Essay: The United States and International Law After September 11

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Editor’s Note: Professor Head prepared this essay for a panel discussion held at the University of Kansas School of Law on September 24, about two weeks after the terrorist attacks of September 11, 2001 on the World Trade Center and the Pentagon. The essay does not reflect any developments after September 27, 2001.

I need not recount the horrors of September 11. In this essay, I want to address two specific questions. First, what can the United States do in response to the terrorist attacks of that day on the World Trade Center and the Pentagon, and still be true to its international legal obligations? Second, what should the United States do in response to those attacks, and be both prudent and effective in the long term? I believe that how we answer those questions will bear importantly on the future of the United States and of international law.

I. WHAT CAN THE UNITED STATES DO?

Threshold Issues

Some Americans, enraged by the events of September 11, would assert that the United States can do whatever it wants in response to the terrorist attacks. After all, these people might say, the United States is now the world’s sole superpower; why should it feel at all constrained in its efforts to “bring our enemies to justice or bring justice to our enemies”, as President Bush promised? This raises a crucial threshold issue: Assuming there are in fact any international legal norms at all that purport to cover this kind of situation, does it matter whether or not the United States abides by them? Expressed differently, should the United States feel bound by any international obligations that it has voluntarily and deliberately undertaken?

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Yes. Despite weaknesses in the enforcement of international law—or perhaps because of those weaknesses—it is especially important that the United States abide by its international legal obligations. I would offer two main reasons. First, ours is a society founded on a respect for the rule of law. In countless ways we pledge fealty to law and criticize those persons, whether outside this country or inside it, who seek to replace the rule of law with the arbitrary exercise of raw power. We would demean ourselves and our values if we were to dishonor this pledge merely because we are so powerful and so seriously aggrieved today. Hence, we should take our international legal obligations seriously and honor them to the extent that they apply to the current situation.

Second, there is a practical reason for the United States to abide by its international legal obligations: reciprocity. It is in our own national interest to treat international legal obligations as binding on us so that we can continue to expect other states to take their own international legal obligations seriously. If we disregard or dishonor or disavow our treaty commitments—such as the United Nations Charter commitments I shall discuss below not to use armed force against another country except in self-defense—then we cannot easily press other states to honor their own treaty commitments.

Another threshold issue warrants attention: does international law even cover this situation? Are there any treaty provisions or rules of customary international law that address an attack so bizarre and unprecedented as that visited on the World Trade Center, or have we instead entered into a new phase in which the old rules of international law no longer apply? Those old rules, after all, rest largely on an old reality, in which states were the only entities directly subject to international law. Hence, even if the UN Charter prohibits the use of armed force by State A against State B unless State B has attacked State A, should we conclude that there are no rules that apply directly to this case, which apparently involves non-state actors? Are we working with a clean slate, legally speaking?

No. I believe the old rules still apply—partly because they are written broadly and partly because they are not really so old. The brief analysis I offer in the following paragraphs relies on a variety of sources of rules that I believe bear on this case, and particularly on the range of actions that are legally open to the United States in responding to the events of September 11. Several of those rules—for example, the statute of the new international criminal court—clearly reflect the growing recognition that international law reaches beyond traditional state-to-state relations. The terrorist attacks on New York and Washington do not thrust the world into such completely uncharted territory that no rules apply.

Self-Defense?
Can the United States, in response to the events of September 11, legally attack Afghanistan? By asking whether it can “legally attack” Afghanistan, I am asking whether
it would be consistent with treaty commitments and rules of customary law binding on the United States for it to carry out airstrikes or a ground invasion against or within the territory of the state of Afghanistan, currently ruled by the Taliban.\textsuperscript{2}

I believe the answer depends largely on the aims, scope, and circumstances of such an attack. I distinguish between three different scenarios—one in which the United States acts in self-defense, one in which the United States acts in retribution or retaliation, and one in which the United States leads a UN-authorized force.

In the first scenario—self-defense—I believe the United States would be acting consistently with its UN Charter obligations if it were to use military force against or within Afghanistan to defend against further strikes in a continuing attack being staged against the United States by a terrorist group within Afghanistan, assuming certain conditions were present. Let me identify first the key UN Charter provisions that bear on the issue. They are Articles 2(4) and 51.

\textbf{Article 2(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 ....

