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# AMERICAN EXCEPTIONALISM AND THE INTERNATIONAL LAW OF SELF-DEFENSE

MARY ELLEN O'CONNELL\*

Following the September 11th attacks in the United States (U.S.), one could make a case for America's use of force in Afghanistan as a lawful exercise of the right of self-defense.<sup>1</sup> But the proposals to invade Iraq following September 11th cannot be so defended. Those proposals did not concern defending the basic security of the U.S. in the sense that basic security defense is currently understood in the international community. They concerned, rather, defense of a more expansive concept of security, a concept wherein the U.S. need not tolerate antagonistic regimes with the potential to harm U.S. interests. The invasion plans represent a view that the United States is a privileged nation with more rights than others.<sup>2</sup> Under this view, the United States may invade Iraq and remove Iraq's leader, Saddam Hussein, because he poses an indefinite future threat, the type of threat a superpower need not live with, though all other states must.

The belief in American exceptionalism has been part of American thinking since the country's founding.<sup>3</sup> Officials in the Reagan Administration, especially Jeanne Kirkpatrick and Allan Gerson, applied this thinking to international law rules on the use of force.<sup>4</sup> The belief also appears in the Clinton Administration policies of Madeleine Albright and William Cohen regarding the North Atlantic Treaty Organization (NATO) and its right to use force without United Nations (U.N.) Security Council authorization.<sup>5</sup> American exceptionalism is fully evident on the part of those who proposed invading Iraq in the aftermath of September 11th, especially Paul Wolfowitz and Richard Cheney. The position taken by other governments - that an invasion of Iraq without Security Council authorization would be an act of aggression - has not been answered by the Bush

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1. Mary Ellen O'Connell, *The Myth of Preemptive Self-Defense*, available at <http://www.asil.org/taskforce/oconnell.pdf> (last visited December 30, 2002) (copy on file with author); 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 (2002); Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839 (2001); Mary Ellen O'Connell, *Lawful Responses to Terrorism*, JURIST, Sept. 18, 2001 available at <http://www.jurist.law.pitt.edu/forum> (last visited September 3, 2002).

2. See generally Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001).

3. See, e.g., Robert Weisberg, *Values, Violence and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 HOUS. L. REV. 1, 9 (2002). See also Vagts *supra* note 2.

4. LOUIS HENKIN ET AL., *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 2, 13 (1989).

5. Mary Ellen O'Connell, *The UN, NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57, 76-79 (2000).

Administration.<sup>6</sup> A justification under law was not part of the Administration's public position when it began discussing an invasion.<sup>7</sup>

This is one of the rare occasions since the adoption of the U.N. Charter that the United States has been so disinterested in international law as to not provide an explanation as to how a major use of armed force would comply with the law. Another time was in 1999 in respect to the bombing of Yugoslavia.<sup>8</sup> The significance of this is not that the United States has always acted consistently with international law and now suddenly it is not. The United States has plainly violated international law on the use of force in the past. The difference is that now the prevailing view sees no need to offer explanations. The United States need not show how it has acted consistently with the principles of the community. The United States is above the law. That is a significant departure from the past that may well have serious negative consequences for future legal restraints on the use of force.

This paper is about the current and future law of self-defense. It applies the law to Operation Enduring Freedom in Afghanistan and to a proposed invasion of Iraq in light of the circumstances prevailing in Spring 2002. The analysis shows that while Enduring Freedom was arguably lawful, an invasion of Iraq would indeed be an act of aggression. The discussion then turns to the impact an invasion, or even the planning for an invasion, would have on the legal regime for restraining force. Because international law's structure is based on the members' equality under the law,<sup>9</sup> treating the United States exceptionally in a matter as grave as an unlawful invasion will have serious consequences for the future legal regime for restraining the use of force. The thesis of this paper is not necessarily to defend the old order. The aim is a more modest one: pointing out how that order is changing.

## I. THE LAW OF SELF-DEFENSE

International law generally prohibits the use of force except in self-defense or with the authorization of the U.N. Security Council.<sup>10</sup> The right of self-defense

6. Neil MacFarquhar, *Arabs Approve an Offer to Israel With Conditions It has Rejected*, N.Y. TIMES, Mar. 29, 2002, at A1.

7. One of the most complete accounts of what invasion planners had in mind as of Spring 2002 is found in Thom Shanker & David E. Sanger, *U.S. Envisions Blueprint on Iraq Including Big Invasion Next Year*, N.Y. TIMES, Apr. 28, 2002, at 1.

8. The bombing began March 24, 1999. No official legal position was presented. The State Department Legal Adviser's Office did put forward a more general statement about the legality of the bombing May 11 at the International Court of Justice in arguing the Court had no jurisdiction in a case brought by Yugoslavia. *Legality of Use of Force (Yugo. v. U.S.)*, 1999 I.C.J. Pleadings (Verbatim Record: Request for the indication of provisional measures), para. 1.7 (11 May 1999), available at [http://www.icj-cij.org/icjwww/idocket/iyall/iyall\\_cr/iyall\\_iyus\\_icr9924\\_19990511.html](http://www.icj-cij.org/icjwww/idocket/iyall/iyall_cr/iyall_iyus_icr9924_19990511.html) (last visited September 27, 2002).

