



2006

# The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It

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## Recommended Citation

Gregory E. Maggs, The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It, 4 Regent J. Int'l L. 149 (2006).

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Citation: 4 Regent J. Int'l L. 149 (2006)

**THE CAMPAIGN TO RESTRICT THE RIGHT  
TO RESPOND TO TERRORIST ATTACKS IN SELF-DEFENSE  
UNDER ARTICLE 51 OF THE U.N. CHARTER AND WHAT THE  
UNITED STATES CAN DO ABOUT IT**

Gregory E. Maggs\*

I. Introduction

Article 51 of the United Nations Charter preserves the right of nations to use military force in self-defense. The article says:

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.<sup>1</sup>

This broad language would appear to allow nations to use military force in self-defense in response to “armed attacks” by terrorists. The United States has cited the article in explaining its use of force against terrorists, including its counter-attacks on al-Qaeda in response to the \*150 1998 bombings of its embassies in Kenya and Tanzania<sup>2</sup> and the attacks of September 11, 2001.<sup>3</sup>

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\* Professor of Law, George Washington University Law School. I presented this essay at the Regent Journal of International Law’s Symposium entitled, The War on Terrorism: Balancing Civil Liberties and National Security, held on November 18, 2005. I would like to thank Professor Sean Murphy, Professor Peter Maggs, and all the participants at the symposium for their insights and suggestions.

<sup>1</sup> U.N. Charter art. 51.

<sup>2</sup> See Letter from Bill Richardson, Permanent Representative of the United States of America to the United Nations, to Danilo Turk, President, U.N. Security Council, U.N. Doc S/1998/780 (Aug 20, 1998) (“In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America has exercised its right of self-defence in responding to a series of armed attacks against United States embassies and United States nationals.”).

<sup>3</sup> See Letter from John D. Negroponte, Permanent Representative of the United States of America to the United Nations, to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001).

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent

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A significant problem, however, has developed over the past twenty years. In a series of resolutions and judicial decisions, as this essay will show, organs of the United Nations have attempted to read into Article 51 four very significant and dangerous limitations on the use of military force in self-defense. These limitations find no support in the language of Article 51, they do not accord with general principles of self-defense, and they are inimical to efforts to end terrorism.

The United States needs to oppose limitations on the right of self-defense preserved by Article 51, not only for its own safety but also to further the most fundamental goals of the United Nations. As William Howard Taft IV, the legal advisor to the U.S. State Department, has said: "One of the central purposes of the U.N. Charter is to prevent states from attacking other states, and a state is surely less likely to attack another state when it credibly expects the use of force in response by the other state, or the other state and its allies."<sup>4</sup> Unfortunately, the United States has only a few tools at its disposal for preserving its legal right to act in self-defense. The United States can use its veto power to prevent the Security Council from condemning countries that properly use force in self-defense. It can also use opportunities afforded by the U.N. Charter to express its interpretation of Article 51, thus establishing helpful precedent for future disputes.

### \*151 II. The Use of Force Against Terrorism

Before the mid-1980s, the United States already had experienced many acts of international terrorism. In 1973, for example, Palestinian radicals killed two U.S. embassy officials in Sudan.<sup>5</sup> In 1976, Croatian nationals hijacked a TWA flight and planted a bomb in Grand Central Station.<sup>6</sup> In

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right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.

Id.

<sup>4</sup> William H. Taft IV, *International Law and the Use of Force*, 36 *GEO. J. INT'L L.* 659, 659 (2005).

<sup>5</sup> TIMOTHY NAFTALI, *BLIND SPOT: THE SECRET HISTORY OF AMERICAN COUNTERTERRORISM* 68-71 (2005).

<sup>6</sup> *Id.* at 96-97.

Sadly the New York bomb squad [was] not able to detonate the bomb safely, and one policeman died. The FBI negotiated with the hijackers and agreed to let them issue their statement as long as they promised to release the hostages unharmed. In France, after a two-day ordeal, the incident ended peacefully. The hijackers surrendered and were extradited to the United States.

Id.

1979, Iranian militants took over the U.S. embassy in Tehran and held the staff hostage for a year.<sup>7</sup> In 1983, a suicide bomber destroyed the U.S. Marine barracks in Lebanon, killing over 200 persons.<sup>8</sup>

These were all horrible events. Yet the United States' response to these attacks was quite limited. Despite having the greatest military power in the world, the United States did not react with armed force to these or any other incidents of terrorism.<sup>9</sup> Instead, the United States responded using only diplomatic pressure, economic sanctions, and criminal law enforcement measures. True, the United States did attempt a military rescue of the hostages in Iran.<sup>10</sup> However, it never undertook a counter-strike against the hostage takers.

Seeing the ineffectiveness of previous responses, President Reagan gave counter-terrorism efforts a new dimension in 1986. In April of that year, terrorists sponsored by Libya bombed a nightclub in Berlin, Germany.<sup>11</sup> The explosion killed three people and injured 200 others.<sup>12</sup> The casualties included U.S. service members stationed in Germany, whom the terrorists were targeting. Later that month, the United States struck back by bombing Libya's terrorist training camps, military \*152 headquarters, and the residence of Libya's dictator, Mu'ammarr al-Qadhafi.<sup>13</sup>

The assault on Libya was the first overt use of military force by the United States in response to terrorism.<sup>14</sup> It was by no means the United States' last. Since 1986, although the United States government has continued to prosecute some terrorists criminally,<sup>15</sup> it has used military

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<sup>7</sup> See DAVID FARBER, *TAKEN HOSTAGE: THE IRAN HOSTAGE CRISIS AND AMERICA'S FIRST ENCOUNTER WITH RADICAL ISLAM* 12-13 (2004).

<sup>8</sup> See THOMAS L. FRIEDMAN, *FROM BEIRUT TO JERUSALEM* 201-03 (1990).

<sup>9</sup> See NAFTALI, *supra* note 5, at 71-72; 96-97; 114; 134.

<sup>10</sup> See *id.* at 114.

<sup>11</sup> See Mary Williams Walsh, *Germany Finally to Try '86 Disco Bombing Case*, *L.A. TIMES*, Nov. 18, 1997, at A1 (summarizing the evidence that German prosecutors eventually gathered).

<sup>12</sup> See *id.*

<sup>13</sup> See Walter J. Boyne, *El Dorado Canyon*, 82 *AIR FORCE MAGAZINE* 56 (Mar. 1999).

<sup>14</sup> See NAFTALI, *supra* note 5, at 185.

<sup>15</sup> See, e.g., *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (prosecuting of defendant accused of participating in the conspiracy to commit the attacks of September 11, 2001); *United States v. Rahman*, 189 F.3d 88 (2d Cir.