\textbf{Article 51}

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.\textsuperscript{3}

By these provisions, the UN Charter establishes a general rule and a specific exception to it. Although Article 2(4) prohibits a member state from using force against another state, Article 51 creates an exception to that Article 2(4) prohibition by permitting the use of force in self-defense “if an armed attack occurs”.\textsuperscript{4} Although it seems likely that the Charter’s drafters, in writing that phrase, envisioned an attack on a state by another state, the language is not on its face limited to that situation; and it does not seem unreasonable to apply the language broadly to encompass the terrorist acts of September 11—commandeering passenger jetliners to serve as giant weapons against important U.S. commercial and military centers.\textsuperscript{5} Indeed, this interpretation of Article 51 is supported by the fact that the NATO parties invoked Article 5 of the North Atlantic Treaty, in essence expressing their understanding that an armed attack against the United States occurred.\textsuperscript{6}

On this reasoning—that the September 11 terrorist acts amount to an “armed attack” on the United States—Article 51 would give the United States a right to act in self-
defense. Article 51 does not, however, give a blank check. The right of self-defense that it provides is circumscribed both (i) in duration (how long the right lasts) and (ii) in extent (how much of a response the right permits).

As for duration, the right of self-defense lasts only as long as the immediate threat persists and only until the Security Council responds effectively to the situation. The latter of these two temporal limitations appears in the wording of Article 51 itself, which authorizes self-defense only “until the Security Council has taken [necessary] measures”. Despite its refusal to pay the full amount of its UN dues in recent years, the United States still has a powerful voice in the UN generally, and of course it occupies one of the five permanent seats on the Security Council. It would be possible for the United States to take a two-step approach, engaging in self-defense action to address an immediate threat and building support within the Security Council for UN-authorized action to “restore international peace and security”. Such a two-step approach, however, would seem necessary only if it were considered impossible to get quick action from the Security Council. On the other hand, Article 51 imposes no express requirement on the attacked state (here, the United States) to request Security Council action. Moreover, if the Security Council proposed taking some action that the United States found inadequate, the United States could exercise its veto power to kill that proposal.

A second limitation on the duration of the right of self-defense appears not in the language of Article 51 itself but in customary international law. It is widely accepted that the right to use force in self-defense arises only when there is “a necessity for self-defence [that is] instant, overwhelming, leaving no choice of means, and no moment for deliberation.” Daniel Webster announced this formulation in 1837 in the Caroline case, and authors, governments, and international entities have endorsed it many times since then. Recent statements from U.S. government officials have emphasized the continuing threat that exists of further acts of terrorism against U.S. territory, as parts of a continuing attack allegedly masterminded by terrorists based in Afghanistan. If this is in fact the case, then I believe the Article 51 right to self-defense would apply.

However, in addition to these temporal limitations on the right of self-defense—valid only as long as the immediate threat lasts and “until the Security Council has taken [necessary] measures”—there are other limitations as well. One concerns proportionality. The Article 51 right to self-defense is generally regarded as allowing only such a use of force as is “necessary” to the circumstances, and not such a use of force as would be “unreasonable” or “excessive.” These norms also were announced in the Caroline case referred to above. This means that the United States could not use “excessive” force in any armed attack it might launch on or in Afghanistan in response to the September 11 events. Although views differ on exactly what might constitute “excessive” force, it surely would include force that does not carefully discriminate
between civilian and military targets. A recent decision of the International Court of Justice has made this clear:

States must never make civilians the object of attack and consequently never use weapons that are incapable of distinguishing between civilian and military targets... States do not have unlimited freedom of choice of means in the weapons they use.  

Further guidance appears in Article 48 of the First 1977 Protocol to the Geneva Convention relating to the protection of victims of international armed conflicts:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

These sources focus on discrimination—that is, discriminating between civilian and military targets. Force used in self-defense would also be “excessive” if it were not proportional to the armed attack. Not surprisingly, the exact dimensions of “proportionality” are the subject of dispute. As a general guide, however, as one author has put it, “the use of armed force should be for the purpose of defense and not for punishment.”

Reprisal, Revenge, Retaliation
The second scenario I address is that of a U.S. armed attack on Afghanistan undertaken not as a measure of self-defense but instead for other purposes. One such purpose might be to seize Osama bin Laden in order to bring him to trial in the United States. Another would be to kill him on the spot—not out of a concern that he is currently in the process of launching another wave in a multi-phase attack but instead out of a thirst for revenge. Another such purpose might be to retaliate against the Taliban for its refusal to extradite Osama bin Laden. Yet another might be to retaliate against the Taliban for another reason—its harboring of dangerous terrorists generally.