9. U.N. CHARTER, art. 2, para. 1 59 Stat. 1031. T.S. No. 993, 3 Bevans 1153, amended 24 U.S.T. 2225, T.I.A.S. 7739 [hereinafter U.N. CHARTER].

10. The most basic principle regulating the use of force in international law, refers only to "force" and not to "armed force":

allows the use of an armed force against an armed attacker when that force can prevent future attacks and is proportional to the threat. These circumstances arguably existed on October 7, 2001, when the United States and the United Kingdom launched Enduring Freedom in Afghanistan. The necessary circumstances did not exist in Spring 2002 when the Bush administration openly discussed invading Iraq. A state may still use force when conditions do not permit self-defense, if the U.N. Security Council authorizes the force.<sup>11</sup> But in the case of Iraq, no sufficient authorization existed when the plan to invade was formed. The discussion below begins with self-defense, then turns to the U.N. Security Council authorization.

#### A. THE LAW OF SELF-DEFENSE

An armed response in self-defense is lawful when four conditions are met:

1. An armed attack has occurred;
2. The response is aimed at the armed attacker;
3. The response has the purpose of preventing future attacks;
4. The response is necessary to remove the threat and is proportional in the circumstances.<sup>12</sup>

United Nation Charter Article 51 mandates that force in self-defense may only be used to respond to an armed attack.<sup>13</sup> The International Court of Justice [hereinafter ICJ] in the *Nicaragua* Case in 1986 provided an authoritative interpretation of Article 51.<sup>14</sup> The Court found the “attack” refers only to acts in Article 51 which could amount to an actual armed attack. Moreover, such acts must amount to significant force. The Court, relying on the General Assembly’s

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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.

U.N. CHARTER art. 2, para. 4; *see also generally* on use of force: YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* (3d ed. 2001); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (2000); HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* (1992); IAN BROWNIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* (1963).

11. U.N. CHARTER art. 51

12. *But see* Robert F. Teplitz, *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, 576-583 (1995) (discussing the rules established by the *Caroline* case and their interaction with U.N. Charter art. 51).

13. U.N. CHARTER art. 51:

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

14. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 102 (June 27)[hereinafter *Nicaragua*].

Definition of Aggression, held that “‘armed attack’ means ‘sending by or on behalf of 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’ (*inter alia*) an actual armed attack conducted by regular forces. . . .”<sup>15</sup>

The Court assessed U.S. claims that the United States used force on the territory of Nicaragua in lawful collective self-defense of El Salvador. After considering U.S. arguments that Nicaragua had first used unlawful force, the Court concluded that the evidence did not prove Nicaragua had first used force significant enough to trigger lawful collective self-defense.

The facts of *Nicaragua* did not invite the Court to consider the problem of when self-defense may actually begin. In the circumstances of the case, attacks were on-going and the question was one of significance in respect to what the United States characterized as the first armed attack to trigger the fighting – shipments of weapons by the Nicaraguan government to rebels fighting the government of El Salvador. The Court only had evidence of low-level shipments, which it found did not amount to an armed attack.<sup>16</sup> We have no judicial decision on the question of when self-defense to an armed attack may begin. International lawyers have reached consensus that just as in the case of individual self-defense in domestic law, the state need not wait to suffer the actual blow before defending itself, but it must be sure the blow is coming.

The United States and United Kingdom discussed the conditions giving rise to the right of self-defense in the *Caroline Case*.<sup>17</sup> They concluded that a state is on solid legal ground to begin self-defense when the “[n]ecessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>18</sup>

In the case of Enduring Freedom in Afghanistan, the September 11th attack was clearly an armed attack that could give rise to self-defense should other conditions be met. The U.N. Security Council referred in two resolutions to the right to resort to self-defense in the context of September 11th.<sup>19</sup> No state argued that such attacks should not give rise to self-defense.

This is the only event since World War II that has given rise to a U.S. use of force in its own defense. The United States is justifiably worried about states, like Iraq, possessing weapons of mass destruction. But mere possession of such weapons without more is not an act amounting to an armed attack. In the ICJ’s advisory opinion in *Nuclear Weapons Case*, the Court held the use of nuclear weapons would be unlawful except in “an extreme circumstance of self-defense,”

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15. *Nicaragua*, *supra* note 14 at 103.

16. *Id.* at 119.

17. JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW 412 (1906); *see also* MCCOUBREY & WHITE, *supra* note 10, at 91-96; OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 150-52 (1995).

