Prytania.

In the second scenario, Harmony again discovers a La Pravus terrorist cell operating in Prytania. This time, however, the government of Prytania may or may not support the La Pravus cause and may or may not be aware of the La Pravus operations within its territory. But, either way, Prytania is too weak or otherwise incapable of terminating La Pravus's activities within its borders, despite its genuine attempts or desires to do so.²²⁰ In this situation, Prytania's international responsibility to Harmony resulting from the terrorist attacks is nominal.²²¹ However, that fact in no way dictates that Harmony must quietly endure violent terrorist attacks simply because no sovereign state can be held responsible.²²² Therefore, just as in the first scenario, Harmony is entitled to exercise its right to self-defense against La Pravus within the territory of Prytania.

At first glance these scenarios may seem to solve the problems facing the United States in its War on Terrorism. However, as noted

²¹⁷ See DINSTEIN, *supra* note 12, at 214 (citing *Tehran*, 1980 I.C.J. at 32-33, 44).

²¹⁸ Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L. L. 559, 565 (1999) (emphasis added).

If a host state is unable or unwilling to curtail harmful private conduct when that conduct originates from within the host state's territory, it makes no sense to insist that the victim state remain indifferent to such conduct, effectively sacrificing the integrity of its own territorial sovereignty for that of the host state.

Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 550 (2002).

²¹⁹ See DINSTEIN, *supra* note 12, at 216.

This is an extraordinary case demanding, and getting, an extraordinary solution in international law. Article 51 permits [a State] to resort to self-defense in response to an armed attack. [That State] may, therefore, dispatch military units into [another State's] territory, in order to destroy the bases of the hostile armed bands or terrorists (provided that the destruction of the bases is the 'sole object' of the expedition). When [a State] takes these measures, it does what [the other State] itself should have done, had it possessed the means and disposition to perform its duty.

Id. (internal quotation marks omitted).

²²⁰ See *id.* at 215.

²²¹ See *id.*

²²² See *id.*

by Dinstein, in both scenarios under the traditional norms of international law, the right to act self-defensively within the territory of another state is regulated by the principles emanating from Webster's *Caroline* doctrine.²²³ Under those conditions, not only would the need to infringe upon the sovereignty of another state have to be manifest, but the reaction would also have to be *immediately* responsive to an armed attack already committed by the terrorist organization, and not simply anticipatory of a future threat.²²⁴ Furthermore, a repeat attack from the particular terrorist cell targeted must be expected,²²⁵ and the amount of force used in response must be roughly equivalent, or proportional, to the precipitating terrorist attack.²²⁶

These conditions, however, simply cannot be applied successfully to the modern realities of international terrorism.²²⁷ For one, the requirement that any actions taken against an international terrorist target be strictly in response to an armed attack that already occurred and originated from the particular location to be struck is an impossible standard, owing to the nature and structure of international terrorist networks. For example, the United States was able to identify Osama bin Laden and his al Qaeda terrorist network as masterminding the September 11 attacks.²²⁸ However, the evidence indicates that the actual planning and training of the terrorists who took part in that

²²³ See *id.* at 219 ("Although Webster's prose was inclined to overstatement, the three conditions of necessity, proportionality and immediacy can easily be detected in it. These conditions are now regarded as pertinent to all categories of self-defence.").

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ See *id.* at 184 ("It is perhaps best to consider the demand for proportionality in the province of self-defence as a standard of reasonableness in the response to force by counter-force.").

²²⁷ Professor Beard argues:

Webster's comments in the *Caroline* dispute were . . . related to the standards applicable to a state launching a preemptive strike or engaging in a form of anticipatory self-defense and cannot be relied on to establish a rule prohibiting a state from responding with force to repulse and end on-going acts of aggression after that state has been the target of repeated attacks and faces a near certainty that more attacks will follow. In fact, an unnecessarily strict or overly broad reading of the necessity requirement could prohibit almost all 'after the fact' acts of self-defense except those that are immediately necessary to repel an attack or prevent being overwhelmed. Such a strict and self-defeating version of necessity expansively based on the *Caroline* test does not appear to be consistent with the right of self-defense under customary international law and has been vigorously opposed by a number of writers, particularly in the context of fighting terrorism. Similarly, an overly broad or strict reading of proportionality, which would require a state's armed response in self-defense to be in exact proportion to the attack suffered, is not consistent with customary international law, particularly in relation to attacks received during an on-going conflict.

Beard, *supra* note 192, at 585–86.

²²⁸ See *infra* note 244.

operation occurred in terrorist cells all over the world,²²⁹ and even in locations within the United States.²³⁰ Therefore, how else could the United States possibly respond against the particular location from which the terrorist attack originated without using its various methods (some of them military) to hunt down and strike against the entire worldwide al Qaeda network? The obvious first target was Afghanistan, but there are clearly countless other al Qaeda targets located within the territories of states around the globe.²³¹ The same is true for the repetition requirement. Again owing to the structure of international terrorist organizations, it is virtually impossible for the United States to know exactly which one of the worldwide terrorist cells will attempt to strike next; therefore, they must all be considered targets.²³² Indeed, it is likely that large-scale attacks, like September 11, require a great deal of coordination between a number of terrorist cells.²³³ The same is also true for the requirement that a response to a threat not be purely anticipatory. International terrorist networks are

²²⁹ See, e.g., Douglas Frantz & Desmond Butler, *Sept. 11 Attack Planned in '99, Germans Learn*, N.Y. TIMES, Aug. 30, 2002, at A1.

German authorities said today that the Qaeda cell in Hamburg identified the World Trade Center as a target more than a year before two hijacked airliners were flown into the New York City landmarks. . . . "Besides sharing ideological and military training, the members of the cell coordinated with the international network on the details of the attack and the logistical support," [Germany's top prosecutor,] Mr. [Kay] Nehm said.

Id.; Peter Finn, *German Officials Link Hijackers to Al Qaeda Group*, WASH. POST, Sept. 27, 2001, at A1 (noting that a German project "collected a trove of intelligence about a network of individuals and groups in Germany" and "the analysis of the information led to . . . Canada, the U.S. and other European countries such as Britain, France and Italy" (internal quotation marks omitted)); Terry McDermott, *The Plot: How Terrorists Hatched a Simple Plan to Use Planes as Bombs*, L.A. TIMES, Sept. 1, 2002, at S1 ("A small group of men spread across the globe was assigned the task . . .").

²³⁰ See Amy Goldstein, *Hijackers Led by Core Group: Suspects Left Trail of Movements in U.S. Through Licenses, Rentals*, WASH. POST, Sept. 30, 2001, at A1 (noting that the September 11 terrorists lived in Florida, New Jersey, California, and other locations throughout the United States); Major Garrett, *Bush Upset by INS Visas to Hijackers, Aide Says*, CNN.com, at <http://www.cnn.com/2002/ALLPOLITICS/03/13/Bush.INS/index.html> (Mar. 13, 2002) ("Mohammed Atta, 33, and Marwan Al-Shehhi, 23, learned to fly at Huffman Aviation in Venice Florida, in July 2000 and were aboard separate flights that struck the World Trade Center towers.").