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force in response to several more incidents. Following the 1998 bombing of the U.S. embassies in Kenya and Tanzania, the United States fired missiles at targets in Afghanistan and Sudan.<sup>16</sup> After the bombing of the U.S.S. Cole in 2000, the United States used an unmanned Predator aircraft to strike and kill some of the suspected perpetrators as they were driving a car in Yemen.<sup>17</sup> And the horrendous attacks of September 11, 2001 prompted a massive and sustained use of military force in Afghanistan.<sup>18</sup>

#### III. The United Nations Charter

As the United States has used military force in response to terrorism, an important reality has become clear: The application of this force almost always takes place in foreign countries. The terrorists who attack Americans are generally foreigners. They tend to strike Americans in foreign countries, flee to foreign countries, and have support in foreign countries.

The United States' necessary resort to using military force in foreign countries inevitably raises questions under the U.N. Charter. Part of this multilateral treaty strives to curtail international warfare. Article 2(4) says: "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."<sup>19</sup> Through this article, the nations signing the U.N. Charter generally have agreed not to use military force outside their own borders.

But despite the general prohibition against the use of force in Article 2(4), nations may use force abroad in three situations. First, members of the United Nations may use force in foreign countries if those countries consent. For example, for several years, the United States has had special

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1999) (prosecuting of 10 defendants accused of conspiring commit terrorists acts in New York and elsewhere).

<sup>16</sup> See Letter from Bill Richardson to Danilo Turk, *supra* note 2 (providing the official U.S. justification for the strikes on Afghanistan and the Sudan).

<sup>17</sup> See Letter from Jeffrey De Laurentis, Chief of Section, Political and Specialized Agencies, Permanent Mission of the United States to the United Nations, at Geneva addressed to the secretariat of the Commission on Human Rights, E/CN.4/2003/G/80 (Apr. 22, 2003) (expressing the official U.S. justification for the strike in Yemen).

<sup>18</sup> For a complete description of the military responses to the attacks of September 11, 2001, see U.S. Dep't of Defense, News about the War on Terrorism, <http://www.defendamerica.mil>.

<sup>19</sup> U.N. Charter art. 2, para. 4.

forces assisting the government of the Philippines in fighting terrorists.<sup>20</sup> These forces are in the Philippines by consent and thus are not violating Article 2(4). Similarly, when the United States attacked members of al-Qaeda in Yemen in response to the bombing of the U.S.S. Cole in 2000, the United States was acting with the consent of the Yemeni government.<sup>21</sup>

But, of course, consent is not always possible. The leaders of al-Qaeda and the Taliban clearly did not welcome United States forces into Afghanistan after the attacks of September 11. Libya did not invite American bombers after the Berlin nightclub bombing. Similarly, Sudan did not request the missile strike that occurred after the embassy bombings in Africa.

Second, Article 42 of the U.N. Charter says that nations can use force outside of its territory if the Security Council authorizes the use of force.<sup>22</sup> However, this provision, as a practical matter, does not offer much help to nations that wish to combat international terrorism. A sad reality is that the United States cannot count on the Security Council to authorize the use of force against even the worst terrorists. In fact, the Security Council has never used Article 42 to authorize force against terrorists,<sup>23</sup> not even after the attacks of September 11, 2001.<sup>24</sup>

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<sup>20</sup> U.S. Pacific Command, Combating Terrorism in the Philippines, <http://www.pacom.mil/piupdates/index.shtml>.

<sup>21</sup> See Norman G. Printer, Jr., The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen, 8 *UCLA J. Int'l L. & FOREIGN AFF.* 331, 336 n.21 (2003).

<sup>22</sup> See U.N. Charter art. 42.

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Id.

<sup>23</sup> See Yutaka Arai-Takahashi, Shifting Boundaries of the Right of Self-Defence-Appraising the Impact of the September 11 Attacks on Jus ad Bellum, 36 *Int'l L.* 1081, 1090 (2002).

<sup>24</sup> One critic has argued that the United States itself prevented the Security Council from authorizing the use of force against al-Qaeda under article 42. See Gilbert Guillaume, Terrorism and International Law, 53 *Int'l & COMP. L.Q.* 537 (2004) (“[W]hilst the United Nations was prepared to authorise military action by the United States and its allies in Afghanistan, the United States was not looking for such authorization. It was seeking to act freely by invoking its inherent right of

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Therefore, that leaves just the third alternative: Article 51 of the U.N. charter. Article 51 recognizes the possibility of using force in self-defense when the Security Council has not acted. As noted at the start of this essay, Article 51 recognizes the “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”<sup>25</sup> As a practical matter, it is only this provision—Article 51—that the United States and other nations can cite to justify military action against terrorists in a foreign country without the country’s consent.

In fact, the United States has relied on Article 51 to support military actions that it has taken against terrorists in hostile countries. Article 51’s second sentence requires a nation acting in self-defense to inform the security council of what it is doing.<sup>26</sup> The United States has complied with this provision by writing letters to the president of the Security Council when it has used force.<sup>27</sup> For example, when the United States fired missiles at Sudan and Afghanistan after the 1998 embassy bombings in Africa, the Ambassador of the United States to the United Nations wrote a letter to the President of the Security Council saying: “In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America has exercised its right of self-defence in responding to a series of armed attacks against United States embassies and United States nationals.”<sup>28</sup>

### \*155 IV. The Campaign to Limit the Right of Self-Defense

An unfortunate situation has developed since the United States began to use force against terrorists. The problem is that organs of the United Nations, such as the Security Council and the International Court of Justice, have creatively interpreted Article 51 to contain four restrictions on the use of force in self-defense. They have said Article 51 means that a nation cannot act in self-defense in response to an armed attack unless the armed attack is against the nation’s territory as opposed to its citizens or vessels.<sup>29</sup> They have said that Article 51 does not permit a nation to respond to an

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self-defence pursuant to Article 51 of the Charter.”). But little evidence substantiates this view.

<sup>25</sup> U.N. Charter art. 51.

<sup>26</sup> *Id.* (“Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council.”).

<sup>27</sup> See, e.g., Letter from Bill Richardson to Danilo Turk, *supra* note 2; Letter from John D. Negroponte to the President of the Security Council, U.N., *supra* note 3.

<sup>28</sup> Letter from Bill Richardson to Danilo Turk, *supra* note 2.

<sup>29</sup> See *infra* part IV.A.

armed attack unless the attack had a traditional military character and caused a significant amount of harm.<sup>30</sup> They have ruled that Article 51 means that a nation can use military force in self-defense only after it has clear proof of the identity of the perpetrator of the armed attack.<sup>31</sup> Finally, they have asserted that a nation may act in self-defense only against nations that engage in terrorism, and not against non-governmental terrorist organizations.<sup>32</sup> The following discussion describes these four creative restrictions that the United Nations have attempted to impose.<sup>33</sup> It explains why these restrictions would stand as an obstacle to the war on terror. Moreover, it demonstrates the reasons that they are legally unsound.