18. MOORE, *supra* note 17, at 412.

19. S.C. Res. 1368, U.N. SCOR 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR 4385th mtg., U.N. Doc. S/RES/1373 (2001).

but it could not decide whether the threat to use them would be unlawful.<sup>20</sup> *A fortiori*, the mere possession without a threat is not unlawful under general international law.<sup>21</sup> When Israeli jets bombed a nuclear reactor under construction at Osirik, Iraq in 1981, the U.N. Security Council condemned the bombing,<sup>22</sup> despite the threat nuclear weapons in the hands of Saddam Hussein could pose for Israel. The Council found “the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.”<sup>23</sup>

Armed attacks, did occur on September 11th, however, so the United States had the right to take self-defensive measures following that day. It has no right of self-defense to eliminate weapons of mass destruction in Iraq. It certainly has no right of self-defense to attack a state to eliminate persons who might be planning to possess weapons of mass destruction.

If the requisite armed attack occurs or will occur imminently, the response to the armed attack must aim at those responsible for the attack. If the response aims at the territory of a state, that state must be legally responsible for the attack before it may be targeted in self-defense. Legal responsibility follows if the territorial state used its own agents to carry out the attack; if it controlled or supported the attackers; possibly where it failed to control the attacks; or where it subsequently adopted the acts of the attackers as its own.<sup>24</sup>

The case can be made that the September 11th attackers were so closely aligned and supported by Afghanistan’s *de facto* leaders, the Taliban, as to give rise to Afghanistan’s responsibility.<sup>25</sup> No comparable case can be made, or indeed, any case for Iraq’s responsibility for September 11th. In the Spring of 2002, no evidence of a link had been found. Early reports that an Al-Qaeda member met with Iraq’s ambassador to the Czech Republic before the attack were subsequently denied by Czech officials.<sup>26</sup>

Even if a link could be found, the United States also needs clear and convincing evidence of future attacks.<sup>27</sup> A response in self-defense must be defensive in nature. It must aim at deterring or degrading offensive capability. With no evidence of future attacks, responsive armed attacks would only be unlawful reprisals or punishment.<sup>28</sup>

The United States had evidence before Operation Enduring Freedom that Al-

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20. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 at para. 105 (July 8)[hereinafter Nuclear Weapons].

21. *Cf.* Nuclear Weapons *supra* note 20..

22. *See* S.C. Res. 487, U.N. SCOR 2288th mtg., U.N. Doc. S/RES/487 (1981).

23. *Id.*

24. In the Hostages Case, the ICJ found Iran was responsible for the hostage-taking at the U.S. Embassy because of the “failure on the part of the Iranian authorities to oppose the armed attack by militants” and “the almost immediate endorsement by those authorities of the situation thus created.” United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 42 (May 24).

25. *See* Beard, *supra* note 1, at 582-583.

26. *Atta’s Canceled Czech*, WALL ST. J., May 15, 2002, at A18.

27. Mary Ellen O’Connell, *Evidence of Terror*, 7 J. OF CONFLICT & SEC. L. 19, 30 (2002).

28. *Id.* at 29, 30.

Qaeda planned more attacks. That evidence was confirmed by documents and video tapes found in Afghanistan during Enduring Freedom.<sup>29</sup> As of Spring 2002, no evidence linked Iraq to Al-Qaeda and its plans to attack American interests, past or future.

The final element of lawful self-defense requires that the response be carried out only if the principles of necessity and proportionality can be respected. Necessity restricts the use of military force to the attainment of legitimate military objectives. Proportionality requires that the force needed to attain those military objectives be weighed against possible civilian casualties. If the loss of innocent life or destruction of property is out-of-proportion to the importance of the objective, the objective must be abandoned.<sup>30</sup>

The amount of force used during the first weeks of Enduring Freedom appeared necessary and proportionate – certainly while the United States restrained the Northern Alliance from going to Kabul. Secretary Powell indicated that the United States did not aim to eliminate the Taliban entirely. His approach tracks the international legal rules.<sup>31</sup>

Degrading the Taliban's offensive ability was a legitimate objective. The care taken in targeting to avoid civilian casualties kept the force used proportionate. Changing the government of Afghanistan was arguably not necessary for the defense of the United States. The United States warned the Northern Alliance not to enter Kabul, though, in the end, the United States seems to have been overtaken by events when the Northern Alliance took the city. After the Taliban fell in mid-December, however, the continued use of massive aerial bombardment was arguably well out-of-proportion to the objective of capturing small groups and individual Al-Qaeda members scattered in the Afghan mountains. The shift to ground forces in mid-January was far more protective of civilians.

It is extremely difficult to understand how a massive invasion of Iraq would meet the requirements of necessity and proportionality. These principles apply even if the reason for going to war is unlawful. In the case of Iraq, the announced reason for the invasion is to prevent Saddam Hussein from obtaining weapons of mass destruction. Experts consistently testify, however, that the robust embargo on Iraq is preventing the regime from getting the inputs for effective weapons of mass destruction. An invasion does not appear necessary for the objective. Continuing with the embargo will not cost the civilian lives of an invasion,

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29. *Tape Shows Bin Laden Celebrating*, WASH. POST, Dec. 11, 2001, at C14.