I believe the UN Charter has rules that cover these situations and that the United States would be acting in contravention of those rules if it launched an armed attack on or in Afghanistan for any of those purposes I listed above. The overarching aim of the UN Charter is to create a broad mutual defense and peacekeeping regime that centralizes the use of force in the Security Council. The Charter’s provisions are quite explicit on this. By way of Article 2(4), which I quoted above, the UN members have surrendered the right to use armed force, except in cases of self-defense under Article 51. To whom has this right been surrendered? The Security Council. Articles 24 and 42 provide as follows:
Article 24(1) [The UN] Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Article 42 [The] Security Council ... may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.\textsuperscript{18}

A unilateral armed attack by an individual state that is not in self-defense would typically be seen as falling within the general category of "armed reprisal".\textsuperscript{19} The UN Charter provides no support for the proposition that such action (use of force other than in self-defense) is permitted. But what about other sources of law? Given the numerous instances of states—particularly the United States—using armed force against other states in which any claim of self-defense would be extremely difficult to sustain (the invasions of Grenada and Panama come to mind\textsuperscript{20}), perhaps the set of rules established by the UN Charter has been superseded by a new set of rules that has arisen in customary international law permitting armed reprisal and other aggressive uses of force.\textsuperscript{21} Is the United States freed from its Article 2(4) obligations by any such rule of customary international law?

I think not. It seems generally accepted that although there are occasional departures from the central rule prohibiting the unilateral aggressive use of force, that rule still stands, at least (i) as far as armed reprisals (retaliatory use of force not in self-defense) are concerned\textsuperscript{22} and (ii) as it applies to the harboring of terrorists.\textsuperscript{23} More importantly, even if that central rule is in question—particularly as it applies, for example, to the unilateral aggressive use of force for other purposes, such as humanitarian intervention or arresting drug kingpins or terrorists—I believe it is in the best interests of the United States to hew to its Article 2(4) commitments, and hence to eschew a unilateral attack,\textsuperscript{24} if there is a reasonable alternative way to solve the problem, as through multilateral action.

**Multilateral Action with Security Council Authorization**

The third scenario I address involves the United States as the leader of a multilateral effort expressly authorized by the Security Council to counteract a threat to international peace and security. This would clearly be a legal use of force by the United States. This is what occurred in 1950 when the Security Council authorized states to "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack (by North Korea) and to restore international peace and security in the area" (the Korean peninsula)\textsuperscript{25} and in 1990, when the Security Council used nearly identical language in authorizing what became Operation Desert Storm to force Iraq out of Kuwait.\textsuperscript{26}

The Security Council would have ample grounds for "determining the existence of [a] threat to the peace", as provided for in Article 39,\textsuperscript{27} and for taking action under
Article 42 (quoted above). These grounds would include (i) the need to address a continuing threat posed by Osama bin Laden to the United States and (ii) the need to address the threat posed by Osama bin Laden to other countries, or to the world at large. The first of these (continuing threat to the United States) would be the complement to Article 51 self-defense rights: the United States would have the right to use force in self-defense (as discussed above) under Article 51 as long as the immediate threat of continued attack persisted and until the Security Council acted; in turn, such Security Council action would rest on its Article 42 powers. The second of those grounds for Security Council action under Article 42 (the threat Osama bin Laden poses to other countries or the world at large) could involve a charge that the September 11 attacks constitute crimes against humanity, as that term has been defined:

The use of the hijacked aircraft as lethal weapons, resulting in the deaths of hundreds if not thousands of persons, may be a crime against humanity under international law. The Statute of the International Criminal Court, which is in the process of obtaining the necessary ratifications to enter into force, defines a crime against humanity as any of several listed acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." The acts include murder and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." 28

II. WHAT SHOULD THE UNITED STATES DO?

Military Options

As I stated near the beginning of this essay, I believe the United States should abide by its international legal obligations as carefully as possible. Beyond that, of course, the United States should also be guided by policy considerations; it should not exercise every legal right it has at its disposal – for example, the right to use force in self-defense – if doing so would not serve the policies that are in the best long-term interest of the country.