#### A. The Attempt to Impose a Territorial Limitation

In 1985, terrorists killed three Israelis on a yacht in Cyprus.<sup>34</sup> Israel suspected that agents of the Palestinian Liberation Organization (PLO) had carried out the attacks.<sup>35</sup> In response, Israel bombed the PLO headquarters in Tunisia.<sup>36</sup> Israel proclaimed that it was acting in self-defense to prevent future attacks. The Security Council did not see it that way. The Security Council, with the United States abstaining, condemned Israel for its “act of armed aggression against Tunisian \*156 territory” made “in flagrant violation” of Article 2(4) of the U.N. Charter.<sup>37</sup>

At the time, everyone could see that Israel was acting in self-defense and that it wanted to prevent the PLO from striking again. Surely no one thought that Israel had initiated armed aggression against Tunisia with hopes of undermining Tunisia’s “territorial integrity or political independence”<sup>38</sup> in violation of Article 2(4). So why wouldn’t Article 51 authorize Israel’s response? The Security Council resolution contains no legal analysis and therefore does not explain why the Security Council thought Article 51 was not applicable. But the answer was apparent to observers: The Security Council did not believe that Israel could act in self-defense to an “armed attack” under Article 51 because the armed attack occurred in

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<sup>30</sup> See *infra* part IV.B.

<sup>31</sup> See *infra* part IV.C.

<sup>32</sup> See *infra* part IV.D.

<sup>33</sup> For discussion of two possible additional restrictions, see *infra* notes 49 and 76.

<sup>34</sup> See Associated Press, *Israel Calls Bombing a Warning to Terrorists*, N.Y. TIMES, Oct. 2, 1985, at A8.

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> S.C. Res. 573, P 7, U.N. Doc. 5/RES/573 (Oct. 4, 1985).

<sup>38</sup> *Id.* at P 4.

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Cyprus rather than in Israel. As Jochen Frowein put it, the Security Council believed that “an armed attack cannot consist of a terrorist action against citizens on foreign territory.”<sup>39</sup> The Security Council, in other words, must have interpreted Article 51 to mean that the “armed attack” must occur against the territory of the nation wishing to exercise self-defense, not merely against its citizens.<sup>40</sup>

The General Assembly apparently had the same view of Article 51 the following year. In 1986, the General Assembly condemned the United States for bombing Libya in response to the attack on the Berlin nightclub.<sup>41</sup> Like the Security Council, the General Assembly did not explain why Article 51 did not preserve the right of the United States to take this action in self-defense. But again, no mystery surrounded the General Assembly’s thinking. Observers recognized that the General Assembly was interpreting Article 51 to mean that a nation may not use self-defense in response to an “armed attack” unless the attack occurred against the territory of the nation.<sup>42</sup>

The International Court of Justice also adopted this reading of Article 51 in its decision in the Case Concerning Oil Platforms (Islamic Republic

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<sup>39</sup> See Jochen Abr. Frowein, *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, in *LEGAL ASPECTS OF INTERNATIONAL TERRORISM* 64 (1988). See also Jackson Nyamuya Maogoto, *Countering Terrorism: From Wiggled Judges to Helmeted Soldiers- Legal Perspectives on America’s Counter-terrorism Responses*, 6 *SAN DIEGO Int’l L.J.* 243, 266-67 (2005) (discussing differing views on the issue whether attacks on citizens of a nation outside its territory may constitute an “armed attack” on the nation).

<sup>40</sup> The Security Council also may have found article 51 inapplicable because it believed that Israel lacked proof of the PLO’s culpability and because Israel was retaliating instead of acting in self-defense. See Wallace F. Warriner, *The Unilateral Use of Coercion under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 *NAVAL L. REV.* 49 (1988). Neither of these arguments seems much better. As part IV.C. explains, principles of self-defense do not require a victim to have proof of the identity of the perpetrator before taking actions in self-defense. And article 51 specifically contemplates that nations will use military force in response to an armed attack; calling the counterstrike “retaliation” cannot negate Israel’s purpose of trying prevent future attacks by the PLO.

<sup>41</sup> See G.A. Res. 41/38, P 11, U.N. Doc. A/RES/41/38 (Nov. 20, 1986).

<sup>42</sup> See John A. Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-defense in Customary International Law*, 15 *PACE Int’l L. REV.* 283, 323 (2003) (noting that critics asked how “an ‘armed attack’ [could] exist in the isolated murder of American servicemen abroad”).

of Iran v. U. S.).<sup>43</sup> In the late 1980s, Iran was threatening oil shipments in the Persian Gulf. The U.S. Navy went to the region to protect U.S.-flagged vessels and to keep the peace. The Iranians then began laying mines in international waters and firing on U.S. aircraft.<sup>44</sup> At one point, a missile came from the direction of two Iranian oil platforms in the Gulf and struck a U.S.-flagged vessel.<sup>45</sup> The United States responded by sending Navy ships to destroy the platforms.<sup>46</sup>

Iran later sued the United States in the International Court of Justice. The United States' defended on grounds that it was acting in self-defense under Article 51.<sup>47</sup> But the International Court of Justice rejected the defense on several grounds. Most relevant here, the Court said:

On the hypothesis that all the incidents complained of are to be attributed to Iran the question is whether that attack, either in itself or in combination with the rest of the “series of attacks” cited by the United States can be categorized as an “armed attack” on the United States justifying self-defence. The Court notes first that the Sea Isle City was in Kuwaiti waters at the time of the attack on it, and that a Silkworm missile fired from (it is alleged) more than 100 km away could not have been aimed at the specific vessel, but simply programmed to hit some target in Kuwaiti waters. Secondly, the Texaco Caribbean, whatever its ownership, was not flying a United \*158 States flag, so that an attack on the vessel is not in itself to be equated with an attack on that State.<sup>48</sup>

In this passage, the court concludes (1) that an attack against a U.S.-flagged ship is not an armed attack if it occurs in foreign waters (e.g., the waters of Kuwait) and (2) that attacks on U.S.-owned property are not attacks on the United States.<sup>49</sup> The court thus appears to believe that armed

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<sup>43</sup> Case Concerning Oil Platforms (Islamic Republic of Iran v. U. S.), 2003 I.C.J. 161 (Nov. 6) [hereinafter Oil Platforms].

<sup>44</sup> See id. at 175.

<sup>45</sup> See id. at 185.

<sup>46</sup> See id.

<sup>47</sup> Id.

<sup>48</sup> Id. at 191.

<sup>49</sup> The quoted paragraph also appears to state another restriction on the use of force: A nation that has been subjected to an armed attack cannot respond unless it was clearly targeted and not an unintended victim. See Natalia Ochoa-Ruiz & Esther Salamanca-Aguado, Exploring the Limits of International Law Relating to the Use of Force in Self-Defence, 16 EUR. J. Int'l L. 499, 514 (2005). This restriction also has no legal basis. Nothing in the text of article 51 says that a victim

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attacks must occur against the sovereign territory of a nation before the nation can exercise the right of self-defense under Article 51.

