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* The name is derived from a theory of Thomas Hobbes, that a supranational entity will eventually become a monopolizer of force and law, rendering justice where needed. THOMAS HOBBES, LEVIATHAN 120, 153, 236 (Michael Oakeshott ed., 1997). *See also* ROBERT D. KAPLAN, WARRIOR POLITICS: WHY LEADERSHIP DEMANDS A PAGAN ETHOS 105 (1st ed. 2002) (pointing to the International Criminal Court as an effort in creating an international Leviathan).

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I. INTRODUCTION: THE MIDDLE EAST IS ON FIRE AND INTERNATIONAL LAW IS IN A STATE OF FLUX

Many hoped silently that the widespread anti-American protests and vitriolic hatred in the Middle East would simply sputter out. Some politicians are trying to wait it out in the blind hope that anti-American fervor will magically evaporate from the new Islamic landscape. That is not a realistic option. It was only a matter of time before the revolutionary trend of the Arab Spring turned from inward to outward and set upon the United States and its allies. On September 11, 2012, American embassies were attacked abroad.[1] This Article argues that an American response to the embassy attacks, especially the assault in Benghazi, Libya is a unique opportunity. The response should be declared publicly, recognized as part of a targeted-killing opportunity,[2] bolstered with citation to

1. The attacks took place in Benghazi, Syria, Tunisia, and several other nations. *See* Joe Sterling and Greg Botelho, *Clinton Demands Arab Spring Nations Protect Embassies, Halt Violence*, CNN (Sept. 16, 2012, 9:12 PM), http://www.cnn.com/2012/09/14/world/meast/embassy-attacks-main/index.html. That a property is a consulate, rather than an embassy, is not of importance. The land still retains its special status. *See* Vienna Convention on Consular Relations and Optional Protocol on Disputes, art. 31, *opened for signature* Apr. 24, 1963, 21 U.S.T. 77 (entered into force Dec. 13, 1972) (stating that consular premises are under the control of the sending state). Even the Swiss Embassy was attacked in Iran where the United States uses Swiss diplomats as a formal channel of diplomacy. *See U.S. Warns of Rising Threat of Violence Amid Outrage Over Islam Video*, CNN (Sept. 14, 2012, 12:50 AM), http://www.cnn.com/2012/09/13/world/meast/embassy-attacks-main/index.html.

2. Targeted-killing is a term of art used to distinguish from the assassination of heads of state. Mark V. Vlasic, *Assassination & Targeted Killing: A Historical and Post-bin Laden Legal Analysis*, 43 GEO. J. INT'L L. 259, 262 (2012). Targeted-killing means "the use of . . . force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them." *Id.* at 268 (quoting NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 5 (2009)). Vlasic notes that "the administration needs to work harder to explain and defend its use of drones as lawful and appropriate—to allies

international criminal law, and executed with minimal collateral damage.

International law, by nature of its very name, should conjure up images of numerous statutes and a large body of case law. However, as many academics and politicians point out, international "law" simply has no real teeth.[3] The most recent war in Iraq had represented a unique and now lost opportunity to enhance international law with the creation of an international tribunal, i.e. an International Criminal Tribunal in Iraq (ICTI).[4] Other than the war in Afghanistan, Iraq was the last widespread intervention preceding the Arab Spring.[5] The failure on the part of the United States and allied coalition countries to form an international criminal tribunal now

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and critics—if it wants to avoid losing international support and potentially exposing administration officials to legal liability." *Id.* at 332 (quoting John Bellinger III, *Will Drone Strikes Become Obama's Guantanamo?*, THE WASHINGTON POST, Oct. 2, 2011, http://www.washingtonpost.com/opinions/will-drone-strikes-become-obamas-guantanamo/2011/09/ 30/gIQAOReIGLstory.html). Due to the increased use of drones, "we now live in a new age of targeted killing." *Id.* Many of the challenges presented by the use of drones and other unmanned vehicles were realized as early as 1999. *See, e.g.*, Frank Wolfe, *Nathman Outlines UCAV Challenges for Navy*, DEFENSE DAILY (Apr. 5, 1999), http://www.highbeam.com/doc/1G1-54306413.html (citing an interview with Rear Adm. John Nathman and stating that "development and deployment of Unmanned Combat Aerial Vehicles (UCAV) present serious challenges for the Navy . . .").

3. *See* Jodi Thorp, Comment, *Welcome Ex-Dictators, Torturers and Tyrants: Comparative Approaches to Handling Ex-Dictators and Past Human Rights Abuses*, 37 GONZ. L. REV. 167, 198 (2001–2002) (noting that the Nuremberg pledge of "never again" has historically become "again and again" as injustices in various countries, including Iraq, go unabated or unchallenged) (citing MICHAEL P. SCHARF, BALKAN JUSTICE xiii–xiv (1997); Thomas R. Kleinberger, *The Iraqi Conflict: An Assessment of Possible War Crimes and the Call for Adoption of an International Criminal Code and Permanent International Criminal Tribunal*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 69, 104–05 (1993) (noting that there has been only "marginal success" of international criminal law, as there is "no supranational structure" to enforce it).

4. *See* Andrew Williams, *International Criminal Law and Iraq*, *in* THE IRAQ WAR AND INTERNATIONAL LAW 117, 117–18 (Phil Shiner & Andrew Williams eds., 2008) ("[T]he events in Iraq post-2003, and the responses to them . . . [have] given credence to the claim that international criminal law is a chimera incapable of addressing power and its nefarious whims.").

5. *See* Samuel C. Baxter, *Syria's Crisis Set to Redefine the World*, REAL TRUTH (Sept. 27, 2012), http://realtruth.org/articles/120924-005.html (listing Kuwait, Bosnia, Somalia, Kosovo, Iraq, and Afghanistan as the interventions occurring prior to the Arab Spring).

represents the single greatest failure of Western powers to fully solidify international law.[6] The ongoing crisis in the Middle East, however, presents another unique opportunity to shape the realm of international law into a stable, uniquely American one.[7] This is even more important as the world community and legal scholars understand that international law is in a state of flux, and, perhaps as some have said, also in complete "disarray."[8] The raid on bin Laden and increased drone attacks on foreign soil have hastened the crisis in international law.[9] In some ways, technology has overrun the framework of international law and it is up to current state actors, most notably, the United States, to rebuild that framework.[10]

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6. *See* Catherine S. Knowles, *Life and Human Dignity, the Birthright of All Human Beings: An Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights*, 45 NAVAL L. REV. 152, 153, 215 (explaining that "now is the time" to pursue Iraqi violations of international law, that "the international community must act to enforce these obligations[,]" and that we should not wait for the creation of the ICC); *see* David J. Scheffer, St. Dept. Briefing on The Case for Justice in Iraq Before the Cong. Human Rights Caucus (Sept. 18, 2000), *available at* http://www.fas.org/sgp/news/2000/09/scheffer.html ("The time has come for Saddam Hussein and his top associates to be held accountable for their 20 years of crimes against humanity, war crimes, and genocide.").

7. *See* Vlasic, *supra* note 2, at 333 ("[I]t is important to recognize that the way we prosecute the so-called 'long war' now, will help to develop the norms that will guide and bind the global community in its response to terrorism in the future. And due to the global implications of such decisions, the manner by which we prosecute this 'war'—and the extent to which we work with our friends, allies, and international community in our related endeavors—will either contribute to or detract from our leadership role in the world and the success of America's newest 'war.'").

8. *See, e.g.*, Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1366 (2012) ("The international law governing when states may target to kill or preventively detain nonstate actors is in disarray.").