30. Proportionality prohibits force "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage anticipated." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, art. 51, para. 5(b), 1152 U.N.T.S. 3, 16 I.L.M. 1391, 1413. "In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy." Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391 (1993).

31. Serge Schmemmann, *U.N. Envoy Says All Options are Open on a Post-Taliban Afghanistan*, N.Y. TIMES, Oct. 18, 2001, at B4.

especially if the embargo is more targeted. Estimates of the deaths from invasion being suggested in Spring 2002 were in the thousands.<sup>32</sup> We have a proportionate way to achieve the objective through an embargo on inputs and verification by inspections. Arguably some force could be used to get the inspectors back into Iraq or to protect them once there, though that would really need a Security Council authorization. [As this article goes to press, the Security Council has adopted Resolution 1441 (Nov. 8, 2002) authorizing security guards for inspectors.]

### *B. Security Council Authorization*

The U.N. Security Council has spoken relative to both the use of force in Afghanistan and Iraq. It had not, however, provided the requisite authorization for force as of October 7 in Afghanistan or March 2002 in Iraq. This conclusion will be discussed first before turning to the law of self-defense governing force in the absence of the Security Council authorization. With regard to September 11th, Security Council resolutions adopted in the wake of the attacks refer to the right of self-defense. In particular, Resolution 1373 (September 28) reveals the Council's consensus as to self-defense and terrorism shortly before Enduring Freedom was launched:

The Security Council, *Reaffirming* its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001, *Reaffirming also* its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts, *Reaffirming* the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001), *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..<sup>33</sup>

The operative part of the Resolution mandates economic sanctions to combat terrorism. It does not authorize the use of armed force, nor does it explicitly authorize the United States to use armed force in self-defense to the September 11th attacks. As argued above, the Resolution supports the conclusion that the September 11th attacks were significant enough to trigger the right of self-defense, if the other conditions of legality are met. In several subsequent resolutions relating to terrorism and the situation in Afghanistan neither the U.N. Security Council nor the General Assembly condemned Enduring Freedom as a violation of

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32. "But a ground invasion of Iraq might involve hundreds or even thousands of U.S. casualties, while tens of thousands of Iraqi civilians would certainly have to die before there was any chance of breaking Saddam's will through bombing alone." Anatole Kaletsy, *America is Becoming its Own Worst Enemy*, THE TIMES OF LONDON, Mar. 14, 2002, available at WL 4190063; Kenneth M. Pollack, *Next Stop Baghdad? United States' Foreign Policy*, 81 FOREIGN AFFAIRS 32, 43 (2002) ("The casualties incurred during such an operation might well be greater than during the Afghan or Gulf Wars, but they are unlikely to be catastrophic.")

33. S.C. Res. 1373, U.N. SCOR 4385th mtg., U.N. Doc. S/RES/1373 (2001).

the Charter.<sup>34</sup> Still, these resolutions are not authorization. Nor do they indicate that the U.N. Security Council would be taking over America's defense as it may do under Article 51 and did do regarding Kuwait in the Gulf War.<sup>35</sup>

Indeed, as a result of the Council's active role in the liberation of Kuwait from Iraq in the Gulf War, it passed numerous resolutions, including, significantly, Resolution 687.<sup>36</sup> Resolution 687 sets out the terms of the cease-fire between the coalition forces and Iraq. Some scholars have argued that this Resolution authorizes an invasion of Iraq or at least creates conditions allowing for a lawful invasion. Professor Yoram Dinstein at the March 2002 Meeting of the American Society of International Law argued as follows:

As for Iraq, it must be pointed out that the situation there is *sui generis*. The Gulf War that began on August 2, 1990 is not over yet. The United States-led coalition's military actions – conducted in 1991 – were an exercise of collective self-defense, with the full prior blessing of the Security Council. There was a cease-fire, which Iraq has consistently breached (by expelling U.N. disarmament supervisors and otherwise). The United States can always resume hostilities, irrespective of the presence of Bin Laden in Iraq.<sup>37</sup>

There are several weaknesses in this argument. First, it is clear that the Security Council took over the defense of Kuwait, as per Article 51. It ordered economic sanctions and restricted the onset of hostilities until sanctions had been given a chance to work. Neither the coalition nor Kuwait itself could start military action against Iraq until the date set by the U.N. Security Council. The Council did far more than give the coalition "its blessing." Second, the cease-fire agreement is plainly between the U.N. Security Council and Iraq, not the coalition and Iraq. Thus, it is for the U.N. Security Council to determine if it is aggrieved about non-compliance with the terms of the agreement, not the coalition. Finally, Resolution 687 contains enforcement provisions to be used in the case of Iraqi non-compliance. Economic sanctions remain in place until all the terms are met and, should further action be required, Paragraph 34 of Resolution 687, states that the Security Council "[d]ecides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area."<sup>38</sup> Finally, in the more than ten years since the liberation of Kuwait, the U.N. Security Council has exercised oversight over