I have explained above my view that there is a limited right of self-defense that the United States could invoke in carrying out an armed attack against Afghanistan. On balance, however, I would prefer to see the United States use the UN machinery if at all possible. An obvious advantage of doing so is that it would broaden the scope of possible operations beyond those of self-defense. 29 There is no question that any immediate continuing threat to the security of the United States must be addressed. However, the campaign that President Bush has announced has other aims that extend well beyond self-defense for the United States. 30 A multilateral approach, with Security Council approval, could more effectively serve those aims.
Such a multilateral approach also would obviously broaden the base of support among other countries, thus increasing the possibility of success in the overall anti-terrorist campaign. From a policy and foreign-relations perspective, I believe the interests of the United States would be best served by an anti-terrorist campaign that is not unilateral but instead draws on the resources and reflects the support of many countries. Some might argue that such an approach would dilute U.S. influence. I would argue that it would temper U.S. impatience. It also could improve the chances of success by deflecting charges, whether justified or not, that the United States is involved in a modern “crusade.”31 I return to this point below.

Given the gravity of the circumstances and the support that has been shown by other world leaders,32 it would not seem overly difficult for the United States to muster support for a Security Council resolution along the lines of the 1950 and 1990 resolutions. However, if this did prove impossible, it would still be open to the United States to take Article 51 action in self-defense—presumably for as long as the Security Council did not act in a way that the United States supported. On the other hand, whatever difficulty the United States might experience in the Security Council should serve as a warning to the United States that its initiatives do not enjoy broad enough support and might ultimately fail.

**Characterizing the Campaign**

I believe it is crucial that the United States not allow the campaign against terrorism to be perceived as a crusade against Islam. I question whether it should be characterized as any sort of a contest at all,33 unless perhaps as a contest for Islam. In my view, the United States has done a poor job of portraying itself to the Muslim world as a country that has any real concern for that world. This has allowed extremists such as Osama bin Laden to persuade many Muslims that the United States is a Great Satan. I believe that the United States cannot ultimately succeed in its campaign against terrorists and terrorism unless it displaces that image. And it can do that only if it aggressively blocks attempts by extremists, both in this country and in Muslim countries, to characterize the campaign as a “clash of civilizations”34 or a religious war. Instead, the fundamental similarities among Christians, Jews, and Muslims must be emphasized35 and relied on to isolate the terrorists as outlaws in all three faiths.36 This, in turn, will require that more Americans overcome their ignorance and their intolerance of Islam.

I also believe that the United States should not be distracted by calls for vengeance. The campaign against terrorism—to be directed most immediately, it seems, against Osama bin Laden—should have security, not retribution, as its central aim.
Other Options—Beyond Mere Security

I have offered some views on “the military option” for responding to the September 11 attack. And I have just said that security should be the central aim of the campaign against terrorism. However, we need to look beyond this campaign, beyond the military option, and beyond the terrorism itself, to consider what underlying conditions have allowed terrorism to flourish. I cannot develop this theme in a short essay, but it warrants attention by U.S. policy-makers and the U.S. populace. A recent New York Times article refers to a “sea of resentments” in which terrorists swim. Ultimately, it is those resentments—born of a world economic and political system reeking of poverty and despair, intolerance and inhumanity—to which we must direct our efforts.

III. CONCLUSIONS

I have tried to cover a lot of ground in this short essay. Let me summarize the main questions and my answers to them:

Q: Does it matter whether or not the United States abides by its international legal obligations?

A: Yes, both (i) in order to be true to our own values, especially the value we place on the rule of law in society, and (ii) in order to serve best our own long-term national interests.

Q: Does international law even cover this situation?

A: Yes. Even though the rules governing use of force in situations of this sort—involving terrorist actions by non-state actors but with global repercussions—are outside the sort of state-to-state relations that international traditionally covers, there are numerous sources of law that apply to this situation and that bear on the types of response that would be legal.

Q: Can the United States, in response to the September 11 attacks, legally attack Afghanistan—that is, use military force against or within Afghanistan?

A: It depends on the aims, scope, and circumstances of such a U.S. use of force. I have distinguished between three different situations:

(1) Such a U.S. use of force would be legal if (i) it is to defend against further strikes in a continuing attack being staged against the United States by a
terrorist group within Afghanistan and (ii) the scope of the U.S. use of force is not excessive but instead is proportional to the threat posed and (iii) the Security Council has not yet taken measures to restore international security.