9. *See* Jennifer D. Kibbe, *Conducting Shadow Wars*, 5 J. NAT'L SEC. L. & POL'Y 373, 373 (2012) (noting that "just about every indication points to a further expansion of this hybrid military and intelligence activity beyond war zones. It is imperative, therefore, that we more clearly understand how these shadow wars are being conducted and by whom, and whether they are subject to adequate oversight and accountability.").

10. *See id.* at 389 (recognizing that some aspects of the United States' counterterrorism programs use of technology may have already compromised international law and undermined public trust).

II. AFTER WITHDRAWING FROM THE ICC, THE IRAQI WAR PRESENTED A UNIQUE OPPORTUNITY TO RESTORE AMERICAN INTERESTS ABROAD AND PREVENT ANTI-AMERICAN FERVOR

The United States has often sought to be part of the growth of international law, whether related to war, the protection of intellectual property, trade agreements, or criminal prohibitions.[11] Working toward the creation of the International Criminal Court (ICC), many had hoped to "make all men answerable to the law,"[12] sustain international security,[13] and create, at long last, accountability for individuals who break international law.[14] Tyrants were to be treated as international criminals.[15] An international security based on the balance of power filled with alliances and threats of mutual destruction was to be replaced by rules and regulations. The letter of the law, for the sake of order, would reign supreme.[16] But the

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11. *See, e.g.*, U.S. DEPARTMENT OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2011 iii–vii (2011), http://www.state.gov/documents/organization/169274.pdf (listing treaties and other international agreements of the United States).

12. Jordan J. Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351, 379 (1991) (alluding to a phrase from the chief prosecutor at Nuremberg); *see* Phillippe Kirsch, Q.C., *The International Criminal Court: Current Issues and Perspectives*, 64 LAW & CONTEMP. PROBS. 3, 3 (2001) (noting that the basic objective of ICC was to replace the "culture of impunity" with a "culture of accountability").

13. Kleinberger, *supra* note 3, at 106; *see* Joshua B. Bevitz, *Flawed Foreign Policy: Hypocritical U.S. Attitudes Toward International Criminal Forums*, 53 HASTINGS L.J. 931, 963 (2002) (explaining that the ICC could be a "momentous contribution to world order").

14. *See* Kirsch, *supra* note 12, at 3.

15. *See* Michael J. Kelly, *Case Studies "Ripe" for the International Criminal Court: Practical Applications for the Pinochet, Ocalan, and Libyan Bomber Trials*, 8 MICH. ST. U.-DCL J. INT'L LAW & PRAC. 21, 21, 24 (1999) (quoting UN Secretary General Kofi Annan's declaration that the ICC "will ensure that humanity's response [to crimes against humanity] will be swift and just"); Thorp, *supra* note 3, at 196 (noting that the void in international law for bringing ex-leaders to justice could only be filled by an organ, such as the ICC, capable of bringing them to justice).

16. *See* M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443, 468 (1999) (alluding to his own speech wherein he asserted that the ICC will mitigate power politics); ROBERT D. KAPLAN, WARRIOR POLITICS: WHY LEADERSHIP DEMANDS A PAGAN ETHOS 105 (1st ed.

frightening prospect of using the ICC as a political weapon and the lack of certain fundamental provisions persuaded the United States to essentially remove its name from the ICC treaty.[17] Originally envisioned to take down evil tyrants who prey on their respective populations and on others, the court seemed to insulate such dictators.[18] As will be discussed below, Saddam Hussein—along with many others—were safe from ICC indictment.[19] More importantly, America's withdrawal from the ICC Treaty effectively extinguished much of America's international political capital.[20] As a result, the United States is increasingly viewed as hypocritical and alienated.[21]

Now, the high degree of dissent among allied nations against American foreign policy is disturbing.[22] Following the zealous retaliation for September 11, 2001, some feared that the United States had become fiercely anti-Muslim or anti-Arab.[23] This is an especially heightened concern given the spread of anti-American protests.[24] Many also criticize America's seemingly inconsistent approach regarding North Korea's renewed vigor for its own nuclear program.[25] However, the most

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2002).

17. Bevitz, *supra* note 13, at 931; *see* Joel F. England, Note, *The Response of the United States to the International Criminal Court: Rejection, Ratification, or Something Else?*, 18 ARIZ. J. INT'L & COMP. L. 941, 944–45 (2001).

18. *See* England, *supra* note 17, at 945–46 (illustrating specifically that the ICC could not prosecute Saddam Hussein, but that Saddam could turn the ICC against America).

19. *See infra* Part B.

20. *See* Bruce Broomhall, *Toward U.S. Acceptance of* the *International Criminal Court*, 64 LAW & CONTEMP. PROBS. 141, 141–42 (2001) (explaining that refusal to accept the ICC has left the U.S. on a "lonely legal ledge," unable to maneuver the ICC process).

21. *See id.* at 143–45.

22. *See* Patrick E. Tyler, *A Deepening Fissure*, N.Y. TIMES, Mar. 6, 2003, at A1, A17 (noting that the UN has split among allies and that the U.S. is becoming entrenched). *See also* Robert Kagan, *The U.S.-Europe Divide*, WASH. POST, Dec. 19, 2002, at B7 (asserting that Europe views the world differently from the United States).

23. *See* Abdus Sattar Ghazali, *American Muslims Ten Years After 9/11*, HIIRAAN ONLINE (Sept. 6, 2011), http://www.hiiraan.com/op4/2011/sept/20258/american_muslims_ten_years_after_9_11.aspx ("The 9/11 attacks have left a lasting and damaging image for American Muslims who to this day are still fighting stereotypes and negative image.").

24. *See* Sterling & Botelho, *supra* note 1 (describing the spread of anti-American attacks and protests throughout the Middle East).

25. *See* LAWRENCE F. KAPLAN & WILLIAM KRISTOL, THE WAR OVER IRAQ: SADDAM'S

valid criticism was America's failure after the Gulf War, amid enthusiastic announcements,[26] to help establish an international criminal tribunal to prosecute Hussein and others for war crimes, genocide, and crimes against humanity.[27] Calls for such trials immediately followed the widespread knowledge of Iraqi abuses, which included the 1988 massacre of Kurds.[28] Even prior to the Iraqi invasion of Kuwait, President George H.W. Bush raised the possibility of a Nuremberg-style tribunal for Iraq when comparing Hussein to Hitler as early as October 15, 1990.[29] As an affirmation, the UN Security Council, through Resolution 674, welcomed the international community to "collate substantiated information . . . [of] grave breaches [of international law] . . . and to make this information available to the Security Council."[30] During the Gulf War, the gaudish display of coalition prisoners of war (POWs) on Iraqi television intensified the American and international interest in such trials.[31] Then-Secretary of Defense Richard Cheney declared such prisoner treatment as a "clear-cut violation of the Geneva Convention."[32] Even the American Bar Association Standing Committee on Law and National Security chimed in with its unanimous support for a

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TYRANNY AND AMERICA'S MISSION 82–83 (1st ed. 2003).

26. *See* Michael D. Greenberg, *Creating an International Criminal Court*, 10 B.U. INT'L L.J. 119, 120–21 (1992) ("Congressional support for an Iraqi war crimes tribunal appeared to peak on Apr. 18, 1991, when the United States Senate approved a bill urging the Bush administration to advocate the creation of an international tribunal to prosecute the Iraqi war crimes.").

27. *See* Henry T. King, Jr., *The Limitations of Sovereignty from Nuremberg to Sarajevo*, 20 CAN.-U.S. L.J. 167, 171 (1994) (noting that Desert Storm afforded America with a "golden moment" to prosecute Iraqi violations of international laws); David A. Martin, *Symposium, War Crimes: Bosnia and Beyond: Reluctance to Prosecute War Crimes: Of Causes and Cures*, 34 VA. J. INT'L L., 255, 257 (1994) (discussing why the failure may have occurred, including the United States' belief that holding trials without the individual culprits could set a dangerous precedent).