²³¹ There are thousands of [al Qaeda] terrorists in more than 60 countries. They are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan, where they are trained in the tactics of terror. They are [then] sent back to their homes or sent to hide in countries around the world to plot [terrorist attacks].

President's Address to Joint Session of Congress, *supra* note 2, at 1348; see also *infra* note 236 (discussing the al Qaeda-linked terrorist cells in the Philippines).

²³² See Michele L. Malvesti, *Bombing bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, 26 FLETCHER F. WORLD AFF. 17, 27 (2002) ("[The counter-terrorism strikes in Afghanistan] are unlikely to be sufficient in undermining bin Laden's ability to conduct future acts of terror because the strikes are unlikely, by themselves, to destroy the critical nodes in his terrorist infrastructure.").

²³³ See *supra* text accompanying note 204.

obviously quite serious about conducting terrorist strikes, but, unlike dealings between hostile nations, the opportunity to use negotiation or diplomatic methods for resolving disputes is almost never an option. Nor can U.N.-imposed sanctions (whether social²³⁴ or economic) or embargoes effectively break a multistate terrorist organization's will to commit indiscriminate and unpredictable attacks. Therefore, the only way to effectively address a terrorist threat is through proactive engagement. Under what logical paradigm should a state be required by international law to wait for an attack that is virtually certain to come, when reasonable steps can be taken to prevent that attack from ever occurring?²³⁵ With regard to the requirement of rough equivalence in the amount of force used, it would be futile to attempt to make a logical connection between the amount of damage inflicted on September 11 with the damage caused by multiple U.S. strikes in their various forms (*e.g.*, financial or military) and severity (*e.g.*, the campaign in Afghanistan or the involvement in the

²³⁴ See JORGE CASTAÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 12* (Alba Amoia trans., 1969). Castañeda describes the phenomenon of international "social sanctioning" as follows:

[An international organization's] adoption of a recommendation represents an expression of a general social feeling. It is a manifestation of the manner in which the purposes of the treaty must be fulfilled in the eyes of the organization. The member who does not observe it is opposing not only a social consensus but also the juridical system that is the normative superstructure of that social environment. The pressure that a recommendation brings to bear on its addressees means this: faced with conduct contrary to the recommendation, and to the extent to which it is contrary, the social group can act, in its turn, against the asocial conduct of whomsoever does not carry out the recommendation, directing it reprobation against the author of the conduct. This is the *social sanction* of recommendations. The essential element in this ingenious theoretical construction is not so much the nonfulfillment of the recommendation in itself as the reaction of the group against the divergent attitude of the delinquent recipient.

Id. Social sanctioning would have no effect on an international terrorist organization, due in large part to the fact that such organizations, like al Qaeda, have no representation at the U.N. Nor, for that matter, did the Taliban.

²³⁵ See President's State of the Union Address, *supra* note 14, at 135 ("I will not wait on events while dangers gather. I will not stand by as peril draws closer and closer."); Beard, *supra* note 192, at 589 ("In the face of such serious attacks and continuing threats [from international terrorist organizations], international law and the United Nations Charter cannot require a passive defense in response."); Prime Minister Tony Blair, *Prime Minister's Statement on Military Action in Afghanistan*, 10 Downing Street Newsroom, at <http://www.number-10.gov.uk/news.asp?NewsId=2692> (Oct. 9, 2001) ("The world understands that whilst, of course, there are dangers in acting the dangers of inaction are far, far greater. The threat of further such outrages, the threat to our economies, the threat to the stability of the world."). Former U.S. Secretary of State George Schultz also noted: "A nation attacked by terrorists is permitted to use force to prevent or *preempt* future attacks The U.N. 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." *Low Intensity Warfare: The Challenge of Ambiguity*, 86 DEP'T STATE BULL., Mar. 1986, at 15, 17 (emphasis added).

fight against terrorist groups in the Philippines²³⁶), depending on the threat presented and the level of international support for U.S. efforts. In addition—and this is where the breakdown of the traditional notions of proportionality most strongly comes into play—Professor Dinstein’s discussion of self-defense in response to a terrorist attack coming from within a state does not appear to envision multiple actions against targets within the territories of multiple states occurring over an extended period of time, actions that are necessary to combat modern international terrorism successfully.²³⁷

Returning to the hypothetical scenarios between Harmony and Prytania: What if many months, or even years, have passed between the time of the precipitating attack and the responsive attack it generated? And what if there is not one Prytania, but many Prytanias, all with varying levels of La Pravus activity and Prytanian support for those activities, requiring many different responsive strikes, possibly separated by significant lapses of time? That scenario is more analogous to the situation currently confronting the United States. And that scenario necessitates a relaxation of the rules, requiring the proportionality limitation regulating the right to self-defense to become more elastic with regard to combating international terrorism. Under the *Caroline* rules of self-defense, engaging in multiple actions in multiple locations across the globe in response to a single terrorist attack, with some of those responsive actions occurring years after that attack, would not be considered proportionate to the precipitating attack.²³⁸ Yet, extreme situations call for extreme measures, and the United States must take steps to avoid more terrorist strikes similar to those of September 11. Furthermore, considering that modern-day international terrorists have the potential to inflict an almost unthinkable

²³⁶ See Eric Schmitt, *U.S. and Philippines Setting Up Joint Operations to Fight Terror*, N.Y. TIMES, Jan. 16, 2002, at A1 (discussing U.S. military action in the Philippines).

²³⁷ See generally DINSTEIN, *supra* note 12, at 213–21. However, Dinstein states earlier in the book:

Immediacy signifies that there must not be an undue time-lag between the armed attack and the exercise of self-defence. However, this condition is construed “broadly”. Lapse of time is almost unavoidable when—in a desire to fulfill letter and spirit the condition of necessity—a tedious process of diplomatic negotiations evolves, with a view to resolving the matter amicably.

Id. at 184 (citations omitted). However, this language does not seem to grant as reasonable the lapse of many years between an attack and responses to that attack considering that, generally speaking from historical examples, international terrorist organizations have not employed diplomatic means to negotiate the peaceful settlement of disputes with the United States, nor vice-versa.

²³⁸ See *id.* at 219–20. Compare the United States’s current and proposed plans for the campaign against international terrorism with the events that precipitated them: The attacks of September 11 occurred on only one day and successfully targeted three U.S. buildings.

amount of loss of life,²³⁹ as evidenced by the September 11 attacks,²⁴⁰ the need for a relaxation of the traditional norms for the purpose of combating international terrorism becomes all the more clear.