Although the Security Council, General Assembly, and International Court of Justice all have interpreted Article 51 to permit nations to act in self-defense only when an “armed attack” occurs against the nation’s territory, this interpretation finds no support in the language of Article 51. Article 51 identifies an “armed attack” as an event that would trigger a right to act in self-defense. But it does not say that the armed attack must occur against the territory of the nation. Indeed, it is instructive to compare Article 51 to Article 2(4). Article 2(4) specifically addresses action taken against “territory,” while Article 51 does not. So a reasonable interpretation is that Article 51 does not impose a requirement that an armed attack must be against a nation’s territory before the nation can respond in self-defense.

The General Assembly, Security Council, and International Court of Justice’s creative but erroneous interpretation of Article 51 also is inimical to the United States’ efforts in combating terrorism. Most international terrorist strikes against the United States occur outside of its territory. Accordingly, if Article 51 contains a territorial limitation, the United States effectively cannot use military force in response to terrorism; as explained above,<sup>50</sup> the United States generally cannot act \*159 without the consent of the nation hosting the terrorists or without the express approval of the Security Council.

This is a serious problem. If the United States cannot use military responses against terrorists located in foreign countries, the only remaining option is diplomacy. But diplomacy works between governments, which represent constituents and have long term interests. Groups like al-Qaeda do not participate in it; and they certainly are not deterred by the prospect of diplomatic overtures.

### B. The Attempt to Impose a “Grave Harm” Limitation

In addition to attempting to impose a territorial limitation, the International Court of Justice also has attempted to engraft a “grave harm” limitation onto Article 51. This limitation would prevent a nation from

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may respond in self-defense to an armed attack only if the perpetrator of the armed attack had a specific mens rea. And a restriction of that kind would make little sense as a matter of policy. If terrorist missiles are striking American vessels, the United States should have the right to stop them, regardless of whether the perpetrators are specifically targeting the American vessels.

<sup>50</sup> See supra part III.

responding in self-defense to any armed attack unless that attack has caused significant harm.

A requirement of “grave harm” first appeared in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U. S.),<sup>51</sup> which came before the International Court of Justice in 1986. Although this case did not involve terrorism, it did involve Article 51. The communist Sandanista government of Nicaragua was supplying rebels in El Salvador with arms to help them destabilize the government.<sup>52</sup> In addition, Nicaraguans had made cross-border incursions into Costa Rica and Honduras.<sup>53</sup> The United States came to the aid of El Salvador, Costa Rica, and Honduras by mining Managua’s harbor and taking other military actions.<sup>54</sup>

Nicaragua sued the United States in the International Court of Justice, claiming that the United States’ use of force was unlawful.<sup>55</sup> The United States said it was acting in the collective self-defense of its allies, Honduras, Costa Rica, and El Salvador, under Article 51.<sup>56</sup> But the court did not accept the argument. Article 51 did not permit the United States to defend El Salvador because Nicaragua had supplied \*160 only “an intermittent flow of arms,” not on a “scale of any significance.”<sup>57</sup> In addition, the court ruled that the trans-border incursions by Nicaragua into Honduras did not justify acting in self-defense because Honduras and Costa Rica had not explained the facts of the incursion or why they considered themselves victimized by them.<sup>58</sup> In other words, even if a nation is the subject of an armed attack, it cannot use military force in self-defense unless the armed attack caused substantial harm.<sup>59</sup>

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<sup>51</sup> Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U. S.), 1986 I.C.J. 14 (June 27) [hereinafter Nicaragua].

<sup>52</sup> See id. at 119.

<sup>53</sup> See id. at 119-20.

<sup>54</sup> See id. at 118.

<sup>55</sup> See id. Nicaragua argued that the United States’ action violated U.N. Charter article 2(4) and principles of customary international law. But the International Court of Justice based its decision solely on principles of customary international law. Id.

<sup>56</sup> See id. at 119.

<sup>57</sup> Id.

<sup>58</sup> See id. at 119-20.

<sup>59</sup> See Sean D. Murphy, Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter, 43 HARV. INT’L L.J. 41, 45 (2002) (“If the Nicaragua Court’s decision still stands, then in an analysis under Article 51, one must consider the scale of actions that might constitute an armed attack.”); W.

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The court reiterated and amplified this creative limitation on the right to use force in self-defense in the Oil Platforms Case. In addition to asserting the territorial limitation described above, the court said:

Even taken cumulatively these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning Military and Paramilitary Activities in and against Nicaragua, qualified as a “most grave” form of the use of force ....<sup>60</sup> In other words, even though Iran may have sunk a ship and fired on other vessels, it had not caused enough harm to warrant an action in response.

The magnitude limitation, like the territorial limitation, is inimical to the war on terrorism. A threat may exist-and may require a response-even if an armed attack fails to cause significant harm. To see this point, suppose that on September 11, 2001, the same al-Qaeda hijackers had attempted to take over and crash the same aircraft, but through some miracle, they failed in their mission because passengers and the airline crews immediately had subdued them. In that case, the United States still would have suffered an armed attack, but the magnitude of harm actually caused by the attack would be minuscule.

**\*161** Under the facts of this hypothetical and the International Court of Justice’s restrictive view of Article 51, the United States could not respond by using military force against al-Qaeda. This conclusion is not sensible. The future threat posed by al-Qaeda would be no less, whether by happenstance the nineteen hijackers had succeeded or failed. Furthermore, the United States would have just as much reason to go to Afghanistan and other foreign countries to eradicate the threat that al-Qaeda posed.<sup>61</sup>

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Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. Int’l. L. 3, 37 (1999) (“The court’s approach to a right of unilateral response would seem to depend on the amount of destruction wrought: if a terrorist attack, whatever its intention, succeeded in killing only two people, it would not warrant unilateral response, but if it killed thousands, whatever its intention, it would.”).

<sup>60</sup> Oil Platforms, *supra* note 43, at 191.

<sup>61</sup> As one writer has elaborated:

The only way to prevent future acts of terrorism is to eliminate the support without which terrorists cannot act: the financial support, the training bases, the safe houses. Every state, every group that provides such support must be put on notice to stop, and that if it does not, we will use whatever force is necessary to do so. This is not retaliation or anticipatory self-defense. There is a continuing imminent threat to the United States.

Malvina Halberstam, *The U.S. Right to Use Force in Response to the Attacks on*

The International Court of Justice's interpretation of Article 51-that only armed attacks that cause significant harm permit military responses-finds no support in the text of Article 51. Indeed, it is contrary to the article's basic purpose. Article 51 is a provision about self-defense, not about revenge. It is a provision about preventing future harm, not about evening the score. The goal is not to ensure that the victim's response matches the terrorist's act but instead to ensure that the victim can take steps to prevent future attacks that may occur.