28. James S. Robbins, *War Crimes: The Case of Iraq*, 18 FLETCHER F. WORLD AFF. 45, 54 (1994).

29. *Id.*

30. *Id.* at 54–55 (quoting Robert F. Turner, *Iraqi War Crimes*, 26 INT'L LAW. 274, 278 n.9 (1992)).

31. *Id.* at 55.

32. Greenberg, *supra* note 26, at 120 (quoting *Nightline: Iraqis Show POW's on TV: Air War Continues* (ABC television broadcast Jan. 21, 1991)).

Nuremberg-style tribunal.[33] The U.S. Senate passed the Persian Gulf War Criminals Prosecution Act of 1991 (S.253),[34] which called upon American leaders to work with the UN Security Council in establishing an international criminal tribunal for Iraq, or alternatively, rely upon Desert Storm allies.[35]

Even the Security Council affirmed the criminal liability of Iraqi officials.[36] One of the main Iraqi opposition groups, the Iraqi National Congress, drew international attention to the crimes of Hussein and his inner circle,[37] while other non-governmental organizations, such as Human Rights Watch, continued to chronicle documents and evidence in the hopes of one day allowing an international court to rely on its archives, including Iraqi crimes during the Iran-Iraq War and Iraq's attempt to systematically exterminate the Kurdish Iraqis.[38]

There were other traces of American support for an ICTI between the Gulf War and the capture of Hussein during Operation Red Dawn. During the Clinton administration, American calls for the indictment of Hussein increased.[39] In March 1998, Senator Arlen Specter introduced Senate Concurrent Resolution 78,[40] which included the creation of a UN commission to archive a record of Iraqi criminal conduct, called for both an ICTI and

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33. Robbins, *supra* note 28, at 55.

34. *Id.*

35. *Id.*

36. *See* Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 465 (1991).

37. *See* Jonathan Schanzer, *Iraqi Opposition Leaders: The Evil of Saddam*, MIDDLE E. FORUM (Feb. 12, 2001), http://www.meforum.org/8/iraqi-opposition-leaders-the-evil-of-saddam (showing that the INC used a forum in New York to bring international attention to the crimes Hussein and his regime committed).

38. *See Justice for Iraq: A Human Rights Watch Policy Paper*, HUMAN RIGHTS WATCH (Dec. 2002), http://www.hrw.org/legacy/backgrounder/mena/iraq1217bg.htm (describing evidence collected thus far and arguing for a need to establish an international tribunal that would use such evidence).

39. *U.S. Pushing War Crimes Charges Against Iraq's Saddam Hussein*, CNN (Aug. 18, 1999), http://articles.cnn.com/1999-08-18/world/9908_18_hussein.indictment_1_war-crimes-indictment-austrian-government?_s=PM:WORLD.

40. S. Con. Res. 78, 105th Cong. (1998) (as introduced by Senator Arlen Specter).

a long-term plan for the removal and capture of Hussein.[41] Then-Senate Majority Leader Trent Lott also pressured the Clinton White House to back the idea of an ICTI and to help enforce it.[42]

Following Operation Red Dawn, in which coalition forces and the 4th Infantry Division captured Hussein,[43] the world community and America quickly backed away from their originally harsh rhetoric for a variety of reasons.[44] President George H.W. Bush had used the threat of creating such a tribunal in order to deter further Iraqi war crimes, albeit ineffectively.[45] Politically pushing for such a tribunal would make the dictator even less willing to voluntarily step down.[46] This new American "unwillingness" in the face of widespread trial interest led to accusations that the Department of Defense had withheld additional evidence of Iraqi abuses.[47] As for the international community, worldwide attention was refocused on other international crises such as Bosnia.[48]

Tactically, it was noted that indictment of the Iraqi dictator could be key to his later overthrow; for, in removing Hussein from power, the "key element . . . would be the indictment of Hussein and the leadership of Iraq as war criminals by an international criminal court."[49] Some pointed to using the

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41. *Id.*

42. *See Senate Urges Trial of Hussein By UN: Resolution Alleges Iraq War Crimes*, CHI. TRIB., Mar. 14, 1998, *available at* http://articles.chicagotribune.com/1998-03-14/news/9803140082_1_iraqi-president-saddam-hussein-war-crimes-bosnia-herzegovina-and-rwanda (showing Trent Lott's support of a resolution to establish an international tribunal and the reluctance of the White House to take such a step).

43. Bret Baier, Rita Cosby & Associated Press, *Saddam Captured "Like a Rat" in Raid*, FOXNEWS.COM (Dec. 14, 2003), http://www.foxnews.com/story/0,2933,105706,00.html. U.S. intelligence identified two likely locations for Hussein's hide-out and had codenamed them Wolverine 1 and Wolverine 2. *Id.* Someone planning the mission was apparently fond of the Patrick Swayze movie entitled "Red Dawn."

44. *See* Robbins, *supra* note 28, at 55–56 (explaining that the general desire to try Hussein for war crimes faded after the war ended, and international attention turned to other crises).

45. *Id.* at 55.

46. *Id.*

47. *Id.* at 55–56.

48. *Id.*

49. SCOTT RITTER, ENDGAME: SOLVING THE IRAQ PROBLEM ONCE AND FOR ALL 204

already-established International Criminal Court (ICC).[50] However, the ability of the ICC to prosecute Hussein was always a "mistaken" delusion.[51] The best option remained a UN Security Council action to establish an ICTI, since the Council would be free to grant the ICTI jurisdiction over past crimes, unlike the ICC, which "will apply only to crimes that are committed after the treaty takes effect [in 2002]."[52] Moreover, ousting Hussein in 1998, while "incredibly effective" was thought impossible for the UN and U.S. allies to openly seek.[53] Things have certainly changed.

As the standing victor of the Cold War, America's ability to project its new unbridled political weight and unmatched military prowess puts America in the unique position to act as the world's policeman, albeit sometimes reluctantly.[54] During the Cold War, the United States could not afford to get pulled into multiple humanitarian interventions when the operation could not independently be justified for the strategic purpose of containing the Soviet Union, because the USSR was poised to take advantage of any tactical weakness in American foreign policy.[55] Now the United States is capable of playing a more pronounced role as international peacekeeper.[56] Additionally, scholars and politicians (international and domestic alike) have

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(1999).

50. *See* Marcus R. Mumford, *Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 MICH. ST. U.-DCL J. INT'L L. 151, 179 (1999) (noting that Ambassador-At-Large for War Crimes David Scheffer described those who advocated the use of the ICC to prosecute Hussein as being "mistaken").

51. *Id.*

52. Kenneth Roth, *Indict Saddam*, WALL ST. J., Mar. 22, 2002, at A14.

53. Knowles, *supra* note 6, at 212.

54. KAPLAN, *supra* note 16, at 146–47. *See* HENRY A. KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? TOWARD A DIPLOMACY FOR THE 21ST CENTURY 251–52 (2001) ("[T]he United States having arrived at the optimum political and economic system, the best-indeed, the only viable-option for the rest of the world was to adopt American-style political and economic premises.").

55. *See* KISSINGER, *supra* note 54, at 251 ("Clinton acted as if his predecessors contributed to the Cold War by excessive concern with strategic considerations.").