In the most extreme situations in which every level of the government of a sovereign nation is infiltrated by members of a terrorist organization, and when that government is complicit in virtually all of the activities of the terrorist organization, then that government, as well as the terrorist organization it harbors, should be considered hostile and a potential target in the U.S. response against international terrorism. This, of course, is the case of the Taliban and al Qaeda in Afghanistan.²⁴¹ However, it is unlikely that there exist any other similarly extreme examples of complete state support for a terrorist organization such as existed under the Taliban.²⁴² If, however, a sovereign nation turns a blind eye toward terrorist cells operating within its territory or tacitly supports the terrorists (without the terrorist organiza-

²³⁹ The disintegration of many states in the post-Cold War period, and the Cold War legacy of a world awash in advanced conventional weapons and know-how, has assisted the proliferation of terrorism worldwide. Combined with the increasing ease of transnational transportation and communication, and the presence of states and non-state actors to provide financial, material, and operational support, the lethal potential of terrorist violence has reached new heights.

Moore, *supra* note 201, at 168.

²⁴⁰ See, e.g., Jim Dwyer et al., *Fighting to Live as the Towers Died*, N.Y. TIMES, May 26, 2002, at A1 (stating that, at the time the article was written, there were 2,823 individuals believed dead as a result of the September 11 terrorist attacks on New York City alone).

²⁴¹ See Beard, *supra* note 192, at 582 ("In regard to the link between Al Qaeda and the Taliban Regime, the U.N. Security Council has on numerous occasions made the Taliban's clear and established support of terrorist networks a subject of concern and condemnation."); Johanna McGeary, *The Taliban Troubles*, TIME, Oct. 1, 2001, at 36, 42 ("[T]he Taliban found an enthusiastic new benefactor [in Osama bin Laden]. . . . In exchange for a haven in Afghanistan's switchback valleys and rugged passes, bin Laden offered the Taliban money and fighters."); Walter Rodgers, *Radicals Believe in Bin Laden*, CNN.com, Oct. 3, 2001, at <http://www.cnn.com/2001/WORLD/asiapcf/central/10/03/ret.rodgers.otsc/index.html> ("Taliban Supreme Leader Mullah Mohammed Omar has asked his people to prepare for a 'holy war' against the United States, just a day after Taliban leaders indicated that they want to negotiate with the United States over the American demand to turn over Osama bin Laden."). But see Paust, *supra* note 192 (manuscript at 12). Paust argues:

[T]he U.S. attacks on the Taliban in 2001 and the arrest or detention of members of the Taliban armed forces (as opposed to bin Laden and al Qaeda) [are] highly problematic. From what is publicly known, the Taliban did not send bin Laden's operatives abroad to attack the U.S., control and direct bin Laden's attacks on the U.S. and its nationals, knowingly finance the attacks, or otherwise directly participate in the attacks.

Id.

²⁴² The record in the U.N. Security Council . . . supports the finding that no government has been as universally condemned by the international community for its support of terrorism and so closely linked with terrorist activities as the Taliban Regime of Afghanistan. With this status comes a more easily assigned and more certain international legal responsibility for the horrific attacks on the United States of September 11 and a clearer case for self-defense under Article 51.

Beard, *supra* note 192, at 583.

tion actually being involved with official government functions), then the United States should have the legal option of addressing that terrorist threat.

It is illogical to allow terrorist camps and cells to fester and grow—only to strike at them after the terrorists have already attacked—if indeed the United States is aware of their existence beforehand.²⁴³ Cooperation should be sought from the nations within which terrorist organizations operate. However, if that cooperation is not forthcoming, the United States should not be afraid to act in its self-interest. After the events of September 11, the United States should not simply wait to become the victim of yet another terrorist attack before deciding to act. By virtue of necessity, the U.S. right to self-defense in the context of combating international terrorism will and should exist long into the future. Finally, to conclude this illustration of the proportionality exception, it is important to note that, as with all uses of force, use of this proportionality exception would be legal *only* after obtaining sufficient and credible evidence to validate and verify all targets as legitimate sources of international terrorist activities.²⁴⁴

E. Fighting Terrorism While Avoiding Anarchy in the International System

As previously stated, many commentators may believe that with the military strikes in Afghanistan, the United States has once again moved beyond the permissible bounds of Article 51 of the U.N. Charter.²⁴⁵ As with past U.S. uses of force in response to terrorism, many may criticize U.S. officials' claims that the U.S. response to September 11 fits within Article 51 self-defense, and argue that in reality the U.S.

²⁴³ See *supra* note 235.

²⁴⁴ See generally Lobel, *supra* note 147, at 547 (“Given the potential for abuse of the right of national self-defense, international law must require that a nation meet a clear and stringent evidentiary standard designed to assure the world community that an ongoing terrorist attack is in fact occurring before the attacked nation responds with force.”); Scheideman, *supra* note 142 (arguing for thorough and reliable decision making based on substantial and credible evidence for the selection of targets in the War on Terrorism) .

The United States claimed it had sufficient and credible information to warrant the strikes on al Qaeda and the Taliban in Afghanistan. See, e.g., Suzanne Daley, *NATO Quickly Gives the U.S. All the Help that It Asked*, N.Y. TIMES, Oct. 5, 2001, at B6 (“[T]he United States briefed its allies on its investigation, and NATO agreed that there was ‘clear and compelling evidence’ that Osama bin Laden and his Al Qaeda organization were behind the attacks.”); John Diamond, *U.S. to Detail Case Against Bin Laden*, CHI. TRIB., Sept. 24, 2001, at 1 (reporting that “U.S. intelligence and law-enforcement officials are preparing documents that . . . would show . . . that . . . Osama bin Laden and his Al Qaeda network planned and carried out the terrorist attacks on New York and the Pentagon,” and that Secretary of State Colin Powell said, “I am absolutely convinced that the Al Qaeda network . . . was responsible for this attack.”).

²⁴⁵ See *supra* notes 175–79, 183.

response does not seem to conform to the traditional equation. To attempt such justification may very well resemble the official U.S. justifications for the 1998 cruise missile strikes in Afghanistan and Sudan, and the 1986 bombing of Libya. However, given the depth and breadth of the U.S. intervention in Afghanistan, it may be an even harder sell for U.S. policymakers this time around; unlike the bombing of Libya and the cruise missile strikes, the broad and far-reaching War on Terrorism may eventually take the United States so far beyond the U.N. Charter's vision for the maintenance of international peace and security²⁴⁶ that the international system may never be able to return to its stasis of the past.²⁴⁷ This is because the United States is currently writing, unilaterally, its own doctrine for combating international terrorism: a doctrine of *zero tolerance*²⁴⁸ for international terrorism in all its manifestations and combating it wherever it is found.²⁴⁹ However, the Bush Administration has yet to clearly spell out the effects of this new doctrine on current international law, and how the doctrine might alter those norms.²⁵⁰ Given how fragile the international system can be, it is incumbent upon the Bush Administration to explain to the rest of the world that this zero tolerance policy, this deviation from the norm, is strictly limited to the narrow exception of international terrorism. Though the United States does want the freedom to conduct its fight against terrorism, it should also want to do so without causing the collapse of the entire international legal structure that regulates the international use of force.