(2) However, such a use of force by the United States would not be legal (that is, it would be inconsistent with U.S. commitments and obligations under international law) if it is only for the purpose of seizing Osama bin Laden in order to bring him to trial in the United States, or to kill Osama bin Laden on the spot—not out of a concern that he is currently in the process of launching another wave in a multi-phase attack but instead out of a thirst for revenge—or if its aim is to inflict retribution against the Taliban for its refusal to extradite Osama bin Laden or its harboring of dangerous terrorists.

(3) Such a use of force by the United States would be legal if the United States undertakes it as the leader of a multilateral effort expressly authorized by the Security Council to counteract a threat to international peace and security, similar to the course of events in 1950 (Korea) and 1990-1991 (Kuwait).

Q: Is it better to use the existing UN machinery for multilateral action or to take a unilateral approach outside the UN machinery?

A: It is better to use the UN machinery if possible. Getting Security Council authorization (i) would broaden the scope of possible operations beyond those of self-defense, (ii) would broaden the base of support among other countries, thus increasing the possibility of success in the overall anti-terrorist campaign, and (iii) would probably not be hard to do, given the circumstances.

Q: How should the United States characterize the campaign against Osama bin Laden, Al Qaeda, and terrorism in general?

A: The United States should not allow the campaign to be perceived as a crusade against Islam. Instead, it should resist at all costs those forces of religious and cultural ignorance and intolerance in the United States that would make this a clash of religious cultures. Moreover, the United States should characterize the campaign as having long-term security, not immediate retribution, as its central
aim. Ultimately, we must look beyond security, to find ways of drying up the "sea of resentments" in which terrorists swim.

I am writing this about two weeks after the terrible events of September 11. Soon the United States will have taken definitive action in response to those events. As soon as it does, of course, some of the issues that I have touched on above will be settled for now. However, this will not make those issues moot. Rather, the actions the United States takes in these first few days and weeks following September 11 will live with us and the world for years to come. I firmly believe that those actions should be legal, should be effective, and should be enlightened.

Notes

1. N.Y. TIMES, Sept. 21, 2001, at B4 (reprinting the text of President Bush’s address of September 20, 2001 to the U.S. Congress and the nation).
2. International law generally defines a “state” as having “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.” Convention on the Rights and Duties of States, done Dec. 26, 1933 (entered into force Dec. 26, 1934), 49 Stat. 3097, 165 L.N.T.S. 19. Afghanistan has these attributes, and thus attracts the protection of Article 2(4) of the UN Charter, discussed below, even though only two or three other governments in the world recognize the Taliban as the legitimate government of Afghanistan.
3. UN CHARTER, arts. 2(4), 51.
4. For an extensive treatment of these provisions, and particularly of the Article 51 right of self-defense, see Yoram Dinstein, War, Aggression and Self-Defence 177-245 (2d ed. 1994).
5. See Dinstein, supra note 4, at 238: “Armed attacks by non-State armed bands are still armed attacks, even if commenced only from—and not by—another State.” Dinstein goes on to explain that “[w]hereas [State A] may bear international responsibility for having tolerated the activities of armed bands carrying out an armed attack from within its territory against [State B], that does not mean that the armed attack as such is attributable to [State A].” Id. at 239. Notwithstanding that fact, “[j]ust as [State B] is entitled to exercise self-defence against an armed attack by [State A], it is equally empowered to defend itself against armed bands operating from within [State A’s] territory.” Id. at 240.
8. For a discussion of this element of the temporal limitation on the right to use force in self-defense, see Ingrid Detter, The Law of War 85 (2d ed. 2000): “States only have the right to resort to force until the Security Council has had an opportunity to consider the matter.”
9. The two main "sources" of international law are considered to be treaties and customary international law. These are the first two items set forth in Article 38(1) of the Statute of the International Court of Justice. Statute of the International Court of Justice, done June 26, 1945 (entered into force Oct. 24, 1945), 59 Stat. 1031, 1976 U.N. Y.B. 1052. The other items appearing there are general principles of law, judicial decisions, and legal scholarship. Id.