56. *See id.* at 253 (noting that as a result of America's victory in the Cold War and the adoption of variations of the American economic and political systems across the world, the U.S. had greater influence in international policy making).

long asserted that the United States has a moral duty of humanitarian intervention.[57] This moral responsibility arises from two American characteristics: America's status as a democracy and America's capability as the world's only superpower.[58] While the UN is said to be charged with this responsibility,[59] the constant lack of resources and manpower hinder the UN's ability to enforce its own rules or to enforce customary international law,[60] hence its increasing reliance upon NATO and American military capabilities to meet its objectives.[61] Strangely, some UN authorizations for intervention, such as in Sierra Leone and Kosovo, come after the intervention.[62]

Following the Iraqi War, the United States failed to

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57. *See id.* at 246 (describing the United States as "champions and defenders of free peoples everywhere").

58. *See* President Barack Obama, Remarks in Prague Addressing the International Nuclear Threat (Apr. 5, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered ("Just as we stood for freedom in the 20th century, we must stand together . . . [and] as the only nuclear power to have used a nuclear weapon, the United States has a moral responsibility to act."). *See also* KISSINGER, *supra* note 54, at 252 (noting that the United States had "arrived at the optimum political and economic system").

59. *See* United Nations Peacekeeping, Role of the Security Council http://www.un.org/en/peacekeeping/operations/rolesc.shtml (last visited Feb. 21, 2013).

60. *See, e.g.*, Michelle Nichols, *U.N. Chief Warns of Lack of Resources in Kony Hunt*, REUTERS (June 14, 2012), http://www.reuters.com/article/2012/06/14/us-kony-un-idU.S.BRE85D1LO20120614 (providing an example of how the UN "is short of equipment, training, food and transportation" in its efforts to hunt down Joseph Kony in Africa).

61. *See* Brooke A. Smith-Windsor, *The UN and NATO: Forward from the Joint Declaration* 24–26, (NATO Defense College, Forum Paper No. 17, 2011), *available at* http://www.cic.nyu.edu/peacekeeping/docs/un_nato_declaration.pdf (stating that because of NATO's regional knowledge and interest in ending conflict, the UN has increasingly relied on NATO for peacekeeping operations).

62. Philip C. Bobbitt, *Inter Arma Enim Non Silent Leges*, 45 SUFFOLK U. L. REV. 253, 264–65 (2012) (noting that Resolution No. 1244 of the UN Security Council "authorized a NATO force in Kosovo after the initial fighting, apparently ratifying *nunc pro tunc* the initial NATO action"); *Special Report, The United Nations and Iraq: Irrelevant, Illegitimate or Indispensable?*, ECONOMIST, Feb. 22–28, 2003, at 24, 26 [hereinafter *Special Report*]. *See also* Edith Y. Wu, *Saddam Hussein as Hostes Humani Generis? Should the U.S. Intervene?*, 26 SYRACUSE J. INT'L L. & COM. 55, 83 (1998) (noting that the UN-based world order is a "chimera").

capitalize on the impetus for the creation of an ICTI.[63] Now the United States stands on a precipice, and appears undecided on whether or not to utilize the functions of the United Nations. The "steering" of the international system in the right direction is often related to how the "driver" state commands itself.[64] The United States' "ultimate challenge" is to "transform" its military might into an increasingly necessary international "moral consensus."[65] Most importantly, "failing to seize" on what little remained of an opportunity to "prosecute Iraqi crimes under international law[,]" it has been argued that America has been "left barren" of many of its original founding principles of individual liberty.[66] This has allowed a further defiling of respect for international law.[67] How the United States responds to the recent embassy attacks and continues its "war" on terrorism will determine how international law is developed, and more importantly, how the United States maintains its place in the world.

With its unique hegemonic position unprecedented in the world's history, America is presented with the awesome opportunity of creating a new international order based on its own terms.[68] Such a distinct window can be used to sow the seeds of a worldwide system of order that commands nations to abide by the international rule of law, thus catalyzing a distinctly American version of an international Leviathan. Should America fail to shape the new international system, surely others will shape it for us, or, more accurately, against us.[69] Hobbes's vision of a supranational Leviathan, a protectorate against armed rogues, arises from the chaotic

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63. *See* Robbins, *supra* note 28 (noting U.S. officials' fear of being linked to Iraqi chemical attacks).

64. *See* Alexander Wendt, *What is International Relations For? Notes Toward a Postcritical View*, *in* CRITICAL THEORIES AND WORLD POLITICS 205, 211, 213 (Richard Wyn Jones ed., 2001).

65. KISSINGER, *supra* note 54, at 288.

66. Louis René Beres, *Prosecuting Iraqi Crimes Under International Law: An American Constitutional Imperative*, 15 HOUS. J. INT'L L. 91, 112–13 (1992).

67. *See id.* at 112.

68. *See* KISSINGER, *supra* note 54, at 252–53 (noting that "the entire world was adopting variations of the American economic and political systems").

69. KAPLAN & KRISTOL, *supra* note 25, at vii.

natural state of affairs, which is equivalent to the post-Cold War need to re-establish international order.[70] More importantly, the only alternative to American leadership is a "chaotic, Hobbesian world," where there is no authoritative structure to ensure the sanctity of international law.[71]

The International Criminal Tribunal of Yugoslavia, created by the United Nations,[72] was an outgrowth of America's Cold War victory, but it was merely the first step in recognizing America's new role in the post-Cold War era.[73] Now is the key time: the United States must essentially become Hobbes's Leviathan for "[t]his is what it means to be a global superpower with global responsibilities."[74] To do so, however, the United States must recognize the importance of using the United Nations Security Council.

III. THE IMPORTANCE OF THE UNITED NATIONS SECURITY COUNCIL

By its very function, the United Nations Security Council (UNSEC) represents the ultimate arbiter of what is declared a global threat.[75] UNSEC can authorize or ratify any intervention or armed conflict, even after the fact.[76] When the Security Council declared that the pre-war situation in Iraq was an international threat, American military action was deemed legally justified because the coalition forces were enforcing the UN resolution.[77] It was not merely based upon

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70. *See* KAPLAN, *supra* note 16, at 83 (referring to the need for a Leviathan, which is "a regime powerful enough to monopolize the use of force, thereby protecting the inhabitants from the lawlessness of armed marauding bands.").

71. *See* KAPLAN & KRISTOL, *supra* note 25, at 121.

72. *Establishment*, UNITED NATIONS INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sid/319 (last visited Oct. 25, 2012).

73. *See* KAPLAN, *supra* note 16, at 105, 145–47 (describing the unique role of America's power and values in spreading democracy to create uniformity in political regimes).

74. KAPLAN & KRISTOL, *supra* note 25, at 120–21.

75. *See Special Report*, supra note 62, at 24 (noting that UN laws are the highest authority and the UN Security Council determines whether a threat is posed that will justify an attack).

76. *Id.* at 26.

77. S.C. Res. 1441, ¶¶ 1–2, 13, U.N. Doc. S/RES/1441 (Nov. 8, 2002); Authorization

ambiguous ideals of self-defense. Intervention was justified based on "international peace and security" under a previous UN Resolution.[78] More recently, UNSEC authorized NATO to intervene in Libya by resolution[79] and Syria may be next.[80] By the same token, the lack of UNSEC support could render any American action illegal, which could affect our international credibility.[81]

With no standing army, UNSEC is purely a political power.[82] However, this political power is directly related to post-World War I American military power. Specifically, the jump-start of the modern international legal system correlated with the beginning of the League of Nations under President Woodrow Wilson.[83] While Wilson's initial vision dissolved, the UN rose from its ashes as an outgrowth of worldwide American influence[84] to become the established framework of international

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for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

78. S.C. Res. 1441, *supra* note 77 (showing that the threat was based on international peace and security). *See* Vlasic, *supra* note 2, at 271–72 (describing the debate over translating the ideal of self-defense into practice for justification of an attack).