By way of comparison, consider how the criminal law addresses self-defense.<sup>62</sup> The Model Penal Code says: "[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."<sup>63</sup> The same general principle should apply under Article 51: A nation may use force when it reasonably believes that such force is immediately necessary to protect itself from unlawful force by terrorists. In other words, the question should not be how many service members did Libya actually succeed in killing in Berlin or did al-Qaeda manage to kill on September 11, 2001. The question should be whether the United States, having seen what happened in these attacks, believes that military force is necessary to stop future threats. Armed **\*162** attacks by terrorists may demonstrate the existence of a threat, regardless of the magnitude of injury that they actually cause. In some instances, ordinary law enforcement methods-extradition requests and so forth-simply will not be enough even if substantial harm has not already occurred.<sup>64</sup>

### C. The Attempt to Require Clear Proof of the Perpetrator

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the Pentagon and the World Trade Center, 11 *CARDOZO J. Int'l & COMP. L.* 851, 861-62 (2004).

<sup>62</sup> See John Yoo, *Using Force*, 71 *U. CHI. L. REV.* 729 (2004). "Article 51 copies the domestic system's rule of self-defense in cases in which the government cannot bring its power to bear to prevent illegal violence." *Id.* at 738.

<sup>63</sup> Model Penal Code § 3.04 (2001).

<sup>64</sup> What if American terrorists struck targets in a foreign country? Could the foreign country attack the United States in self-defense under article 51? The foreign country most likely would not need to take military action because the United States (unlike Libya, Iran, or other terror-sponsoring nations) surely would take immediate action against the terrorists. But if the United States for some reason did not act, then a foreign nation could and should use military force in self-defense under article 51.

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In the Oil Platforms Case, as described above, the United States retaliated against Iran after a missile struck a U.S.-flagged vessel in Kuwaiti waters. The International Court of Justice, as noted, rejected the United States' argument that it was acting in self-defense in part because the attack was not against the territory of the United States and in part, because it did not cause great harm.<sup>65</sup> The International Court of Justice also gave a third reason, namely, that the United States did not have sufficient proof that Iran had fired the missile. The court said:

For present purposes, the Court has simply to determine whether the United States has demonstrated that it was the victim of an "armed attack" by Iran such as to justify it using armed force in self-defence; and the burden of proof of the facts showing the existence of such an attack rests on the United States [I]f at the end of the day the evidence available is insufficient to establish that the missile was fired by Iran, then the necessary burden of proof has not been discharged by the United States.<sup>66</sup>

The court then made the task of proof very difficult, if not impossible. The United States presented satellite photographs and expert testimony that Iran possessed missile-firing equipment at the oil platforms but the court did not find the photographs "sufficiently clear."<sup>67</sup> The United States presented eyewitness testimony of a Kuwaiti military officer who claimed to have seen the missile and observed its direction\*163 of flight, but the court was not persuaded that he was credible.<sup>68</sup> The court emphasized that the United States had not shown that the missile that struck the Sea Isle City had sufficient range to have come from the oil platforms because the United States had "no direct evidence at all of the type of missile that struck the Sea Isle City."<sup>69</sup> (The court did not say where the United States could have acquired this evidence; indeed, this would probably be impossible without the cooperation of the perpetrator given that the missile would have disintegrated upon exploding.) The United States pointed out that the President of Iran had threatened U.S. shipping in prior months, saying that "Iran would attack the United States if it did not 'leave the region.'"<sup>70</sup> But the Court did not think that was sufficient. The United States showed that independent experts—"Lloyd's Maritime Information Service, the General Council of British Shipping, Jane's Intelligence

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<sup>65</sup> See supra parts IV.A. & IV.B.

<sup>66</sup> Oil Platforms, supra note 43, at 189.

<sup>67</sup> Id.

<sup>68</sup> See id.

<sup>69</sup> Id. at 190.

<sup>70</sup> Id. (internal quotation marks omitted).

Review and other authoritative public sources”<sup>71</sup> -all had blamed Iran for the attack, but the court did not know what evidence these sources had relied on and therefore thought that they might be wrong.

From this case comes the principle that a nation cannot defend itself under Article 51 unless, and until, it has some high degree of proof of the identity of the perpetrator. This second restriction, like the first, has terrible practical effects. It is likewise wrong as a legal matter.

The practical consequences of this restriction are easy to see. How is a nation supposed to come up with clear proof? Iran certainly did not photograph the firing of the missile or admit responsibility. No perpetrator of such an act would do that. Consider the attacks of September 11. Did the United States have clear and convincing proof that Bin Laden was responsible when the United States sent forces to Afghanistan? The United States did not acquire the videotape of Osama bin Laden bragging about the incident until weeks later. But it never would have gotten that evidence if it had not counterattacked. Indeed, nations that follow the Oil Platforms decision hardly ever will be able to use Article 51 to mount an immediate counterattack when struck by terrorists.

This interpretation of Article 51 also does not square with ordinary self-defense principles. A person acting in self-defense does not need **\*164** to have clear proof. Again, the Model Penal Code says that the standard is whether the person believes that force is necessary to prevent immediate harm.<sup>72</sup> Surely, the United States reasonably could and did believe that it was necessary to strike Iran given all the provocation.

True, mistakes may happen, but the law of self-defense has never sought to prevent all mistakes. In the criminal law context, a victim does not even need to use force against the right person. In one criminal case, for example, a woman thought she was about to be attacked by her brother-in-law. She wanted to shoot him but accidentally killed her sister. Nevertheless, the court said that was still self-defense.<sup>73</sup> Requiring individuals or nations to wait for perfect proof of the identity of the perpetrator of an armed attack before acting in self-defense may negate their right of self-defense altogether.

#### D. The Attempt to Prohibit Self-Defense Against Non-States

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<sup>71</sup> Id.

<sup>72</sup> Model Penal Code § 3.04 (2001).

<sup>73</sup> *Brown v. State*, 94 So. 874, 874 (Fla. 1922).

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In its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,<sup>74</sup> the International Court of Justice attempted to impose yet another restriction on the inherent right of self-defense preserved in Article 51. The court ruled that a nation may act in self-defense only when attacked by another nation.<sup>75</sup> A nation, the court said, cannot use force to defend itself against attacks by a mere terrorist organization.<sup>76</sup>

The opinion concerned Israel's efforts to build a security barrier to prevent suicide bombers and other terrorists from entering Israel from the occupied territory of the West Bank.<sup>77</sup> The security barrier, as planned, would run along Israel's borders with the West Bank. The \*165 barrier also would enter the occupied West Bank in many places, enclosing territory that does not belong to Israel.