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34. See Measures to Eliminate International Terrorism, G.A. Res. 56/88, U.N. GAOR, 56<sup>th</sup> Sess., U.N. Doc. A/RES/56/88 (Jan. 24, 2002); S.C. Res. 1378, U.N. SCOR, 4415<sup>th</sup> mtg., U.N. Doc. S/RES/1378 (2001); S.C. Res. 1383, U.N. SCOR, 4434<sup>th</sup> mtg. U.N. Doc. S/RES/1383 (2001).

35. See Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. Ill. U. L. J. 453, 479 (1991).

36. S.C. Res. 687, U.N. SCOR, 44<sup>th</sup> Sess., 2871<sup>st</sup> mtg., U.N. Doc. S/RES/687 (1989), available at 30 I.L.M. 847 (1991).

37. Yoram Dinstein, *Remarks*, 2002 PROC. ASIL (forthcoming); see also Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AM. J. INT'L L. 724 (1998).

38. S.C. Res. 687, *supra* note 36, at 854.

Iraqi compliance.<sup>39</sup> The coalition is no longer in existence. It ceased to exist with the adoption of Resolution 687 – its task completed.

When Professor Ruth Wedgwood took a similar position on the meaning of the unperfected cease-fire she only aimed to defend bombing Iraq, not invading.<sup>40</sup> Once Kuwait was liberated, the overwhelming consensus was that the war was over. Iraq and Kuwait normalized diplomatic relations in March 2002, an odd thing to do in the middle of hostilities.

Even the use of bombing to enforce the secondary aspects of the Gulf War cease-fire, is highly questionable under our analysis of Resolution 687. When the United States and United Kingdom bombed Iraq in December 1998, to force Saddam Hussein to comply with the weapons regime, France, Russia and China all condemned the action. The United States and United Kingdom have also regularly used force to police no-fly zones over northern and southern Iraq. This use of force would be equally unlawful, except for the fact that for the first year or two after the adoption of Resolution 687, France, too, joined in this policing and other permanent members of the U.N. Security Council did not condemn the use. It may be that in the case of the no-fly zones, we have acquiescence to the use of force by the United States and United Kingdom. Once such as acquiescence has occurred, it would take a U.N. Security Council resolution to condemn the policing. But the United States and United Kingdom will veto any attempt to condemn their actions and so the policing remains, arguably, lawful. The contrast with the weapons regime is clear. The Council never acquiesced in the use of force to enforce the weapons regime, and the December 1998 bombing never accomplished any constructive outcome, quite the contrary.

### C. *Alternatives to Self-Defense*

The law of self-defense did not unreasonably restrict U.S. action following September 11th. It does restrict what the United States might wish to do regarding Iraq. If the United States nonetheless ignores the law, it will commit an act of aggression. Such a grave violation of international law will have serious negative consequences for the restraints on force, restraints which serve the United States and the world in providing normative standards for the community and aiding in some small way toward achieving peace. Undermining norms, and peace itself, will be a high price to pay, especially in light of alternatives that exist in international law for those cases where military force is unlawful to achieve national policy. This section discusses alternatives to self-defense in the case of Iraq: both unlawful aggression and lawful countermeasures.

The United Nations General Assembly adopted a “Definition of Aggression” in 1974.<sup>41</sup> The Assembly concluded that aggression is “the use of force by a State against the sovereignty, territorial integrity or political independence of another

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39. S.C. Res. 687, *supra* note 36, at 851-52.

40. See Wedgwood, *supra* note 37, at 727.

41. Definition of Aggression Resolution, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) 2, at 142, U.N. Doc. A/9631 (1974) [hereinafter Definition of Aggression].

State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.”<sup>42</sup> The Definition excludes insignificant uses of force that otherwise meet the elements in the Definition. The drafters of the crime aggression agree that aggression also is not an insignificant use of force. In March 2002, members of the Arab League concluded that an attack on Iraq would be an act of aggression. They announced that any such attack would be treated as an attack on each of them.<sup>43</sup>