79. Jordan J. Paust, *Propriety of Self-Defense Targetings of Members of Al Qaeda and Applicable Principles of Distinction and Proportionality*, 18 ILSA J. INT'L & COMP. L. 565, 579–80 (2012) [hereinafter Paust, *Propriety of Self-Defense Targeting*].

80. The United Nations is now trying to enter Syria to investigate claims that the Syrian military used chemical weapons against its civilian population in April 2013. *See Cameron Fears Iraq Effect Holding West Back in Syria*, BBC NEWS (April 26, 2013, 5:04 PM), http://www.bbc.co.uk/news/uk-politics-22316517 (noting that according to the U.N. over 70,000 people have been killed in the recent Syrian conflict).

81. *See generally* Paust, *Propriety of Self-Defense Targeting, supra* note 79, at 579–80 (noting that Security Council authorization is "an important reaffirmation of the need to comply with the principles of distinction, reasonable necessity, and proportionality . . ."). *Cf. Special Report*, *supra* note 62, at 24 (noting American intervention in Iraq was deemed legal after receiving UNSEC authority).

82. *See The Global Regime for Armed Conflict*, COUNCIL ON FOREIGN RELATIONS (July 25, 2012), http://www.cfr.org/global-governance/global-regime-armed-conflict/p24180 ("[T]he UN does not maintain its own standing army.").

83. *See* United Nations, International Law Commission, http://www.un.org/law/ilc/ (last visited Nov. 28, 2012) (describing the League of Nations as the first attempt to codify and develop an international legal system and discussing the subsequent incorporation of its underlying themes in the Statute of the International Commission of the United Nations).

84. KAPLAN, *supra* note 16, at 145–46 ("[I]n its sixth decade, the U.N. is effective to

diplomacy and the *de facto* rule of law.[85] In this sense, the UN is both an outgrowth of American power and recognition of the United States' self-imposed limitations.

IV. BECOMING A BENEVOLENT LEVIATHAN

Now, more than ever before, the American involvement in the evolution of international law stands at a crossroads.[86] Armed with America's unique historical position as the world's foremost superpower, the United States stands poised to greatly influence the international system. As noted earlier, the United States must "transform" its military might into international moral and legal consensus.[87]

That American intervention abroad may be a vehicle to sustain the international system, or change it, is not a new idea. Early American history depicts an evolution of thought regarding America's role in the world. Alexander Hamilton and Thomas Jefferson viewed the nation as a critical counter-balance to European power.[88] In 1804, when James Madison asserted that America was hope for the world as an "example of one government at least to protest against the corruption which prevails," he never solved the quandary of how America should push for international justice.[89] In 1821, Secretary of State John Quincy Adams temporarily resolved this question by declaring that America spreads its value by being the non-assertive "shining city on the hill," not intervening

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the degree that it has the tacit approval of a great power, especially the United States.").

85. United Nations, United Nations and the Rule of Law, http://www.un.org/en/ruleoflaw/index.shtml (last visited Nov. 28, 2012) (discussing the fundamental role the United Nations plays in promoting international rule of law, the United Nations' framework for supporting "the development, promotion, and implementation of international norms and standards," and the participation of the United Nations in 110 countries regarding rule of law issues).

86. *See* KISSINGER, *supra* note 54, at 283.

87. *Id.* at 288.

88. *See* KISSINGER, *supra* note 54, at 237 (noting that Hamilton wanted America "to modulate [its] support for the European powers while tying [itself] to nobody" and Jefferson wished that in the interest of maintaining their own national security, European powers would leave the rest of the world in peace).

89. *Id.* at 238.

abroad.[90] President Theodore Roosevelt, however, resurrected the Hamiltonian sense that America operated as Europe's problem-solver (and at the same time, rejected the efficacy of international law).[91] During World War I, President Woodrow Wilson essentially led the United States into war in order "to remake the world in its own image."[92] After Wilson though, the "Jacksonian" view took hold of American domestic politics in direct opposition to Wilson's pro-interventionism even while World War II raged, that is until, the attack on Pearl Harbor.[93] For, as Wilsonians could be roused by the violation of international law in Germany, the Jacksonians refused to acknowledge the necessity of American involvement until the threat had realized.[94] During the Cold War, the two camps allied with each other, but became fragmented during the chaos of the Vietnam War.[95]

Throughout American history, these two schools of thought united in some causes, but fought each other in others. President Richard Nixon took the Hamiltonian approach, trying to focus on domestic interests, but still had substantial Wilsonian undertones.[96] President Gerald Ford came under attack from both camps—Wilsonians attacked him as being "power-oriented," while Jacksonians criticized him for being "too accommodating."[97] Finally, President Ronald Reagan firmly entrenched Wilsonianism in the final stages of the Cold War.[98] In the modern world, President Bill Clinton thrust America into an unprecedented "doctrine of humanitarian intervention,"[99] pushing Wilsonian theory into full swing,[100] but it was in

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90. *Id.* at 238–39, 245.

91. *See id.* at 240–41 (describing Teddy Roosevelt's development of the Roosevelt corollary to the Monroe doctrine with the example of intervention in Korea).

92. *Id.* at 243.

93. *Id.* at 245.

94. *Id.*

95. *Id.* at 246–48.

96. *Id.* at 248.

97. *Id.* at 249.

98. *Id.* at 250.

99. *Id.* at 252–53.

100. *Id.* at 256 (characterizing humanitarian intervention as "a redefin[ition of] the national interest in extreme Wilsonian terms").

President George W. Bush that the United States saw a substantial rise in pro-interventionism in concert with Wilsonian ideas. [101]

This distinction is clearer as President George H.W. Bush's first response to Iraq's invasion of Kuwait was characterized as "Narrow Realism," Clinton's as "Wishful Liberalism," and George W. Bush's as a "Distinctly American Internationalism."[102] Interestingly enough, Obama's higher number of drone attacks can be thought as more aggressive than Bush, increasing from thirty-three attacks per year to more than 100 per year.[103]

After September 11, 2001, America was said to have entered into a "new era," but there was no "fundamental" alteration of American grand strategy.[104] To the extent that America did enter a new era, President George W. Bush recognized that the September 11th attacks charged him with the duty of shaping the international atmosphere to prevent another attack.[105] Thus, while the political imperative of U.S. world leadership has always been present, only its implementation has been the center of controversy. At issue here is something much more historical in nature: the Westphalian notion of noninterference, which refers to the theory that nation-states should not interfere in each other's affairs, and finds its roots in old Europe, when major powers signed the Treaty of Westphalia in 1648 to solve the problem of violence between states.[106] This created an international system[107] by which European powers restrained themselves and which is reflected in the modern notion of sovereignty,[108] and also codified under Article 2(4) of the United

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101. *See* William Safire, Op-Ed., *Give Freedom a Chance*, N.Y. TIMES, Mar. 6, 2003, at A31 (referring to President Bush's focus on Iraq as related to Teddy Roosevelt and Wilsonianism).

102. KAPLAN & KRISTOL, *supra* note 25, *passim*.

103. *See* Kibbe, *supra* note 9, at 375 (noting that there were 33 drone attacks in 2008, 53 in 2009, and 118 in 2010, dropping off only in mid-2011 when relations with Pakistan chilled).

104. KAPLAN & KRISTOL, *supra* note 25, at vii, 119.

105. *Id.* at 113.

106. KISSINGER, *supra* note 54, at 235–36, 252.

107. *Id.* at 236.

108. *Id.* at 234–37.