10. See Dinstein, supra note 4, at 243, quoting from the official correspondence of Secretary of State Daniel Webster.

11. See Dinstein, supra note 4, at 243-44 (describing the facts of the Caroline incident and discussing the three conditions of necessity, proportionality, and immediacy announced in it). The Caroline was a steamboat that rebels against British rule in Canada used in 1837 for transporting men and materials from the U.S. bank of the Niagara River to an island on the Canadian side of the river. British troops crossed into the United States one night to set the steamboat on fire and set it adrift to perish in the Niagara Falls. The United States lodged a protest with the British Government for violating American sovereignty. When the British invoked self-defense, Daniel Webster announced rules governing the legitimate use of force in self-defense. The British acquiesced in those rules. Id. at 243. For a similar account of the Caroline case and its application to modern rules on self-defense, see John F. Murphy, The United Nations and the Control of International Violence 17-18 (1982).

12. I believe I am in good company in drawing this conclusion. See Kirgis, supra note 6: "[I]f the coordinated use of force to hijack and use large airliners loaded with fuel to attack the World Trade Center and the Pentagon can be classified as an armed attack against the United States, and if it is necessary to take counter-measures involving the use of armed force in order to prevent further attacks, the United States arguably could use force under article 51 until such time as the Security Council can act to maintain international peace and security." Moreover, the UN Security Council, in condemning the September 11 attacks, "[r]ecognize[d] the inherent right of individual or collective self-defense in accordance with the Charter." S/Res/1368 (12 Sept. 2001), appearing at http://www.un.org (visited Sept. 23, 2001).

13. See supra notes 10, 11. Daniel Webster stated that an act of self-defense must involve "nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it". Dinstein, supra note 4, at 243, citing correspondence of Secretary of State Daniel Webster.


16. For example, two authors discussing self-defense specifically in response to terrorism distinguish between (i) "eye-for-an-eye" or "tit-for-tat" proportionality, under which the force used in self-defense must be proportionate to the specific prior act of terrorism, (ii) "cumulative" proportionality, under which a victim state's forcible measures should be proportionate to an aggregation of past illegal acts, and (iii) "eye-for-a-tooth" or "deterrent" proportionality, under which the victim state's use of force must be proportionate to the overall threat faced by the state. ANTHONY CLARK AREND AND ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 165 (1993). Another author distinguishes between "whether the measures taken in self-defence constitute war or are short of war." DINSTEIN, supra note 4, at 203.

17. MURPHY, supra note 11, at 17.

18. UN CHARTER, arts. 24(1), 42.

19. Obviously, the dividing line between self-defense and such a reprisal may turn on the specific facts of a case. A central criterion, however, would be that if a unilateral armed attack is to qualify as self-defense, it must (as explained above) be actually necessary to repel an attack that is instant, overwhelming, and immediate.

20. For an account of the U.S. intervention in Grenada in 1983, see MAX HILAIRE, INTERNATIONAL LAW AND THE UNITED STATES MILITARY INTERVENTION IN THE WESTERN HEMISPHERE 7, 73-96 (1997). Hilaire reports that that U.S. action "was overwhelmingly condemned by the United Nations General Assembly and the OAS Council of Ministers", as well as by the United Kingdom. Id. at 7. For an account of the U.S. intervention in Panama in 1989, see id. at 8, 109-123. That U.S. action also "was condemned by the United Nations General Assembly and the Council of Ministers of the OAS". Id. at 8. Hilaire himself concludes that both actions by the United States were illegal. See id. at 73, 111.

21. Claims to this effect—that Article 2(4) is "dead" and has been succeeded by a more complex rule of customary international law that permits states to use force in circumstances not envisioned under the UN Charter—date back at least to the 1970s. See, e.g., BURNS H. WESTON, RICHARD A. FALK, AND ANTHONY D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 969-76 (1990) (reprinting law journal articles questioning the continuing applicability of Article 2(4)). For a more recent analysis, see AREND AND BECK, supra note 16, at 178 (concluding from their review of post-1945 state practice that there has been a "shift in paradigms" that has effectively replaced the UN Charter rules with a new "post-Charter self-help paradigm").