Opponents of the planned security barrier argued in part that it would violate Article 2(4) because it would amount to an acquisition of territory by force; Israel, they asserted, was taking parts of the West Bank territory by forcibly building the security barrier.<sup>78</sup> The U.N. General Assembly asked the International Court of Justice for an advisory opinion on the legality of Israel's plan.<sup>79</sup> The International Court of Justice said that building the fence was an unlawful use of force in the West Bank.<sup>80</sup> It rejected Israel's argument that it was building the fence in self-defense under Article 51.<sup>81</sup> The court said "Article 51 of the Charter recognizes the existence of an inherent right of self-defense in the case of armed attack by

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<sup>74</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) [hereinafter Advisory Opinion]. For an excellent and detailed analysis of the case, see Sean D. Murphy, Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?, 99 AM. J. Int'l L. 62 (2005).

<sup>75</sup> See Advisory Opinion, *supra* note 74, at 194-95.

<sup>76</sup> See *id.* The Court's opinion also might imply yet another restriction on the use of self-defense under article 51: A nation can only use violent means of acting in self-defense under article 51 and that non-violent means-like building a fence-oddly are not justified. See Robert A. Caplen, Note, Mending the "Fence": How Treatment of the Israeli-Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense, 57 FLA. L. REV. 717, 762-63 (2005).

<sup>77</sup> See Advisory Opinion, *supra* note 74, at 170-72.

<sup>78</sup> *Id.* at 171.

<sup>79</sup> *Id.* at 141.

<sup>80</sup> See *id.*

<sup>81</sup> *Id.* at 197.

one State against another State.”<sup>82</sup> Israel could not rely on the article, according to the court, because the terrorist groups attacking Israel are not “States.”

The implications of this decision for the United States are staggering. The United States’ foremost enemy, al-Qaeda, is not a state. Therefore, under this decision, the United States could not respond with force to the attacks of September 11, 2001, or to the 1998 bombings of the U.S. embassies in Africa. On the contrary, any response would violate the U.N. Charter.

The International Court of Justice did not overlook this consequence of its decision. The sole dissenting member of the court, Judge Thomas Buergenthal, not only explained that restricting the right of self-defense was an error, he specifically called the court’s attention to how the decision would make the United States’ military responses to al-Qaeda unlawful.<sup>83</sup> But the court adhered to its views.

Perhaps even more regrettably, a majority of the Security Council appears to agree with the International Court of Justice. Immediately after September 11, the United States prodded the Security Council to act. The Security Council adopted a diplomatically-worded resolution, Resolution No. 1368, condemning the attacks.<sup>84</sup> But the Security Council cagily avoided saying that the United States had a right to defend itself under Article 51.

**\*166** The preamble to Resolution No. 1368 declares that the Security Council was “[r]ecognizing the inherent right of individual or collective self-defence in accordance with the Charter .”<sup>85</sup> In other words, the Security Council acknowledged that the U.N charter contains a right to act in self-defense, something no one ever disputed. The Resolution, however, did not say what the right to self-defense entails. Most particularly, it did not say that al-Qaeda had committed an “armed attack” for the purposes of Article 5 and it did not say that the United States had a right to act in self-defense in response to the attack by al-Qaeda.

In contrast, the North Atlantic Treaty Organization (NATO) had no difficulty seeing the attacks for what they were. On October 2, 2001, NATO’s president issued this statement:

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<sup>82</sup> See *id.* at 194.

<sup>83</sup> See *id.*, Declaration of Buergenthal, J., at 201.

<sup>84</sup> S.C. Res. 1368 U.N. Doc. S/RES/1368 (Sept. 12, 2001).

<sup>85</sup> *Id.*

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The facts are clear and compelling. The information presented points conclusively to an Al-Qaida role in the 11 September attacks. We know that the individuals who carried out these attacks were part of the worldwide terrorist network of Al-Qaida, headed by Osama bin Laden and his key lieutenants and protected by the Taleban. On the basis of this briefing, it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty [which created NATO], which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all.<sup>86</sup> Why couldn't the Security Council issue a similarly-worded resolution declaring that al-Qaeda had committed an "armed attack" justifying the United States in acting in self-defense by attacking al-Qaeda? Presumably, a majority of the Security Council-or a member having a veto power-did not agree with this conclusion.

This fourth creative restriction on Article 51, like the other three previously discussed, also has no legal basis. As many others have observed, nothing in the language of Article 51 says that an armed **\*167** attack must be by a state.<sup>87</sup> And principles of self-defense generally focus on the perspective of the person or the nation threatened, not on the identity of the perpetrator. From the perspective of the nation threatened, it does not matter whether the perpetrator is a state actor or a non-state actor. The goal is to provide self-protection. Indeed, diplomacy and other non-military actions are more likely to be effective with state actors than with non-state

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<sup>86</sup> See Lord Robertson, Secretary General, NATO, Statement (2 October 2001), <http://www.nato.int/docu/speech/2001/s011002a.htm>.

<sup>87</sup> See Carsten Stahn, Terrorist Acts as "Armed Attack": The Right to Self-defense, Article 51 (1/2) of the UN Charter, and International Terrorism, 27 FLETCHER F. WORLD AFF. 35, 42 (Fall 2003) (arguing that "[t]he term 'armed attack' was traditionally applied to states, but nothing in the Charter indicates that 'armed attacks' can only emanate from states."); Fr. Robert J. Araujo, S.J., Implementation of the ICJ Advisory Opinion-Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?, 22 B.U. Int'l L.J. 349, 383 (2004) ("The article does not specify who must be or can be the author of or be responsible for an attack that can trigger application of the self-defense provision."); Barry A. Feinstein, A Paradigm for the Analysis of the Legality of the Use of Armed Force Against Terrorists and States That Aid and Abet Them, 17 TRANSNAT'L LAW. 51, 67-68 (2004) ("Nothing contained in the United Nations Charter specifies that 'an armed attack' may only be perpetrated by a State, and Article 51 was drafted in a broad enough manner to permit the use of force in self-defense to counter non-state actors.").

actors. So there may be a greater need to use military force in self-defense against non-state-sponsored terrorists than against state-sponsored terrorists.

#### V. How the United States Should Respond

The campaign to restrict the right to use force in self-defense under Article 51 is clearly unacceptable to the United States and other nations facing the threat of international terrorism. The four restrictions that organs of the United Nations have attempted to impose would largely make military responses to terrorism impossible. So what should the United States do about them? The United States has several options, although all of them have difficulties.

##### A. Ignoring the Attempts to Impose Restrictions

The first possible response is for the United States to ignore the four restrictions that the organs of the United Nations have attempted to impose on Article 51. This response is not difficult, not unprecedented, and not unjustified.

The U.N. General Assembly has passed all kinds of ludicrous resolutions. These resolutions have few practical consequences and generally\***168** just bring disrepute on the nations that vote for them. The United States, for this reason, did not care, and did not need to care, when the General Assembly condemned it for bombing Libya in 1986.<sup>88</sup> Nothing came of the resolution.

The Security Council's resolutions have more force. But the United States holds a veto power on the Security Council. The United States therefore could veto any proposed Security Council resolution that might condemn defensive actions that the United States might take under Article 51. The United States therefore does not need to ignore resolutions of the Security Council.