Nations Charter.[109] Prior to the second Iraqi War, major powers were split, with France and Germany acting as reluctant allies.[110] But the Franco-German bloc which had arisen in opposition to the war in Iraq did not just materialize.[111] Tensions between the America and Europe had boiled and solidified into opposing worldviews.[112] In this sense, the diplomatic chess game regarding Iraq was at the heart of the dispute between European and American thinking. There will be more at stake in the next few years as current events have incited the "collapse" of this draconian theory of international relations—the stated idea that one State should not intervene in another's affairs is dying.[113] Recently, the international community, through UNSEC, authorized military intervention in Libya because the civilian population was under attack.[114]

Even as State-versus-State relations have been more highly regulated, the relationship with non-state actors has become more and more complex. Jurisdiction over international crimes is a major focal point of controversy.[115] International

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109. U.N. Charter art. 2, para. 4.

110. *See* Steven R. Weisman, *Threats and Responses: Diplomatic Strategy; U.S. Set to Demand That Allies Agree Iraq is Defying U.N.*, N.Y. TIMES, Jan. 23, 2003, at A1 (noting that France and Germany were among those countries that were "skeptics of military action").

111. Germany and France, along with Russia, joined together to issue a declaration in opposition to military intervention in Iraq. Joint Declaration by Russia, Germany and France on Iraq (Feb. 10, 2003), *available at* https://pastel.diplomatie.gouv.fr/editorial/actual/ael2/bulletin.gb.asp?liste=20030211.gb.html.

112. *See id.* ("There is still an alternative to war. The use of force could be only a last resort."). *See also* Centre for European Reform, *"Old" and "New" Europeans United: Public Attitudes Towards the Iraq War and U.S. Foreign Policy* 6–7 (2003), *available at* http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/back_brief_springford_dec03-3848.pdf (describing popular opinion in Europe regarding the U.S. invasion of Iraq).

113. KISSINGER, *supra* note 54, at 252 (noting that the Westphalian notion of noninterference is in collapse).

114. *See* Paust, *Propriety of Self-Defense Targeting*, *supra* note 79, at 580 (noting that "[o]ne of the reasons why the United Nations Security Council authorized the use of armed force in Libya involved the fact that civilians had been targeted in violation of international law, especially by armed forces of the Qaddafi government, and a United Nations authorized use of force had become necessary in order 'to protect civilians and civilian populated areas under threat of attack in' Libya").

115. Bruce Broomhall, *Towards the Development of an Effective System of*

law generally recognizes five types of jurisdiction: territorial, nationality of the offender, protective (nationality of the victim), passive and active personality, and universality.[116] Respectively, the theories of "passive" and "active" personality jurisdiction posit that if the victim or the perpetrator is a citizen of the State harmed, then that State has the international right to prosecute the perpetrators of the act.[117]

Universal jurisdiction is the most controversial and most relevant theory today as terrorists, rather than nation states, operate as the world's aggressors.[118] As unprecedented as the speed at which the theory gained ground, the term "universal jurisdiction" encompasses the belief that some types of crimes are simply "so heinous" that there is no safe haven for their perpetrators.[119] In support of universal jurisdiction, the Princeton Project developed an operative legal text that is intended to be used by legislators, judges, government officials, non-governmental organizations, and many others, both international and domestic.[120] Critics, however, point out its difficult application[121] and its suspicious roots in international law.[122] *Ex Parte Pinochet* represents a lodestar victory for the proponents of universal jurisdiction because it "arm[s] any magistrate, anywhere in the world, with the unilateral power

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Universal Jurisdiction for Crimes Under International Law, 35 NEW ENG. L. REV. 399, 419 (2001) [hereinafter Broomhall, *Towards Development*].

116. Kleinberger, *supra* note 3, at 102. *See also* Zsuzsanna Deen-Racsmány, *The Nationality of the Offender and the Jurisdiction of the International Criminal Court*, 95 AM. J. INT'L L. 606, 609 (2001) (discussing active personality jurisdiction).

117. Deen-Racsmány, *supra* note 116, at 609, 609 n.17.

118. *See generally* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 122 (2007) (noting that "acts of terrorism are both the most palpable crimes to which the United States applies its laws extraterritorially and the crimes over which the United States most aggressively asserts extraterritorial jurisdiction").

119. KISSINGER, *supra* note 54, at 273–74; Kleinberger, *supra* note 3, at 102–03.

120. PROGRAM IN LAW AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 26 (2001).

121. *See* Broomhall, *Towards Development*, *supra* note 115, at 399.

122. *See* KISSINGER, *supra* note 54, at 274–75 (noting that the development of the UN and ICC lacked inclusion of concepts of universal jurisdiction).

to invoke a supranational concept of justice."[123] Additionally, legislation in many countries including Britain's hostage-taking law and America's post-9/11 legislation on terrorism also recognize the doctrine's applicability to modern law.[124] It is in this international environment that this Article analyzes the mission to kill-or-capture Osama bin Laden and the recent embassy attacks in the Middle East.

A. *Operation Neptune Spear: The Mission to Kill-or-Capture Osama bin Laden*

Flying into Pakistan at treetop level, two classified stealth Black Hawks had been stripped of any excess weight and filled to the max with twenty-three members of Navy SEAL Team Six.[125] On board the helicopters, members of SEAL Team Six recognized that the neighborhood resembled generic suburbs in the United States, a reminder that this was not a typical military mission.[126] SEAL Team Six was split into two groups: "Chalk One" and "Chalk Two."[127] Chalk One would clear the guesthouse, while Chalk Two "would act as external security."[128] As the Black Hawk carrying Chalk One hovered above Osama bin Laden's compound and moved into position to allow the SEALs to "fast-rope" into a predetermined location within the compound, it started to wobble.[129] The helicopter's loss of lift forced the pilot to circle around and land on the other side,

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123. *Id.* at 277 (discussing R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte, [2000] 1 A.C. 147 (H.L.) (appeal taken from U.K.)).

124. *See, e.g.*, Taking of Hostages Act 1982, c. 28, § 1 (U.K.) (stating that "[a] person, whatever his nationality, who, in the United Kingdom or elsewhere" detains a person commits an offense that may be prosecuted); 18 U.S.C. § 2331 (2011) (defining international terrorism as a crime that can occur "outside the territorial jurisdiction of the United States, or transcend national boundaries").

125. MARK OWEN & KEVIN MAURER, NO EASY DAY: THE FIRSTHAND ACCOUNT OF THE MISSION THAT KILLED OSAMA BIN LADEN, THE AUTOBIOGRAPHY OF A NAVY SEAL 195 (2012); Vlasic, *supra* note 2, at 312–13. Technically, the interpreter on the mission was the 24th member of the team, but is not counted as a member of SEAL Team Six. OWEN & MAURER, *supra* note 125, at 195.

126. OWEN & MAURER, *supra* note 125, at 211.

127. *Id.* at 158.

128. *Id.* at 166–67.

129. *Id.* at 7, 211.

outside one of the walls to the compound.[130] It was more of a controlled crash . . . with part of the tail boom sitting on a wall.[131] More importantly, however, the crash allowed those within the compound to arm themselves and make the mission even more inherently dangerous.[132]

As Chalk One reached the guesthouse, about five minutes into the mission, Ahmed al-Kuwaiti began firing his AK-47 at the SEALs.[133] One of the SEALs returned fire, then yelled "Ahmed al-Kuwaiti, Ahmed al-Kuwaiti, come out!"[134]

Smashing the window with his barrel, another SEAL fired back at his likely position.[135] The SEALs continued yelling . . . with no response.[136] They prepared to breach the door with an explosive.[137] Suddenly, as they set the explosive on the door, the SEALs heard the latch on the door and what appeared next gave the SEALs pause. A woman opened the door holding something in her hand, close to her chest.[138] Suspecting the worst—a bomb—the SEALs prepared to kill her.[139] They only had a split second to react.[140] Using their night vision, the SEALs were able to recognize the object: it was a baby.[141] The woman was Ahmed al-Kuwaiti's wife.[142] She told the SEALs that her husband was dead.[143] Neither Ahmed al-Kuwaiti's wife nor his child was harmed.[144] Only he had been killed.[145]

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130. *Id.* at 7; Vlasic, *supra* note 2, at 312–13.