Many international legal scholars have argued in the past for a necessary alteration of the rules regulating the use of force precisely to address the threat of international terrorism.²⁵¹ The mandate of

²⁴⁶ See *supra* note 82.

²⁴⁷ See Koh, *supra* note 214, at 27; Malvesti, *supra* note 232, at 27 ("The current [counter-terrorism] strikes contrast sharply with those of the past in terms of length and scope."); Farer, *supra* note 214, at 360.

²⁴⁸ See President's Address to Joint Session of Congress, *supra* note 2, at 1349 ("Every nation in every region, now has a decision to make. Either you are with us, or you are with the terrorists."); Farer, *supra* note 214, at 359 ("The subtext of the president's [January 2002 State of the Union Address] was that the United States was going to hunt down and eliminate terrorists wherever they might be found And [the U.S.] was prepared to act preemptively rather than simply as a response to an actual or imminent armed attack.").

²⁴⁹ See President's State of the Union Address, *supra* note 14, at 134 ("What we have found in Afghanistan confirms that, far from ending there, our war against terror is only beginning."); GLOBAL WAR, *supra* note 156, at 7 (quoting President Bush from September 19, 2001: "The message to every country is, there will be a campaign against terrorist activity, a worldwide campaign" (emphasis added)); *supra* note 168.

²⁵⁰ See Byers, *supra* note 192, at 406 ("Today, the question arises as to whether the right of self-defense extends to military responses to terrorist acts, particularly since most such responses will violate the territorial integrity of a State that is not itself directly responsible.").

²⁵¹ See, e.g., Baker, *supra* note 73, at 47; Malawer, *supra* note 135, at 102; Sofaer, *supra* note 116, at 90; Travalio, *supra* note 198, at 172.

September 11 dictates that the time has come for the United States to officially and openly defend its response to terrorism as a now-permissible exception to the more traditional notions of the right to self-defense.²⁵² An alternative response that does not include an explanation by the United States of this doctrinal shift might have the unsettling effect of inadvertently advocating a wholesale abandonment of the proportionality doctrine, a result that runs the risk of seriously undermining respect for the U.N. Charter system.²⁵³ If the United States, which is in many respects the flag-bearer of the United Nations, does not respect the core principles of the U.N. Charter, then why should any other states?²⁵⁴ Despite many of its own questionable uses of force, the United States—as the remaining hegemon—does desire that the rest of the world abide by the U.N.'s rules regulating uses of force and strive to stay within the bounds of international law.²⁵⁵ But if the United States does not clarify its actions in response to September 11, and other states feel as though proportionality is no longer a requirement for the use of force, what incentive will remain to keep these states on the straight and narrow path? The eventual outcome

²⁵² Cf. Koh, *supra* note 214, at 23–24 (“[W]e must acknowledge that September 11 is a tragedy potentially momentous enough to reshape the very architecture of the domestic and international legal system developed in the wake of World War II.”).

²⁵³ See *infra* note 256.

²⁵⁴ International law protects the fundamental interests of states and their citizens from abuse by actors in the international system. . . . When [the United States] disregard[s] customary international law . . . [the United States] will suffer the consequences of the precedents [it] create[s]. As Oscar Schachter has commented, once [the United States] make[s] decisions about the use of force, those decisions “become part of the law-shaping process, influencing expectations as to the acceptability of future actions influencing use of force.”

. . . Justice Brandeis, . . . who foresaw the consequences of [treating international law lightly, said:] “In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”

Brennan, *supra* note 137, at 1222–23 (citations omitted).

²⁵⁵ Surprisingly, nations typically do try to comply with the international law norms regulating the use of force, despite the fact that there exists no direct enforcement mechanism, as demonstrated by the following:

[I]nternational law and institutions have often appeared powerless to control either interstate or internal armed conflicts.

At the same time, states using force almost invariably seek to justify their actions with reference to international law. They may invoke the right of self-defense, or claim the consent of an affected state, or offer some other legal justification. No state denies the authority of international law governing the use of force, even if many states on occasion seek to reinterpret or evade that law.

of such abuse would be the systematic and incremental degradation of the U.N.'s legitimacy in regulating international armed conflict.²⁵⁶

Such an outcome would promote the already far too prevalent view that anarchy rules the international system. As one scholar noted, "[W]hile domestic politics functions under a system of authority, global politics is anarchic. There is no central authority to determine how nations should act toward one another and unilaterally enforce rules for such interactions."²⁵⁷ However, states have long been attempting to avoid anarchy in the international system:

From the seventeenth century onward, systematic efforts have been made to establish some form of authority in the international system in the hope that doing so might facilitate peace and cooperation among nations. International law and organizations are manifestations of this hope, and . . . they attempt to make the international system less anarchic.²⁵⁸

The most important of these international organizations committed to the furtherance of peace and order in the international realm is, of course, the United Nations. However, it is questionable whether the United Nations could generate the consensus required to pass binding resolutions authorizing actions more tangible than mere condemnations of terrorist activities.²⁵⁹

1. *The Current Shift in State Practice*

To solve this dilemma, one possible option for U.S. policymakers would be to use their leverage to advocate for a revision or rewording of Article 51, allowing for greater leeway in uses of force to combat international terrorism. However, it need not be stated just how time-consuming and controversial such an undertaking would be, not to mention the undoubtedly low probability of success in that endeavor. Yet it appears that the United States is saved from that struggle, owing to the widespread evidence of a developing shift in state practice regarding the U.S. War on Terrorism. As Frederic L. Kirgis observed in an article for *The American Society of International Law*:

²⁵⁶ See Brennan, *supra* note 137 at 1222–23; David Wippman, *NATO's Bombing of Kosovo Under International Law: Kosovo and the Limits of International Law*, 25 *FORDHAM INT'L L.J.* 129, 145–46 (2001); *cf.* Lobel, *supra* note 147, at 557 ("The current Clinton Administration policy to disregard the limits set by international law in dealing with such nations as Iraq and Sudan can only have the long-run effect of undermining respect for the U.N. Charter.").

²⁵⁷ SPIEGEL, *supra* note 35, at 388–89.

²⁵⁸ *Id.* at 389.

²⁵⁹ See G.A. Res 158, U.N. GAOR, 55th Sess., Supp. No. 49, at 513–14, U.N. Doc. A/15 (2001); G.A. Res. I, U.N. GAOR, 56th Sess., Supp. No. 49, at 4, U.N. Doc. A/56 (2001); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., at 1–4, U.N. Doc. S/RES/1373 (2001); S.C. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., at 1, U.N. Doc. S/RES/1368 (2001).