In conditions that do not justify self-defense, avoiding acts of aggression does not require an actor to refrain from all coercive acts. Countermeasures are also an option for a state responding to another state’s violations of international law. For example, in cases where the victim of an armed attack has no evidence of future attacks, countermeasures may be used until the wrongdoer provides a remedy for the wrong. Appropriate remedies can include compensation and assurances of non-repetition. Countermeasures are actions that violate the law but are taken in response to prior violations.<sup>44</sup> Countermeasures must be proportional to the injury suffered and are available only if the parties involved have no prior commitment to resort first to the means of binding dispute settlement (as is the case, for example, with trade disputes which must first be submitted to the WTO.)<sup>45</sup> Countermeasures may be highly coercive, though they may not include violations of the U.N. Charter, human rights or diplomatic immunity.<sup>46</sup> Countermeasures may be taken by the injured state but in the case of universal jurisdiction crimes, any state may take measures.<sup>47</sup> The attacks of September 11th involved international acts of intentional killing on a scale to qualify as crimes against humanity, which are universal jurisdiction crimes.<sup>48</sup> Any state’s courts may exercise judicial jurisdiction over persons accused of universal jurisdiction crimes.<sup>49</sup> Any state may aid in the enforcement of the law prohibiting such crimes by taking countermeasures.

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42. See Definition of Aggression *supra* note 41 at 143.

43. See Shanker & Sanger, *supra* note 7, at 1.

44. Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.) 1997 I.C.J. 1, 47, paras 82-87 (Sept. 25); Air Services Agreement Case (U.S. v. Fr.), 18 R.I.A.A. 416, para. 83 (1978) [hereinafter Air Services]. See also *Draft Articles on State Responsibility Provisionally Adopted by the International Law Commission on First Reading*, [1996] 2 Y.B. Int’l L. Comm’n, pt. 2, at 58, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), arts. 47-50, reprinted in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 348, 360-361 (2002); Karl Doehring, *The Unilateral Enforcement of International Law by Exercising Reprisals*, in ESSAYS IN HONOR OF WANG TIEYA 235-36 (Ronald St. John Macdonald ed., 1994); ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES (1984).

45. See Air Services, *supra* note 44, para. 84, at 444.

46. ZOLLER, *supra* note 44, at 82.

47. *Id.* at 69.

48. Frederic L. Kirgis, *Terrorist Attacks on the World Trade Center and the Pentagon*, ASIL INSIGHT, available at <http://www.asil.org> (last visited September 9, 2002) (citing the Rome Statute of the International Criminal Court definition of a crime against humanity: “widespread or systematic attack directed against any civilian population, with knowledge of the attack.”). Rome Statute of the International Criminal Court, U.N. Doc. No. A/Conf. 183/9, art. 1, (1998), 37 I.L.M. 999 (1998).

49. See, e.g., Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

In the case of Iraq, there is already a regime of sanctions in place to deal with any attempts by Iraq to acquire weapons of mass destruction. It might be possible for the United States to persuade the U.N. Security Council to do more to get the weapons inspectors back in Iraq and then to provide them with greater security so they are not as vulnerable to being forced out again — that would presumably also require commitments by the United States not to abuse the weapons inspection regime by sending U.S. spies with the inspectors.

Otherwise, it is difficult to think what further violations against the United States itself would result in a case of countermeasures against Iraq. If the United States should acquire clear and convincing evidence that Iraq is harboring terrorists rather than trying or extraditing them, it might be possible for the United States to infiltrate agents onto the territory of Iraq to bring those accused persons out. This might be a justifiable countermeasure. A police action or incursion is short of armed force and is arguably proportional to the wrong of harboring terrorists. However, support for this interpretation of the law is limited. We have examples of police actions and the like on the state territory or areas beyond national jurisdiction which states treat as not amounting to prohibited armed force.<sup>50</sup> These police actions are better classified as *de minimis* uses of force. The best known case is the “volunteer” action to kidnap Eichmann from Argentina on behalf of Israel.<sup>51</sup> The action was condemned.<sup>52</sup> Yet it occurred before the development of the “try or extradite” principle. Israel could not justify its action as a countermeasure because it was not responding to a prior wrong by Argentina. However, the kidnapping could hardly be characterized as a use of armed force or an otherwise-prohibited measure. The best approach for a state interest in taking forceful measures on the territory of another state is to seek U.N. Security Council authorization for such an action. Failing such authorization, a state does have alternatives to full-scale self-defense.

## II. THE LAW OF EXCEPTIONALISM

Yet, the Bush administration’s position is equivocal with regard to respecting international law in the case of Iraq. The invasion planners give little indication that they are concerned with the law of self-defense – at least with respect to the United States. In the past the United States has sought to characterize its uses of force as within the international rule of law – even if that meant manipulating facts

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50. States may use minimal armed force to enforce the law without violating Article 2(4). Minimal use of force on the high seas or in air space over the high seas is permissible. For example, states may use armed force in affecting arrests by shooting across the bow of a pirate ship on the high seas or dropping a bomb on an oil tanker in international waters to prevent pollution damage. In 1967, the UK bombed the *Torrey Canyon*, an oil tanker which had run aground in international waters and threatened serious oil pollution damage to the UK coast. See *In Re Barracuda Tanker Corp.*, 409 F.2d 1013 (2<sup>nd</sup> Cir. 1968). The action was universally approved and codified at Article 216 of the United Nations Convention on the Law of the Sea, opened for signature, Dec. 10, 1982, Art. 107, UN Doc. A/Conf.62/122 (1982), reprinted in United Nations, Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, UN Sales No. E.83.v.5 (1983), 21 I.L.M. 1261 (1982).