22. See, e.g., DETTER, supra note 8, at 87-88 (asserting that it is "questionable whether, after the establishment of the United Nations, the right to take reprisals still exists"); Kirgis, supra note 6: "Armed reprisals are highly questionable under the United Nations Charter (a treaty to which the United States is a party) because of its strong emphasis on peaceful resolution of disputes." See also DINSTEIN, supra note 4, at 220-221 (noting that "most writers deny that self-defence pursuant to Article 51 may ever embrace armed reprisals" and explaining that the International Law Commission takes a view consistent with that). Dinstein himself uses the term "armed reprisal" in such a way as to include a use of force in self-defense. Id. at 215-221. Such a "defensive armed reprisal", he claims, would be legal, but only if the requirement of immediacy still applies. Id. at 220: "It is unlawful to engage in these measures of counter-force in response to an event that occurred in the remote past." Any non-defensive armed reprisal would not, in Dinstein's view, be legal. Id. at 221. But see CLARK & BECK, supra note 16, at 42 (enumerating several cases in which states did engage in armed reprisals without directly admitting it).

23. The Security Council in 1985 apparently rejected the claims by Israel that its attacks on Tunisia were legal because Tunisia was harboring terrorists. See Gregory H. Fox, Addendum to ASIL
Head


24. As an aside, I would especially counsel against any suggestion that Osama bin Laden should be “assassinated” or is “wanted dead or alive.” Some legal scholars regard such actions as violations of international law. See Jordan Paust, *Addendum—War and Responses to Terrorism*, ASIL INSIGHTS [American Society of International Law], Sept. 2001, appearing at http://www.asil.org/insights (visited Sept. 23, 2001): “Assassination during an armed conflict is a war crime, subject to universal jurisdiction and nonimmunity from criminal or civil sanctions. [Moreover, according to the U.S. Army Field Manual,] ... ‘putting a price upon an enemy’s head, as well as offering a reward for an enemy “dead or alive”’ is a war crime.” Although the term “assassination” is open to a wide range of definitions, at least some of them could encompass the deliberate, premeditated targeting and intentional killing of a person who, like Osama bin Laden, is not a head of state or other “internationally protected person.” See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, 1989 ARMY LAW. 4,4,8 (listing several different definitions, and noting that “[t]he murder of a private person, if carried out for political purposes, may constitute an act of assassination”). For other views, see generally Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123 (1991); Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT’L L. & TRADE 287 (1998). Just as the definition of assassination is uncertain, likewise the rules of international law governing assassination are uncertain—good reason, in my view, to avoid doing it or calling for it. On the other hand, these concerns would dissipate if it happened that Osama bin Laden were killed by U.S. forces (i) whose actions met all the criteria discussed above for the legitimate use of force in self-defense and (ii) whose mission was to capture Osama bin Laden, not to kill him. This would presumably not constitute a case of assassination at all. Interestingly, “the word ‘assassin,’ derived from Arabic and literally translated as ‘hashish-eater,’ was applied to a sectarian group of Moslem fanatics who, acting under the influence of intoxicating drugs, murdered prominent Christians and other religious enemies.” MURPHY, *supra* note 11, at 177.


26. Security Council Resolution No. 678 (Nov. 29, 1990), appearing at http://www.un.org/Docs/scres. By that resolution, the Security Council authorized member states “to use all necessary means to ... restore international peace and security in the area.” In doing so, the Security Council stated that it was “[a]cting under Chapter VII of the Charter”. *Id*. Chapter VII includes provisions authorizing the Security Council to determine the existence of a threat to the peace and to take various types of measures in response to it. A key provision is Article 42, quoted above in part. In addition to providing for direct Security Council action, Article 42 also provides for “operations by air, sea, or land forces of Members” acting under authority of the Security Council. UN CHARTER, art. 42. Article 51 also appears under Chapter VII. Several legal scholars regard Operation Desert Storm as a case of collective self-defense authorized by the Security Council. See Dinstein, *supra* note 4, at 270-75. See also MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 210 (1999) (reporting that during the Gulf War “the Security Council was able to vote to condemn Iraq’s invasion of Kuwait under Article 39, to impose nonforcible sanctions against Iraq under Article 42,
and finally to provide for forcible measures under Article 51 for collective self-defense”). Others treat the Gulf War experience not as one of collective self-defense but rather as a “truly unprecedented” case in which “all the permanent members of the Security Council had united to authorize the collective use of force in response to an act of aggression.” AREND & BECK, supra note 16, at 54-55. Another author is non-committal on the issue, referring to Operation Desert Storm as a “preemptive war” carried out by “Coalition Forces” acting under the authority of the Security Council. DETTER, supra note 8, at 57.