The United States has relied on its right of self-defense in using military force to respond to the September 11 attacks. Other governments have not challenged the right of the United States to do so Because customary international law is often developed through a process of official assertions and acquiescences, the absence of challenge to the U.S. asserted right of self-defense could be taken to indicate acquiescence in an expansion of the right to include defense against governments that harbor or support organized terrorist groups that commit armed attacks in other countries.²⁶⁰

Indeed, Professor Kirgis is not alone in this belief. A number of commentators have noted the international community's wide support for U.S. actions post-September 11,²⁶¹ including the observation

²⁶⁰ Kirgis, *supra* note 68.

²⁶¹ On September 12, 2001, in an unprecedented action, the North Atlantic Council of the North Atlantic Treaty Organization (NATO) released a statement invoking the collective self-defense of all nineteen member nations of NATO by stating that, if the terrorist attacks of September 11 were determined to be directed from abroad against the United States, then those attacks "shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all." Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001), available at <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

Widespread international support is also evidenced by U.N. Security Council Resolution 1373, adopted on September 28, 2001, which states in part:

Reaffirming [the Security Council's] unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania . . . ,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defense . . . ,

Reaffirming the need to *combat by all means*, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

. . . .
[and] [c]alls upon all States to . . . [c]ooperate . . . to prevent and suppress terrorist attacks and *take action against perpetrators of such acts*

S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., at 1-3, U.N. Doc. S/RES/1373 (2001) (emphasis added); see also Judith Miller, Remarks at the Cornell International Law Journal Symposium on *Terrorism: Implications of the Response to September 11, 2001* (Feb. 14, 2002) (transcript on file with author) ("The unity in the international community regarding the legal basis for U.S. action has been quite remarkable. . . . [T]he overall international agreement is that the U.S. had a proper legal basis for taking self-defensive actions . . . in response to the deliberate attack[s] . . . in New York and Washington, D.C."); GLOBAL WAR *supra* note 156, at 8. The Coalition Information Centers note:

Since September 11, President Bush and Secretary of State Colin Powell have built a worldwide coalition for the war against terrorism. . . . 136 countries have offered a range of military assistance. . . . The U.S. has received 46 multilateral declarations of support from organizations. . . . 89 countries have granted over-flight authority for U.S. military aircraft. . . . 76 countries have granted landing rights for U.S. military aircraft. . . . 23 countries have agreed to host U.S. forces involved in offensive operations.

Id. at 8; see also Steele, *supra* note 214. Steele states:

that states' acceptance of U.S. actions will, in effect, condone the use of anticipatory self-defense to fight international terrorism.²⁶²

2. *The Formation of Customary International Law*

This shift has the potential to be of immeasurable significance. Customary international law, defined as the unwritten body of rules or norms derived from the practice and opinion of states,²⁶³ need not take long to develop, so long as a particular practice of states is uni-

The U.N. security council gave the U.S. approval to take military action against the assumed perpetrators [of the September 11 attacks] under Article 51. . . . Washington was therefore entitled to strike back in self-defence. The argument is controversial, but unless it is challenged by a substantial number of states it will stand as a legitimate new interpretation of international law.

Id. Furthermore, Professor Beard states:

The European Union . . . , along with its member states individually, pledged to support U.S. action against terrorism. Similar views and various offers of support were made by America's Pacific allies, including Australia, New Zealand, Japan, the Philippines, and South Korea. In addition . . . , numerous states throughout Eastern Europe, Africa, and Asia expressed their support for the U.S. military response to the September 11 terrorist attacks.

. . . .

While public opinion in the Arab and Muslim world opposed the U.S. action against Afghanistan, several Arab states such as Bahrain, Egypt, and Jordan expressed support for the U.S. anti-terror campaign. Other Arab states also made significant contributions to U.S. military efforts, including Pakistan . . . , Saudi Arabia . . . , and Persian Gulf states such as Oman and Kuwait

Beard, *supra* note 192, at 569–70 (citations omitted).

²⁶² [T]here is relatively little support for a right of anticipatory self-defence, as such, in present day customary international law—either generally or in respect of terrorist acts.

This does not mean that this aspect of the law will remain unchanged. In his letter [to the U.N. Security Council] of 7 October 2001, [U.S.] Ambassador [to the U.N.] Negroponte did more than invoke the right of self-defence with regard to Afghanistan. He also wrote: "We may find that our self-defence requires further actions with respect to other organisations and other states." The U.S., in extending its claim beyond Al-Qaeda, is clearly contemplating widespread military action of a pre-emptive character that it would justify as anticipatory self-defence. Negroponte's letter could be seen as a step towards securing advanced support for an extension of the right of self-defence to encompass this previously contested sphere. Indeed, the letter attracted little in the way of protests from other States—an omission that might, if continued in the face of action justified as anticipatory self-defence—be regarded as evidence of acquiescence in yet another change to customary international law.

Byers, *supra* note 192, at 411 (citations omitted). Many international legal scholars have debated the validity of the right to anticipatory self-defence. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 186 (1991); Brennan, *supra* note 137, at 1197.

²⁶³ See Byers, *supra* note 192, at 401. The *Encyclopaedic Dictionary of International Law* provides, in part, the following definition for "customary international law":

Art. 38(1) of the I.C.J. Statute directs the Court to apply, *inter alia*, "international custom, as evidence of a general practice accepted as law" and such is generally regarded as a source of international law and to consist in two principal elements: a concordant practice of a number of States acquiesced

form.²⁶⁴ When considerable tension exists between formal international law and the practice of states, as has been the case after the September 11 attacks, the international norms must eventually evolve to reflect this new practice.²⁶⁵ And once customary international law develops, that development can form a reinterpretation of U.N. Charter law consistent with state practice. Professor Dinstein notes as an example of this phenomenon the application of the requirements of necessity and proportionality to Article 51 uses of force.²⁶⁶ Therefore, as this current shift in state practice emerges and forces the norms regulating self-defense to become more elastic, customary international law dictates a reinterpretation of Article 51 to include the exception to the proportionality limitation in the context of combating international terrorism.²⁶⁷ Thus, no formal reworking of the language of Article 51 is necessary so long as state practice holds. However, this shift is not to be taken lightly, for if left without boundaries,

in by others; and a conception that the practice is required by or consistent with the prevailing law (the *opinio juris*).

ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW, *supra* note 10, at 81–82; *see also* Wippman, *supra* note 256, at 135 (“International law rests fundamentally on State practice.”).

²⁶⁴ The Encyclopaedic Dictionary of International Law definition of “customary international law” continues: “As to the fact that, if the practice be uniform, the period during which it has been followed need not necessarily be very long, . . . see the judgment of the I.C.J. in the *North Sea Continental Shelf Cases*.” ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW, *supra* note 10, at 82. *See also* MALANCZUK, *supra* note 24, at 45 (“Customary law has a built-in mechanism of change. If states are agreed that a rule should be changed, a new rule of customary international law based on the new practice of states *can emerge very quickly*. . . .”) (emphasis added).