131. *See* OWEN & MAURER, *supra* note 125, at 215 (explaining that the pilot had "pulled off the impossible").

132. *Id.* at 220.

133. *Id.*; Adrian Brown, *Osama Bin Laden's Death: How It Happened*, BBC NEWS (June 7, 2011), http://www.bbc.co.uk/news/world-south-asia-13257330.

134. OWEN & MAURER, *supra* note 125, at 221.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 221–22.

139. *Id.* at 222.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 222–23.

144. *See id. But see* Vlasic, *supra* note 2, at 313 (conflicting with the prior source as to whether the wife was killed or not, but in agreement that Ahmed Al-Kuwaiti was

As Chalk Two made its way through the main compound, the Navy SEAL "point man"[146] saw a man peak his head out, and, given the "unmistakable sound of AK-47 fire" seconds ago, the point man fired.[147] The peaking man was Abrar al-Kuwaiti.[148] After being wounded, he struggled back into the room where his AK-47 was located.[149] The SEALs pursued him into the room and, as they fired, his wife jumped into the line of fire to shield him.[150] He and his wife were both killed.[151] Several children and another woman were in the corner.[152] They were left alone as Chalk One continued to secure the main building.[153] They still had to reach the third deck of the compound—the likely location of Osama bin Laden.[154]

One of bin Laden's sons, Khalid bin Laden, was on the staircase of the second deck with a fully loaded and cocked AK-47.[155] The SEALs whispered his name, "Khalid, Khalid" which threw him off just enough to give the team the tactical advantage to take him out quickly.[156] Reaching the third deck, the point man saw another man peek around the corner of a doorway.[157] The point man fired twice but one of the SEALs describing the event said he could not tell from his position if the man had been hit.[158] Keeping their rifles trained on the

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killed).

145. OWEN & MAURER, *supra* note 125, at 223.

146. A "point man" is the first to enter any structure and also controls the pace of any given incursion. Colby Brown, *Follow the Leader*, MARINES MAGAZINE, Feb. 28, 2012, *available at* http://marinesmagazine.dodlive.mil/2012/02/28/follow-the-leade/.

147. OWEN & MAURER, *supra* note 125, at 226.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*; Vlasic, *supra* note 2, at 312–13.

152. OWEN & MAURER, *supra* note 125, at 226.

153. *See id.* at 226–27 (explaining that the woman and the children were left because there were not enough assaulters in the SEAL team).

154. *Id.* at 231.

155. *Id.* at 231–33; Vlasic, *supra* note 2, at 313.

156. OWEN & MAURER, *supra* note 125, at 231–32. Mark Owen described the gun as propped up next to Khalid, and in his opinion, believed that Khalid "didn't man up and use" it. *Id.* at 233.

157. *Id.* at 235.

158. *Id.*

doorway, the SEALs cautiously peered inside to see two women crying hysterically and yelling in Arabic.[159] One of the women, seeing the SEALs in the doorway, rushed at the point man.[160] "Swinging his gun to the side, the point man grabbed both women and drove them toward the corner of the room."[161] The man on the floor had been hit in the skull, his body twitching and in its death throes.[162] The SEAL team fired several rounds into his chest.[163] The SEAL team then swabbed the body for DNA and started collecting files, computers, and hard drives.[164] They also confirmed the man on the floor was Osama bin Laden.[165]

When SEAL Team Six completed Operation Neptune Spear, it was heralded as a military achievement.[166] However, with the exception of the stealth helicopters, the raid seemed more like a law enforcement action than a military assault or a straight-up assassination. As chronicled by Mark Owen, the mission was designated as a "kill-or-capture" mission that many thought would be shelved in favor of an all-out air strike on the compound.[167] The SEAL team was given the green light.[168] This was fortunate because the raid, while more risky, also represented the best option under international law, both under

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159. *Id.*

160. *Id.* at 235–36.

161. *Id.* at 236.

162. *Id.*

163. *Id.*

164. *Id.* at 240, 242; Vlasic, *supra* note 2, at 313–14.

165. OWEN & MAURER, *supra* note 125, at 246.

166. *Responses to bin Laden's Death*, CNN POLITICAL TICKER (May 2, 2011 10:00, AM), http://politicalticker.blogs.cnn.com/2011/05/02/responses-to-bin-laden's-death/.

167. OWEN & MAURER, *supra* note 125, at 121; Bobbitt, *supra* note 62, at 266 (referring to the "recent decision to overrule the recommendation of the Pentagon that bombers be sent to strike bin Laden's compound, in favor of the much riskier commando operation that was far safer for the civilians in the neighborhood. It is telling . . . that the Administration sent two of its top lawyers—the legal adviser to the State Department and the White House Counsel—to explain the legal basis of the raid to the public[,]" but also noting that "beginning with the Foreign Intelligence Surveillance Act, the U.S. has shown an increasing awareness of the importance of laws to strategy").

168. Barbara Starr, *Pentagon Warns Former SEAL About bin Laden Book*, CNN (Aug. 31, 2012, 5:36 PM), http://www.cnn.com/2012/08/30/world/asia/us-seal-book-bin-laden/index.html.

the self-defense principle articulated in Article 51 and the law enforcement paradigm of universal jurisdiction.[169]

Critically, Operation Neptune Spear had minimal collateral damage. During the raid, bin Laden's wives and children were not harmed.[170] Given that most of the family was in the same room,[171] the fact that one of the women suffered only a single gunshot to her ankle during the gun battle is phenomenal. Indeed, SEAL Team Six was able to subdue sixteen people during the raid, including three women and thirteen children (using zip ties as makeshift handcuffs).[172] Such a deliberate effort *not to kill* is hardly reminiscent of most military actions. It is most often related to SWAT team procedures and law enforcement personnel, rather than military assaults on hostile targets.[173]

The minimization of collateral damage may not seem like a legal reason, but it is the byproduct of one of the most important principles in international law: proportionality.[174] In an earlier Israeli case, the issue of collateral damage was critical in the assessment of whether or not the action was legal.[175] Prior to Operation Neptune Spear, Israel's experience in the pursuit of terrorists in populated suburban areas is extremely telling. It was only as recent as September 2000 that Israel made

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169. *See* Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 145–48, 155, 162–64 (2010) ("[T]he fact that all targeted killing operations in combating terrorism are directed against particular individuals makes the tactic more reminiscent of a law enforcement paradigm.").

170. *See* OWEN & MAURER, *supra* note 125, at 235–41 (indicating no direct engagement of bin Laden's family, with the exception of one wife, who Owen speculates received a minor wound from a bullet fragment or ricochet).

171. *See id.* at 235–36.

172. Vlasic, *supra* note 2, at 313 n.337.

173. MICHAEL L. GROSS, MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT 91 (2010).

174. Craig A. Bloom, *Square Pegs and Round Holes: Mexico, Drugs & International Law*, 34 HOUS. J. INT'L L. 345, 394–95 (2012); *see also* GROSS, *supra* note 173 at 156 (noting that the law of armed conflict stops incidental harm when it "becomes disproportionate or excessive," but that keeping the limits of the proportionality of this harm is often difficult).