27. UN CHARTER, art. 39.
29. Although I am focusing in this essay on use-of-force issues, a range of other actions could also be brought into play to fight terrorism. One obvious approach, discussed some since September 11, is to locate and freeze financial assets of Osama bin Laden or the Al Qaeda organization. Another would be to strengthen the anti-terrorism initiatives already built into several treaty regimes, including those of the International Convention for the Suppression of Terrorist Bombings, which was adopted by the UN General Assembly in 1997 and entered into force on 23 May 2001 (it currently has 58 signatories and 25 parties), and the International Convention for the Suppression of the Financing of Terrorism, which the General Assembly adopted in 1999. See Arnold N. Pronto, Comment, ASIL INSIGHTS [American Society of International Law], Sept. 2001, appearing at http://www.asil.org/insights (visited Sept. 23, 2001). For texts of and citations to the treaties named above, see, respectively, 37 INT’L LEG. MAT. 249 (1998) and 39 INT’L LEG. MAT. 270 (2000). Calls for a strengthened treaty regime go back at least a couple of decades. See MURPHY, supra note 11, at 197 (calling for “vigorous steps to induce more states to ratify existing antiterrorist agreements and, most importantly, to ensure that they are utilized more effectively”).
30. “We will direct every resource at our command ... to the disruption and defeat of the global terror network. ... This is not, however, just America’s fight. And what is at stake is not just America’s freedom. This is the world’s fight. This is civilization’s fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom. ... Freedom and fear are at war. The advance of human freedom—the great achievement of our time and the great hope of every time—now depends on us. Our nation, this generation, will lift a dark threat of violence from our people and our future.” N.Y. TIMES, Sept. 21, 2001, at B4 (reprinting the text of President Bush’s address of September 20, 2001 to the U.S. Congress and the nation).
31. In an extremely unfortunate slip, “President Bush at first spoke of a ‘crusade’ against evil, a word the White House swiftly retracted when its implications became clear. In America, with perhaps a fuzzy recollection of Sir Walter Scott’s novels, the word has a noble ring; in the Middle East, where historical memories run much longer, it has other connotations: bloody massacres of Muslims, Jews and Byzantine Christians.” John Kifner, Forget the Past: It’s A War Unlike Any Other, N.Y. TIMES, Sept. 23, 2001, at sec. 4, p. 8.
32. See Patrick E. Tyler and Jane Perlez, World Leaders List Conditions on Cooperation, N.Y. TIMES, Sept. 19, 2001, at A1 (noting “a week of unconditional support from abroad” followed by some second thoughts on certain aspects of the prospect of using military force).
33. I also view it as unfortunate that the term “war” has been used, given the technical meaning that the term has in international law. There has been no declaration of war (which would be for Congress, not for the President to make under the U.S. Constitution). So far the campaign is a “war” only in the same sense as a “war on poverty” or “war on drugs”. One author has pointed out, however, that the rules governing the conduct of war, as found in various treaties, would apply to any U.S. attack on Afghanistan. See John Cerone, Acts of War and State Responsibility in ‘Muddy Waters’:

34. I use this term as it appears in Samuel P. Huntington, The Clash of Civilizations, 72 FOR. AFFAIRS 22 (1993) (positing that the coming years will bring an unprecedented division between civilizations—defined mainly by religious belief and practice—that will clash on many fronts).

35. I doubt, for example, that many Americans realize that the Koran explicitly recognizes Jesus as a prophet of God. See THE GLORIOUS QUR’AN (Marmaduke Pickthall, trans.), Sūrah II, verse 136: “We believe in Allah and that which is revealed unto us and that which was revealed unto Abraham and Ishmael, and Isaac, and Jacob, and the tribes, and that which Moses and Jesus received and that which the Prophets received from their Lord. We make not distinction between any of them, and unto Him we have surrendered.” The basic similarities in Jewish, Christian, and Islamic faith are emphasized by the Bahá’í teachings, which take monotheism a step further by recognizing those three faiths as manifestations of God’s design to progressively reveal his will for humanity through a series of Messengers. See THE BAHÁ’ÍS 1, 17, 34-35 (Bahá’í International Community, 1994).

36. The terrorists would also be outlaws in other faiths. Buddhism, Confucianism, Taoism, and Hinduism all counsel against hatred and encourage compassion, tolerance, and forgiveness. For the pertinent texts of and citations to such teachings in these belief systems, see remarks of Professor Timothy Miller of Kansas University at a memorial service on Sept. 14, 2001 (on file with Journal).