²⁶⁵ *See* Wippman, *supra* note 256, at 131 (“The authority of international law rests on a reasonable congruence between formally articulated norms and State behavior; when the two diverge too sharply, the former must adapt or lose their relevance.”).

²⁶⁶ The International Court of Justice pointed out, in the *Nicaragua* case, that Article 51

“does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.” In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court—citing these words—added that “[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law,” but “[t]his dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.”

DINSTEIN, *supra* note 12, at 183 (emphasis added) (citations omitted).

²⁶⁷ *Cf.* Beard, *supra* note 192, at 573.

The actions of the U.N. Security Council and the decisive, widespread, and unprecedented actions and statements by states supporting the U.S. right of self-defense against the September 11 terrorist attacks are compelling evidence of the international community’s assessment of the applicability of Article 51 . . . to America’s new war on terror.

Id. Although Beard applies Article 51 to the U.S. response to the September 11 attacks without qualification, the U.S. war against terrorism, as previously noted, does not seem to fit comfortably within the traditional notion of Article 51 self-defense. Therefore, the Article 51 that Beard speaks of must be one altered by the shift in customary international law.

it has the potential to eat away at the fundamental principles of the U.N. Charter that ensure peace and security in the world, and may go beyond the desired revisions allowing for a more effective campaign against international terrorism.²⁶⁸

Terrorism is a horror that plagues many nations. As such, the great danger is, as stated by one commentator in relation to the 1998 cruise missile strikes in Sudan and Afghanistan, "If every country claimed the right to strike back [as the United States did], the world might soon descend into anarchy."²⁶⁹ Indeed, some observers, even as prominent as New York's former Senator Daniel Patrick Moynihan, believe that we've been heading in that direction for a long time: "[T]here has been a steady erosion of the active conviction that law is the basis on which we conduct our foreign affairs."²⁷⁰ The United States must do what it can to avoid this outcome. The United States should pursue international terrorism, but it is in its best interest to do so under the rule of international law. In order to make this possible, September 11 has dictated that international law must grow and adapt to meet changing needs in the global arena. Now that all eyes are firmly placed on the United States in its War on Terrorism, the United States should not increase international anarchy and lawlessness. Yet, at the same time, the United States seeks the freedom and right to do what is in the best interest of U.S. national security. The apparent shift in state practice currently underway has opened the door to make this delicate balance of interests possible. Of course, terrorism as a practice can never be completely eradicated. However, that does not imply that the United States or the rest of the world should sit idly by while a very real opportunity exists to significantly dismantle the resources and systems upon which international terrorists rely.

²⁶⁸ As Professor Wippman states,

The vigorous military response of the United States and its allies to the attacks on the World Trade Center and the Pentagon reflect a broad interpretation of the right of self-defense. The U.S. view of self-defense in this context has been accepted by most States, though it would have generated vigorous controversy if the assault on Afghanistan had taken place a dozen years ago. This loosening of the constraints on the use of force may, within limits, represent an inevitable and even desirable response to the changed conditions following the Cold War. But we should be wary that the core principles of the U.N. Charter's approach to the use of force are not too rapidly and extensively eroded.

Wippman, *supra* note 256, at 145-46.

²⁶⁹ Bisone, *supra* note 154, at 114 (citation omitted).

²⁷⁰ Fidler, *supra* note 116, at 51.

F. The Second Battlefield: Addressing the Root Causes of Terrorism

Though not the focus of this Note, any analysis of the means and methods of combating the scourge of international terrorism would be incomplete without at least briefly mentioning the importance of addressing the root causes of terrorism. The War on Terrorism is, in actuality, a two-pronged war: one on the physical battlefield, and one on the diplomatic battlefield.²⁷¹ At the same time that the United States defends itself with force, U.S. policymakers must make a concerted effort to take a revisionist look at U.S. foreign policy, rhetoric,²⁷² engagements, and obligations²⁷³ around the world, with an eye toward curbing the disenchantment many in the Arab and Muslim world feel toward the West.²⁷⁴ A recent Gallup poll illustrates the

²⁷¹ To win the war on terrorism, one must therefore set two goals: first to destroy the terrorists and, second, to begin a political effort that focuses on the conditions that brought about their emergence. . . . To do so does not imply propitiation of the terrorists, but is a necessary component of a strategy designed to isolate and eliminate the terrorist underworld.

Zbigniew Brzezinski, *Confronting Anti-American Grievances*, N.Y. TIMES, Sept. 1, 2002, at WK9. Furthermore, Moore states:

Countering terrorism requires seeing through the smoke to determine what constitutes the threat and the best ways to mitigate those threats; *the integration of intelligence into diplomatic and military decision-making is central*. . . . Determination and patience, combined with proactive and dynamic application of social, economic, law enforcement, diplomatic, intelligence, and military tools are the keys to disrupting and destroying terrorist capacity and saving lives.

Moore, *supra* note 201, at 169–70.

²⁷² Former National Security Advisor Zbigniew Brzezinski has brought to light the rhetorical failings of some U.S. policymakers following the September 11 attacks:

President Bush has wisely eschewed identifying terrorism with Islam as a whole and [has] been careful to stress that Islam as such is not at fault. But some supporters of the administration have been less careful about such distinctions, arguing that Islamic culture in general is so hostile to the West, and especially to democracy, that it has created a fertile soil for terrorist hatred of America.

Brzezinski, *supra* note 271.

²⁷³ Concerning U.S. obligations, Professor Koh argues as follows:

To discourage states from harboring terrorists, we must use carrots, not just sticks, to support the law-abiding civil society groups who favor the democratic path in those countries. We need to work creatively, and on a people-to-people basis, with foreign universities, nongovernmental organizations, civil society groups, independent media, labor unions, women's groups, and political parties to demonstrate to would-be terrorists that global freedom and cooperation are far more likely than global terrorism to engender not just long-term prosperity, but genuine prospects for humane self-government.

Koh, *supra* note 214, at 27 (citations omitted).

²⁷⁴ See Kelly, *supra* note 196, at 283 (“[W]e must struggle to understand the genesis of the hatred harbored against our hegemony. Then we must adjust our policies accordingly to pursue our national security priorities without unwittingly engendering further ill will.”).

problem.²⁷⁵ The poll, conducted by interviewing individuals from nine Arab and Muslim nations to gauge public opinion in those countries after the September 11 attacks,²⁷⁶ found that the residents of the nations polled had an unfavorable opinion of the United States by a 2-to-1 margin.²⁷⁷ Most respondents viewed the United States as “ruthless and arrogant” as well as “aggressive and biased against Islamic values.”²⁷⁸ They also described themselves as “resentful” of the United States.²⁷⁹ And while most respondents did not view the September 11 terrorist attacks as morally justified, even larger majorities condemned the U.S.-led military action in Afghanistan as “morally unjustifiable.”²⁸⁰

To counter these sentiments, the United States must initiate a mutually beneficial dialogue to help foster better understanding between the West and the nations of the Arab and Muslim world. Only with this understanding can the United States work towards eradicating the root causes of anti-American sentiment that prevail among certain groups and lead to the breeding of international terrorists.²⁸¹ In addition, the United States must make more of an effort to take sincere interest in the problems facing those in the Arab and Muslim world,²⁸² much like it does with its allies in Europe and elsewhere.²⁸³ And this interest must also be coupled with a reasonable level of international aid.