51. LOUIS HENKIN, ET AL., *INTERNATIONAL LAW* 1083 (3d ed. 1993).

52. *Id.* at 1085.

as in the cases of Vietnam and Grenada. The United States has officially argued its uses of force were lawful. The invasion of Iraq, however, presents a significant new development, which builds on the Clinton Administration's position, demonstrated during Kosovo that NATO should not be subject to the Security Council authorization. Some U.S. foreign policy planners apparently believe the United States has a privileged, exceptional position in international relations and that puts it above international law.

The Bush Administration's antipathy for Iraq was evident from its first days in office. The Administration launched a large bombing mission over the no-fly zones of Iraq. President Bush said: "Saddam Hussein has got to understand we expect him to conform to the agreement that he signed after Desert Storm."<sup>53</sup> Around the tenth anniversary of the end of the ground war to liberate Kuwait (February 1991), the debate in Washington policy circles was all about the failure of the first Bush Administration to take that war to Baghdad to oust Saddam Hussein. In the summer of 2001, the Bush Administration held firm against pressure to lift the sanctions on Iraq.<sup>54</sup> Within days of September 11th, a former secretary of state, Lawrence Eagleburger, said: "You have to kill some of these people; even if they were not directly involved, they need to be hit."<sup>55</sup> Deputy Defense Secretary, Paul Wolfowitz, even said the United States should "end states" that support terrorism.<sup>56</sup> Reportedly, he wants the United States to destroy Iraq, despite the lack of evidence that it supported the September 11th atrocity.<sup>57</sup> Apparently, Secretary of State Colin Powell was urging a different line. At any rate, no attack on Iraq took place during Operation Enduring Freedom against Afghanistan. But during his State of the Union address, President Bush again focused on Iraq, including it with Iran and North Korea in an "axis of evil."<sup>58</sup> In March 2002, Vice President Cheney visited the Middle East to rally support for an invasion.<sup>59</sup> Evidently, the Israeli-Palestinian crisis was diverting the Administration's attention from the invasion, but the Guardian newspaper of London reported contractors were moving U.S. personnel and facilities out of Saudi Arabia to other Gulf States willing to allow the United States to launch the invasion from their territory. By March, the word in Washington was about a September invasion involving around 80,000 troops. The March/April issue of Foreign Affairs contained an article by Kenneth Pollack, who from 1999 to 2001 was the Director of Gulf Affairs on the White House National Security Council. The article provides a detailed brief on why and how to invade.

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53. Thomas E. Ricks, *U.S., Britain Bomb 5 Iraqi Sites, Jets Hit Targets Near Baghdad in Biggest Airstrike in Two Years*, WASH. POST, Feb. 17, 2001, at A1.

54. Alan Sipress, *Powell Defends Stand on Iraq; Goal of Lifting Economic Curbs Is to Revive Military Embargo*, Mar. 8, 2001, WASH. POST, at A14.

55. Brian Toohey, *Questions for Howard and Beazley on How to Wage War*, AUSTRALIAN FIN. REV., Sept. 29, 2001, available at 2001 WL 27345798.

56. *Id.*

57. *Id.*

58. Karen DeYoung, *Bush Lays Down a Marker for 3 'Evil' States*, WASH. POST, Jan. 30, 2002, at A01.

59. Alan Sipress, *Cheney Plays Down Arab Criticism Over Iraq*, WASH. POST, Mar. 18, 2002, at A10.

Pollock advises on 200,000-300,000 troops, 700-1000 aircraft, and from one to five carrier battle groups.<sup>60</sup> “The casualties incurred during such an operation might well be greater than during the Afghan or Gulf Wars, but they are unlikely to be catastrophic.”<sup>61</sup>

The biggest headaches for the United States are likely to stem not from the invasion itself but from its aftermath. Once the country has been conquered and Saddam’s regime driven from power, the United States would be left “owning” a country of 22 million people ravaged by more than two decades of war, totalitarian misrule, and severe deprivation. The invaders would get to decide the composition and form of a future Iraqi government – both an opportunity and a burden. Some form of unitary but federalized state would probably best suit the bewildering array of local and foreign interests involved, but ideally this decision would be a collective one: as in Afghanistan, the United States should try to turn the question of future Iraqi political arrangements over to the U.N., or possibly the Arab League, thus shedding and spreading some responsibility for the outcome. Alternatively, it might bring in those countries most directly affected by the outcome – the Saudis, Kuwaitis, Jordanians, and Turks – both to co-opt them and as an incentive for their diplomatic support. In the end, of course, it would be up to the United States to make sure that a post-Saddam Iraq did not slip into chaos like Lebanon in the 1980s or Afghanistan in the 1990s, creating spillover effects in the region and raising the possibility of a new terrorist haven.<sup>62</sup>