That leaves only the International Court of Justice, and the United States also can ignore its judgments. In fact, it already has done so. In the Nicaragua case, the International Court of Justice ordered the United States to pay compensation to Nicaragua, but the United States refused to comply with the judgment.<sup>89</sup> The U.N. General Assembly subsequently passed

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<sup>88</sup> See G.A. Res. 41/38, P 11, U.N. Doc. A/RES/41/38 (Nov. 20, 1986).

<sup>89</sup> Nicaragua, *supra* note 51, at 40.

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several resolutions urging the United States to comply immediately,<sup>90</sup> but the United States ignored these resolutions as well. As a result of this case, the United States withdrew from the compulsory jurisdiction of the International Court of Justice.<sup>91</sup>

Ignoring attempts to impose restrictions on the right of self-defense has a legal basis. The U.N. Charter is a multilateral treaty. The United States signed this treaty, agreeing to abide by Article 51 and the other articles in the Charter. It did not agree to abide by the creative restrictions that organs of the United Nations have attempted to put on Article 51. The four limitations described above have no basis in the text of Article 51, and they run counter to generally accepted principles of self-defense. For this reason, the United States would be less faithful to the U.N. Charter if it agreed to follow the four restrictions than if it simply ignored them.

For these reasons, ignoring the creative restrictions that organs of the United Nations have attempted to impose on Article 51 is something that the United States can and should do. But ignoring the interpretations of Article 51 is not enough. Although the United States may have the fortitude to ignore the General Assembly, the power to veto \*169 Security Council Resolutions, and the willingness to withdraw from the compulsory jurisdiction of the International Court of Justice, many of the United States' allies do not. These creative restrictions on the right to exercise self-defense may prevent these allies from taking military action against terrorists. In the global war against terrorism, this possibility would harm the United States.

### B. Amending the United Nations Charter

Another possible response would be for the United States to propose amending Article 51 to make clear that the right to exercise self-defense is not subject to the four supposed limitations described above. Some foreign political leaders have expressed interest in this possibility.<sup>92</sup> If the nations

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<sup>90</sup> See G.A. Res. 41/31, U.N. Doc. A/RES/41/31 (Nov. 3, 2001); G.A. Res. 42/18, U.N. Doc. A/RES/42/18 (Nov. 12, 1987); G.A. Res. 44/43, U.N. Doc. A/RES/44/43 (Dec. 7, 1989).

<sup>91</sup> See Letter from Secretary of State Schultz to the Secretary-General of the United Nations (Oct. 7, 1985), reprinted in 24 I.L.M. 1742 (1985).

<sup>92</sup> See Tom Ruys & Sten Verhoeven, Attacks by Private Actors and the Right of Self-defence, 10 J. CONFLICT & SECURITY L. 289, 298 (2005) (discussing a proposal by the Australian Prime Minister to amend the U.N. charter to provide explicitly that a nation has the right to attack terrorist groups in other countries).

of the world could agree on amendments that would accomplish this goal, then the entire problem would disappear.

Drafting an amendment would not be difficult. For example, the United States might propose adding a sentence at the end of Article 51 saying something like the following:

A Member of the United Nations that has suffered an armed attack is not inhibited from exercising its inherent right to use force in self-defense merely because (1) the armed attack did not occur on or against the nation's territory; (2) the armed attack did not cause grave harm; (3) the Member cannot prove the identity of the perpetrator with certainty; and (4) the armed attack was not state-sponsored. This amendment would neither expand nor contract the inherent right of self-defense that Article 51 strives to protect. Instead, it simply would get rid of the creative limitations that the International Court of Justice and the other organs of the United Nations have attempted to place on the inherent right to self-defense.

Unfortunately, this proposal has a clear problem. Amending the U.N. Charter in this manner would be politically impossible. Only the United States and a few other democracies both use military force to respond to terrorism and care about international law. The rest of the \*170 world either does not fight terrorism with military force or does not heed international law. Most nations thus would see no reason to make changes to the U.N. Charter just to benefit the United States and a few other countries. In fact, they likely would oppose it largely because the United States supports it.

Indeed, proposing the amendment might cause more harm than good. If the United Nations rejected the proposal (as it almost surely would), opponents of American policy subsequently might cite the rejection in support of the four creative limitations discussed above. They might argue that the rejection of the amendment shows that members of the United Nations favor the four restrictions. Although this argument lacks legal validity, it would not help the United States politically or diplomatically.

#### C. Persuading the ICJ to Change its Interpretation

The United States also might respond by attempting to persuade the International Court of Justice to change its interpretation of Article 51. However, this possible response also has problems. One is that the United States generally wants to avoid litigation in the International Court of

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Justice, which it rightly considers a hostile forum.<sup>93</sup> Another is that the International Court of Justice seems unlikely to listen to reason on the subject of self-defense.

In the Israeli Wall Case, as noted above, only one judge out of the total of fifteen disagreed with the conclusion that using force was impermissible against non-state actors.<sup>94</sup> The dissenting judge, Thomas Buergenthal of the United States, explained the problem with the majority's position in a simple and cogent manner.<sup>95</sup> But the other members of the court were unmoved. The likelihood of changing the views of the International Court of Justice is thus very small.

### \*171 D. Taking Action Through the Security Council

The United States also might oppose these four restrictive interpretations of Article 51 by using its permanent seat and veto power on the Security Council to influence the decisions of the Security Council. The United States clearly does not have the political influence to persuade the Security Council to authorize the use of force against terrorists; its failure to get stronger wording in Security Council Resolution No. 1368 proves this point.<sup>96</sup> But there are three things that the United States can do.

First, the United States can veto any resolutions that would condemn a nation for using self-defense based on these four principles. For example, the United States should not have abstained from the resolution condemning Israel for bombing the PLO headquarters in Tunisia after the PLO's armed attack in 1985. The United States disagreed with the decision of the Security Council and fully agreed that Israel had a right to defend itself under Article 51, but the United States at the time worried that vetoing the resolution would lead to anti-American riots in Tunisia.<sup>97</sup> In retrospect, the

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<sup>93</sup> Douglas J. Ende, Comment, Reaccepting the Compulsory Jurisdiction of the International Court of Justice: A Proposal for a New United States Declaration, 61 WASH. L. REV. 1145, 1145 (1986) ("Perhaps the primary reason, similar to that advanced following the United States withdrawal from the litigation brought by Nicaragua against the United States, is the administration's belief that the composition of the Court is essentially hostile to United States interests.").

<sup>94</sup> See Advisory Opinion, *supra* note 74, Declaration of Buergenthal, J., at 201.

<sup>95</sup> *Id.*

<sup>96</sup> See *supra* part IV.D.