²⁷⁵ CNN.com, *Poll: Muslims Call U.S. “Ruthless, Arrogant”*, CNN.com, at <http://www.cnn.com/2002/US/02/26/gallup.muslims/index.html> (Feb. 26, 2002).

²⁷⁶ *Id.* (“Researchers conducted face-to-face interviews with 9,924 residents of Pakistan, Iran, Indonesia, Turkey, Lebanon, Morocco, Kuwait, Jordan and Saudi Arabia . . .”).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See Brzezinski, *supra* note 271 (“[I]t is the emotional context of felt, observed or historically recounted political grievances that shapes the fanatical pathology of terrorists and eventually triggers their murderous actions.”).

²⁸² For example, Professor Kelly argues:

America and its allies must communicate to the Islamic world that the West actually does care about its concerns. We must repeatedly point to past actions undertaken to help Muslim countries: successful intervention in Bosnia to defend Muslims against Serbian aggression, NATO bombing of Serbia despite the absence of U.N. Security Council authorization to protect Muslim civilians in Kosovo Then we must translate this message into reality on the ground in Kabul.

Kelly, *supra* note 196, at 287–88.

²⁸³ Missing from much of the [U.S.] public debate is discussion of the simple fact that lurking behind every terroristic act is a specific political antecedent. That does not justify either the perpetrator or his political cause. Nonetheless, the fact is that almost all terrorist activity originates from some political conflict and is sustained by it as well. That is true of the Irish Republican Army in Northern Ireland, the Basques in Spain, the Palestinians in the West Bank and Gaza, the Muslims in Kashmir and so forth.

Brzezinski, *supra* note 271.

The United States must also take steps through cooperation with Arab and Muslim nations to end the constant vilification of the West that permeates Arab and Muslim popular culture and media.²⁸⁴ And, as Arab and Muslim views of U.S. society improve, U.S. efforts to seek assistance from Arab and Muslim states in the War on Terrorism will also go far in improving the U.S. view of Arab and Muslim society, as the distinction between the majority Arab and Muslim population and the minority groupings of radical Islamic fundamentalists becomes more clear to those in the United States. In what is also of vital importance, the United States cannot now abandon Afghanistan to rebuild on its own, as it did after the Soviet Union pullout in 1989.²⁸⁵ If the United States were to do so it “would only be confirmation of the minority Islamic view: that America and the West are indifferent and selfishly concerned with pursuing their own interests.”²⁸⁶

Getting to the root causes of terrorism involves historical analysis as well as addressing institutional problems—ones of entrenched habits of foreign policy, diplomacy, and image—that can only be solved over time with strong and enlightened leadership. Such leadership is sorely needed from the United States as an essential piece of solving the terrorism puzzle.²⁸⁷ Without it, international terrorism will continue to grow even more prevalent and deadly.

G. The Struggle Against International Terrorism Should Be Beyond Politics

Though this Note has, for obvious reasons, focused much attention on the words and deeds of the current Bush Administration, this in no way suggests that the U.S. combat against international terrorism is a partisan issue. In fact, it is quite the contrary. Faced with the realities of the post-September 11 world, every future U.S. president—whether Democrat or Republican—will undoubtedly be re-

²⁸⁴ Kelly, *supra* note 196, at 289 (“[W]e must not continue to sit passively while inflammatory stories air on Al Jazeera television allowing radical Muslims to cast us in the role of the enemy. . . . We must espouse our values and ideals, but in a non-threatening, inclusive manner.” (citations omitted)).

²⁸⁵ *See id.* at 287; Moore, *supra* note 201, at 169.

²⁸⁶ Kelly, *supra* note 196, at 287.

²⁸⁷ Professor Kelly notes:

We must remember that the real enemy is hatred, and hatred is not defeated on the battlefield. It is conquered in the hearts and minds of the people who harbor it. On September 11th, the hearts of most of the world, including the Islamic world, were with us. Now, the task is capturing the minds as well. Today’s active, reinvigorated education together with multiple tangible demonstrations of empathy in place of yesterday’s sentiment of indifference and pervasive arrogance are essential components for attacking the real enemy. Such effort takes a different kind of mind-set on our part, and a more advanced strategy.

Id. at 292 (citation omitted).

quired to place the battle against international terrorism high on his or her priority list.²⁸⁸ The examples presented in Part II of this Note illustrate this point, as presidents from both major U.S. political parties responded with force against terrorist activities even before the mandate of September 11.²⁸⁹ This underscores yet again the importance of the international terrorism exception to the proportionality doctrine outlined in this Note: The U.S. global war against terror must—if it is to be successful—be bigger than the particular president that resides in the White House at any particular moment. Therefore, the necessary rules of engagement must be carved out now so as to avoid any lapses of intensity in the future.

It has already been demonstrated that the American public overwhelmingly believes that combating international terrorism is a vital goal of U.S. foreign policy.²⁹⁰ In addition, the joint resolution authorizing the use of U.S. armed forces against those responsible for the attacks of September 11²⁹¹ passed virtually unopposed in the United States House of Representatives (with a vote of 420 to 1)²⁹² and passed unanimously in the Senate (with a vote of 98 to 0).²⁹³ The ability of international terrorists to commit such atrocities as perpetrated on September 11 firmly united U.S. government officials from both sides of the aisle behind the War on Terrorism. Such unity is a development rarely seen during peacetime.

Indeed, before the mandate of September 11, U.S. uses of force in response to terrorism on such a grand scale as the October 2001 intervention in Afghanistan would never have been permissible.²⁹⁴

²⁸⁸ Cf. Moore, *supra* note 201, at 169 (“[C]ounterterrorism is an ongoing process. There is no victory or end game that signals the eradication of terrorism; it will remain a fixture of human interaction. The objective is to use the best mix of available options to save lives and mitigate the growth and effectiveness of terrorists.”).

²⁸⁹ In fact, in the Clinton Administration’s confrontations with international terrorism, President Clinton used rhetoric strikingly similar to that which is currently being used by the Bush Administration, as demonstrated by the following comment made by Clinton soon after the missile strikes in Afghanistan and Sudan:

My fellow Americans, our battle against terrorism did not begin with the bombing of our embassies in Africa, nor will it end with today’s strike. It will require strength, courage and endurance. We will not yield to this threat; we will meet it, no matter how long it may take. This will be a long, ongoing struggle between freedom and fanaticism, between the rule of law and terrorism. *We must be prepared to do all that we can for as long as we must.*

Clinton, *supra* note 144, at 1461.