In late April, the New York Times reported that a similar blueprint for invasion was on the Bush Administration’s drawing board.<sup>63</sup> President Bush, while visiting Berlin on May 17<sup>th</sup> denied he had war plans on his desk, but the Washington Post reported on May 24<sup>th</sup> that General Tommy Franks had briefed top decision-makers on an invasion for which he wanted 200,000 troops.<sup>64</sup> The Post reported top military commanders persuaded civilian leaders to at least delay the invasion until 2003 or to reconsider it altogether. The military is chiefly concerned with the difficulty of an invasion and potentially high casualties.<sup>65</sup>

As mentioned above, at the Arab League summit in March, Arab leaders stated an invasion of Iraq would be an act of aggression.<sup>66</sup> European leaders who just three years ago fully debated the legality of intervening in Kosovo, concluding it was unlawful, but allowing it anyway, did not debate the legality of invading Iraq in Spring 2002. The United States did not request help from other countries, and appeared resolved on invasion, so, the Europeans did not join their Arab colleagues. No doubt they feared the implications of pronouncing that the United States has committed aggression. The failure to name aggression, however, along with the invasion itself will have repercussions for both the law and the U.N.

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60. Pollack, *supra* note 32, at 43.

61. *Id.*

62. *Id.* at 45.

63. See Shanker & Sanger, *supra* note 7, at 1.

64. Thomas E. Ricks, *Military Bids to Postpone Iraq Invasion – Joint Chiefs See Progress in Swaying Bush*, *Pentagon*, WASH. POST, May 24, 2002, at A01.

65. *Id.*

66. See Shanker & Sanger, *supra* note 7.

NATO's intervention in Kosovo had major repercussions despite the fact that European governments were adamant that it should not. It is surely less shocking today to see the United States contemplating a war of aggression against Iraq, a war without the U.N. Security Council's sanction or condemnation since the NATO use of force against Yugoslavia. Secretary of State Albright at a NATO meeting in December 1998 said: "let me say a word about [Security Council] mandates. NATO will—in all cases—act in accordance with the principles of the United Nations Charter, while continuing to address this issue on a case-by-case basis."<sup>67</sup> In June 1998, U.S. Secretary of Defense, William Cohen had said that NATO would not need a U.N. Security Council authorization to intervene in Kosovo.<sup>68</sup>

The Clinton Administration spoke of NATO but the U.S. dominance of NATO meant it was really speaking of the U.S. When the bombing of Yugoslavia by NATO began on March 24, 1999, without the U.N. Security Council authorization, the United States did not issue an official legal justification for the action. The United States did not even care enough about the rules to manipulate the facts or stretch interpretations.<sup>69</sup> Some in the Bush Administration hold the view that no multilateral organization authorization or other justification under law to invade Iraq is necessary. Rather, the United States is enjoying a position of privilege in the international community and is being allowed to do so by other states, including Europeans, perhaps best in a position to challenge it. As Detlev Vagts has observed:

One increasingly sees the United States designated as the hegemonic (or indispensable, dominant, or preeminent) power. Those employing this terminology include former officials of high rank as well as widely read publicists. The French, for their part, use the term "hyper-power." A passage by Charles Krauthammer in *Time* best captures the spirit "America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly America is in a position to reshape norms, alter expectations and create new realities. How? By unapologetic and implacable demonstrations of will."<sup>70</sup>

Saddam Hussein is an international criminal who no one wants to be seen defending. Nevertheless, allowing the United States to move to a position above the law will have repercussions for the law. Those repercussions will unlikely be the ones the United States wants. The United States wants an orderly world under the rule of law for everyone, but some also want the U.S. to have a right to pick

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67. O'Connell, *supra* note 5, at 79.

68. *Id.* at 76.

69. The United States did put on a defense at the ICJ in a case brought by Yugoslavia. Basically, it followed the British lead and argued the Yugoslav bombing came close to being justified. In the weeks before the case, however, repeated calls to the Legal Adviser's Office at the U.S. Department of State yielded promises of return calls that never came, referrals to telephone numbers for disconnected phones, and recommendations to call the public affairs office, which had no idea what the request meant.

70. Vagts, *supra* note 2, at 843.

and choose the rules it obeys. This is not how law works. Law is based on a psychological element of belief and commitment. When these are absent, there can be no law. If the United States breaks this fiction and declares itself above the law, it will help break down the commitment to law generally in the international community.

The plan to invade Iraq jettisons American leadership toward a world order under the rule of law that began with Roosevelt's vision for the United Nations, continued with George H.W. Bush's declaration after the defeat of Iraq in 1991, through to George W. Bush's report to the U.N. Security Council on the need for Operation Enduring Freedom in 2001.