<sup>97</sup> See Bernard Gwertzman, U.S. Defends Action in U.N. on Raid, N.Y. TIMES, Oct. 7, 1985, at A3 (reporting that Secretary of State George Schultz explained the United States' action by stating the following:

Reagan and other high officials had considerable sympathy for the Israeli

abstention did not help the United States much in its relations with Tunisia.<sup>98</sup> In addition, the Security Council's condemnation of Israel surely gave credence to the General Assembly's view that the United States was acting unlawfully when it used military force against Libya the following year.

Second, the United States generally can persuade other members of the Security Council at least to condemn terrorist attacks. For example, the Security Council condemned al-Qaeda in Resolution No. **\*172** 1368.<sup>99</sup> Certainly, al-Qaeda did not care about the condemnation from the United Nations. But the condemnation may encourage nations to take stronger steps against terrorist organizations.

Third, and perhaps most importantly, the United States can use its communications to the Security Council to shape interpretations of Article 51. As explained above, Article 51 contains a notice requirement: A nation must provide notice when it uses force under Article 51.<sup>100</sup> The United States typically has done this by writing a letter to the Security Council. For example, when the United States attacked targets in Afghanistan and Sudan after the 1998 embassy bombings, it wrote a long letter listing al-Qaeda's evil misdeeds.<sup>101</sup>

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action [but] there was overwhelming information suggesting that a United States veto would unleash leftist students and other groups into the streets in Tunisia, perhaps to destroy the American Embassy and perhaps to overthrow the Government of President Habib Bourguiba.).

<sup>98</sup> Michael Ross, *Reagan Remarks on Raid Caused Shock; U.S.-Tunisian Ties: Irreparable Harm?*, L.A. TIMES, Oct. 15, 1985, at sec. 1, p. 13 (reporting that the "abstention and subsequent statements by Reagan have helped to cool Tunisian tempers, but officials here say they believe that the close relations that successive U.S. administrations have had with Tunisia over the years have now come to an end.").

<sup>99</sup> See S.C. Res. 1368, *supra* note 84 ("The Security Council [u]nequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security .").

<sup>100</sup> See U.N. Charter art. 51 ("Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council .").

<sup>101</sup> See Letter from Bill Richardson to Danilo Turk, *supra* note 2.

My Government has obtained convincing information that the organization of Usama Bin Laden is responsible for the devastating bombings of the United States embassies in Nairobi and Dar Es Salaam. Those attacks resulted in the deaths of 12 American nationals and over 250 other persons The Bin Ladin organization

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Letters of this kind have no binding effect by themselves. But international incidents are often judged in light of past practices. This tradition is useful to the United States. The United States is one of the few countries that takes military action against terrorists in foreign countries. So it is one of the few countries that sends formal notices to the Security Council explaining why it believes that an action in self-defense is necessary. And because the United States has a veto power, the Security Council generally has no way to contradict the United States by passing a contrary resolution.

Letters to the Security Council of this kind have been important already. Even now, scholars are drawing conclusions about the meaning of Article 51 based on the Security Council's non-reaction to the letter sent by the United States following the attacks of September 11, \*173 2001.<sup>102</sup> The letters also may provide legal support for the United States' positions in other contexts. For instance, military commissions in Guantanamo are seeking to try members of al-Qaeda.<sup>103</sup> Some of the accused have disputed when al-Qaeda began or ended various conspiracies to violate the laws of war.<sup>104</sup> But prosecutors have been able to cite letters sent by the United States to the Security Council under Article 51 addressing prior incidents like the embassy bombings, thus providing evidence of the duration of the armed conflict with al-Qaeda.<sup>105</sup>

### VI. Conclusion

Article 51 of the U.N. Charter has great importance in the effort to combat international terrorism. This article preserves the right to use

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maintains an extensive network of camps in Sudan, which have been and are being used to mount terrorist attacks against American targets.

Id.

<sup>102</sup> See, e.g., Erin L. Guruli, *The Terrorism Era: Should the International Community Redefine its Legal Standards on Use of Force in Self-Defense?*, 12 WILLAMETTE J. Int'l L. & DISP. RESOL. 100, 109 (2004) (arguing that article 51 may permit a nation to act in self-defense against terrorists who are not a state in part on grounds that "the Security Council never expressed its disagreement when the United States informed the Council of its intention to exercise its 'inherent right of individual and collective self-defense.'").

<sup>103</sup> See Guantanamo Bay Detainees Legal Updates, [http://www.globalsecurity.org/military/facility/guantanamo-bay\\_legal.htm](http://www.globalsecurity.org/military/facility/guantanamo-bay_legal.htm).

<sup>104</sup> See Human Rights News, *Growing Problem of Guantanamo Detainees*, <http://hrw.org/english/docs/2002/05/30/usdom4007.htm>.

<sup>105</sup> See, e.g., *Prosecution Response to Defense Motion: Armed Conflict in Afghanistan has Ended*, n.11, *United States v. Hicks*, <http://alt.defenselink.mil/news/Oct2004/d20041026motion.pdf>.

military force in self-defense. The United States and other democratic nations must rely on Article 51 for authority to use military force against terrorists in foreign countries. Because the Security Council is politically hostile, they cannot expect the Security Council to grant them the authority to use force under any other provision of the Charter.

Unfortunately, the International Court of Justice and other organs of the United Nations have attempted to impose four dangerous restrictions on the right to act in self-defense under Article 51. Cumulatively they have said that a nation may act in self-defense to an armed attack by terrorists only if the terrorist attack (1) occurred against the nation's territory; (2) actually caused grave harm; (3) left sufficient evidence to allow the victim to prove the identity of the perpetrator in court; and (4) was done by a foreign government as opposed to a nongovernmental\*174 terrorist organization like al-Qaeda, Hamas, or Hizbollah.

These four restrictions, if followed, would have the practical effect of prohibiting most military responses to terrorism. In addition, if they in fact were the law, then the United States would have acted illegally in defending itself following terrorist attacks by Libya, Iran, and al-Qaeda. The United States and other nations that oppose terrorism cannot accept this understanding of the U.N. Charter.

None of the four restrictions that the organs of the United Nations have attempted to impose finds support in the language of Article 51. Indeed, the simple language of Article 51 appears to preclude the restrictions for the reasons explained above. The restrictions also run contrary to general principles of the law of self-defense. They seem to transform Article 51 from a provision about acting in self-defense into a provision about evening the score in a game between equals.

Unfortunately, the United States has limited options for opposing these restrictive interpretations of Article 51. True, the United States generally can ignore the General Assembly's resolutions and can avoid the jurisdiction of the International Court of Justice. But realistically, the United States cannot push through amendments to the U.N. Charter, cause the International Court of Justice to change its views, or get authorization for the use of force from the Security Council.

Still, the United States can use its veto power to prevent the Security Council from condemning countries that use force in self-defense. And it can use opportunities afforded by the U.N. Charter to express its interpretation of Article 51, thus establishing helpful precedent for future disputes. In particular, the United States can and should explain its understanding of

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Article 51 every time it tells the Security Council that it is going to use force in self-defense.