²⁹⁰ See *supra* note 15.

²⁹¹ See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

²⁹² 147 CONG. REC. H5683 (daily ed. Sept. 14, 2001).

²⁹³ 147 CONG. REC. S9421 (daily ed. Sept. 14, 2001).

²⁹⁴ See Wippman, *supra* note 256, at 145 (noting that “[t]he vigorous military response of the United States and its allies to the attacks on the World Trade Center and the Pentagon reflect[s] a broad interpretation of the right to self-defense,” and that “the U.S. view of self-defense in this context has been accepted by most States, *though it would have generated*

For example, imagine if the Clinton Administration had reliable and credible information regarding Osama bin Laden's whereabouts after the embassy bombings in 1998, but the only reliable way to capture or kill him would have been to invade Afghanistan with U.S. troops. Would President Clinton have been able to embark on that mission? It is highly unlikely that he would have been allowed the freedom to implement such an overt use of force. After September 11, however, if a president were provided with such valuable information on bin Laden's whereabouts, then he or she would be expected to act in a manner sufficient to achieve that mission.²⁹⁵

History has shown the United States that cruise missile strikes and solitary bombing runs are ineffective measures in combating international terrorism: terrorists on the run can disappear quickly and quietly, and destroyed training camps can easily be rebuilt or relocated. Targets such as bin Laden and his al Qaeda terrorist network require much more intense uses of force and multi-faceted counter-efforts to be disrupted and defeated. The emerging shift in state practice regarding the relaxation of the rules regulating self-defensive actions against international terrorist threats has made such efforts possible. However, with this massive grant of authority comes the responsibility to wield it prudently. Therefore, policymakers from both major U.S. political parties should unite to clarify and refine the practice of the proportionality exception for the general good of both U.S. national security and global peace and security.

CONCLUSION

The men and women of our Armed Forces have delivered a message now clear to every enemy of the United States: Even 7,000 miles away, across oceans and continents, on mountaintops and in caves, you will not escape the justice of this Nation.

—President George W. Bush²⁹⁶

September 11 taught the United States that it can no longer discount the reach, fervor, persistence, determination, and deadly potential of international terrorist organizations such as al Qaeda. International terrorist networks are no longer far-away entities operating only in foreign lands, so it no longer makes sense to ignore them

vigorous controversy if the assault on Afghanistan had taken place a dozen years ago" (emphasis added)).

²⁹⁵ In fact, President Clinton recently expressed that he is "full of regret" that his Administration did not stop Osama bin Laden before the September 11 terrorist attacks. See Clinton 'Full of Regret' Bin Laden Got Away, CNN.com, at <http://www.cnn.com/2002/US/09/03/clinton.bin.laden/index.html> (Sept. 4, 2002) (quoting Clinton as stating during an interview with CNN's Larry King, "I thought that my virtual obsession with [bin Laden] was well placed, and I was full of regret that I didn't get him.").

²⁹⁶ President's State of the Union Address, *supra* note 14, at 134.

and let them strengthen. Therefore, under what logical paradigm should the United States be forced to accept the continued potent existence of such groups, when it has at its disposal the means and will to combat them? That being said, because the U.S. War on Terrorism will undoubtedly set an important precedent with an equally important impact on the international rules regulating the use of force, an open and honest explanation of the unfurling U.S. terrorism doctrine is badly needed. This is not a bombing run over Tripoli; this is sustained and comprehensive combat against a vast global enemy.

If the United States is to wage its war on global terror, Article 51 of the U.N. Charter—a document drafted over fifty years ago without knowledge of the destructive power now available to modern-day international terrorist organizations—must be reinterpreted to include an exception to the proportionality limitation on the right to self-defense relating specifically to combating international terrorism. This reinterpretation is being dictated by the current shift in state practice which supports U.S. uses of force in the aftermath of September 11, creating a new customary international legal norm. If the U.N. Charter and international law are to be effective in promoting the objective of international peace and security, they must be malleable to the ever-changing international climate. If the Charter cannot bend and adapt to this situation, then it will prove itself ineffective in addressing hostile situations beyond the scope of those its drafters had in mind when they put pen to paper. This result will not bode well for the efficacy of the U.N. Charter system in the modern world. Furthermore, such an outcome would force the United States to continue concocting strained arguments in its effort to justify its actions as falling within the permissible bounds of the U.N. Charter. If the United States remains complacent with that route, then it must expect other states to follow in those convenient footsteps, justifying uses of force far in excess of the threats they face.

It is important to note that even under the revised proportionality doctrine to combat international terrorism, certain fundamental limits must be adhered to in every U.S. use of force. First, all uses of force must continue to adhere to the rules of armed conflict, including the protection of civilians and the ban on certain impermissible methods of warfare.²⁹⁷ Next, the United States may not use force against a target unless it has reliable and credible evidence of international terrorist activity connected with that target. Lastly, the proportionality exception in the name of self-defense post-September 11 cannot be used as an excuse by the United States to topple legitimate government regimes all over the globe. The level of support by the

²⁹⁷ See *supra* note 198.

Taliban for the al Qaeda in Afghanistan appears to be an isolated example. These limitations do not and should never change. The exception is *not* a blank check, and should not be viewed by the United States in that way.

In this new era and in the new fight against the deadly and highly effective forces of global terrorism, U.S. policymakers have an obligation to ensure that the United States does not remain under the veiled and constant threat of terrorism for any longer than necessary. Quite simply, the United States can no longer exchange "tit-for-tat" hostilities with terrorists.²⁹⁸ However, history will no doubt judge the United States more kindly if it clearly defines its actions in its defense, and asks the world community for its support.

This Note does not intend to promote international hostilities. Rather, it is an attempt to find the appropriate and workable balance between avoiding international anarchy and allowing the United States the freedom to act whenever it is justified and necessary to do so. In order to do this without degrading the entire international legal system, the norms regulating the use of self-defense in response to international terrorism must be altered. It has been stated,

The events of 11 September have set in motion a significant loosening of the legal constraints on the use of force, and this in turn will lead to changes across the international legal system. *Only time will tell* whether these changes to international law are themselves a necessary and proportionate response to the shifting threats of an all too dangerous world.²⁹⁹

These words must be tempered with the following admonition: September 11 does indeed seem to have been the end and the beginning of an era, and the international legal landscape will certainly now change. However, as the United States is freed to assert the many facets of its power around the globe in the name of the War on Terrorism, the most definite way to ensure that the terrorists succeed in destroying international peace and security is for the United States to sit idly by as time take its toll on the U.N. Charter system's ability to regulate international uses of force.

²⁹⁸ For example, the 1986 Libyan bombing and the 1998 cruise missile strikes against Afghanistan and Sudan.

²⁹⁹ Byers, *supra* note 192, at 414 (emphasis added).