175. *See* Blum & Heymann, *supra* note 169, at 151–54 (describing the targeted-killing by Israeli aircraft of Hamas' military head in a Gaza City neighborhood, and the local and international outcry resulting from the collateral damage).

targeted-killings a matter of publicly declared and overt policy in the fight against terrorism.[176] Israel's use of targeted killings was public, bolstered with an internal review process called "incrimination," and used proportionally, increasing and decreasing with the level of Palestinian violence.[177]

After a rash of Palestinian suicide bombings, an Israeli F-16 fighter jet dropped a single one-ton bomb on a terrorist leader's residence on July 22, 2002.[178] Prior to the F-16 attack, Israel had formally asked the Palestinian Authority to arrest Salah Shehadah, the head of the military wing of Hamas who was "directly responsible for killing scores of Israeli civilians and soldiers and the injury of hundreds of others."[179] In the ensuing aftermath, it was clear that Shehadeh was dead, but so was his wife, three of his children, and eleven other civilians.[180] The F-16 strike also injured more than 150 civilian bystanders.[181] The legality of the strike was later questioned by both the international community and the Israeli Supreme Court, both of which condemned the strike.[182] In Britain and the United States, lawsuits were brought against the Israeli Defense Force's air commander and the head of the Israel Security Agency.[183] At the time that Israel's Supreme Court took up the case, the collateral damage ratio, between civilians and militants was over thirty-three percent, effectively killing more than one civilian for every three militants.[184] By 2007, the ratio had improved substantially, effectively reducing the rate of

176. *Id.* at 151–52.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 152–53.

181. *See id.* (noting that 150 people were injured).

182. *Id.* at 153–54; Mark Oliver, *Bush Joins in Condemnation of Israeli Attack*, THE GUARDIAN, July 23, 2002, http://www.guardian.co.uk/world/2002/jul/23/israel2.

183. Blum & Heymann, *supra* note 169, at 153.

184. *Id.* at 158. The targeted-killing program killed 339 Palestinians: 201 intended targets and 129 unintended bystanders (accounting for roughly thirty-eight percent of total deaths). *Id.* at 156 (declaring that the Supreme Court's legal opinion was the "most comprehensive judicial decision ever rendered addressing the legal framework of the 'war on terrorism . . .'").

civilian casualties to two to three percent.[185]

Unlike the Israeli operation, the collateral damage from Operation Neptune Spear was virtually non-existent.[186] Such a statement would be impossible to make had the United States employed a drone attack option or larger air assault on the compound.[187] Such a larger-scale attack would also make it virtually impossible to justify under international law and would have also violated Israeli interpretation of what is acceptable collateral damage. Professor Valerie Epps has argued that there is no black-and-white collateral damage calculation that can be applied to missions.[188] Other legal critics may renounce the measure of collateral damage as a factor affecting its legality because it is only clear after the fact. However, it is also indicative of the manner in which the action was performed and is thus critical to the analysis of whether such an action was legal.

Within the framework of domestic law, the legality of mission to kill-or-capture bin Laden is not in doubt. Since the Vietnam War, American Special Operations Forces (SOF), including Delta Force, Army Rangers, and others have covertly gathered intelligence and engaged in kill-or-capture missions, including those persons indicted for war crimes such as Radovan Karadjic, the former Bosnian Serb President.[189] In fact, the U.S.

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185. *Id.* at 158.

186. *See* OWEN & MAURER, *supra* note 125, at 223, 226, 232, 235–36 (describing the raid's effectiveness, resulting in the deaths of bin Laden himself, and those who engaged or impeded the SEALs' progress through the compound).

187. *See* Nicholas Schmidle, *Getting bin Laden*, NEW YORKER, Aug. 8, 2011, at 38 (quoting General James Cartwright, then-Vice Chairman of the Joint Chiefs of Staff, as stating with regard to the air strike option, "[t]hat much ordinance going off would be the equivalent of an earthquake," and reporting President Obama's pause at the prospect of "flattening a Pakistani city").

188. *See* Valerie Epps, *Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule*, 41 GA. J. INT'L & COMP. L. (forthcoming Winter 2013) (manuscript at 31–36), *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2079632_code737120.pdf?abstractid=1929029&mirid=2 (identifying ambiguity in interpretation of the collateral damage rule, particularly in light of modern warfare casualty trends).

189. Wu, *supra* note 62, at 70–71; *see also* Kibbe, *supra* note 9, at 375–76 (describing the roles and organization of various special operations forces, including the covert and clandestine nature of Delta Force and the 75th Ranger Regiment's missions).

covert operations to capture persons by force were partially responsible for the initial push for a permanent international criminal court.[190] Additionally, while the Posse Comitatus Act prohibits the American armed forces from enforcing law domestically,[191] it does not prevent the U.S. military from enforcing domestic law abroad.[192] Following the terrorist attacks on 9/11, both houses of Congress authorized the use of force in tracking down the terrorists responsible for the attacks.[193] However, as domestic law continues to become streamlined in the pursuit of terrorists, it will become increasingly important for the United States to operate with a heightened awareness of international law.

Though not as clear, the mission to kill-or-capture bin Laden was legal under international law. The Obama Administration has already set forth Article 51 of the UN Charter (which allows self-defense of a UN Member state) for actions in using drones as well as Operation Neptune Spear.[194] Alone, however, this may be an insufficient legal justification.[195] Recently, the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions opined that heavy and continued reliance on Article 51 "would diminish hugely the value of the foundational

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190. Wu, *supra* note 62, at 74.

191. Beres, *supra* note 66, 111.

192. *See id.* (asserting the United States has authority under its own law to gain custody of Hussein "by forcible abduction if necessary").

193. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

194. Vlasic, *supra* note 2, at 271–73; *see also* Bobbitt, *supra* note 62, at 256–57 (discussing the doctrinal shift, in interpretation of Article 51 self-defense, in response to technological improvements, including the use of drones and other tactical, targeted killing options); John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012) ("[T]he use of force against members of [Al Qaeda] is authorized under both international and U.S. law, including both the inherent right to self defense and the [2001 AUMF]."); *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 33 (2011) (statement of Attorney General Eric Holder) ("The operation against bin Laden was justified as an act of national self-defense.").

195. *See* Blum & Heymann, *supra* note 169, at 162-64 (explaining the difficulty in consistently grounding an extraterritorial attack on Article 51 self-defense and concluding that its application should only arise in the absence of other factors).

prohibition contained in Article 51."[196] Thus, the White House and State Department should set forth additional rationales, publicly, for why the action was legal under recognizable international law.[197]

For example, the United States may rely on numerous international treaties and customary international law, including anti-piracy and anti-slavery treaties.[198] The United States may also rely on the concept of universal jurisdiction in the pursuit of pirates.[199] Piracy law is one of the oldest categories of international law that allows one nation's naval ships to enter the waters of another nation when pursuing pirates.[200] Pirates, prior to the age of modern terrorism, were legally subject to the penalty of death by the apprehending nation.[201] It is strangely poetic and fitting that the same SEAL team that saved the captain of the *Maersk Alabama* from Somali pirates was also involved in the raid on bin Laden's compound.[202] In essence, SEAL Team Six has been operating as the world's SWAT team.

The United States may also rely on previous UN resolutions, such as Resolution No. 1368, which authorizes the use of force in

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196. *Id.* at 163 (citing Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶ 41, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston)).

197. With respect to the bin Laden raid, the State Department has already sent its top legal advisor to explain the various legal justifications. Vlasic, *supra* note 2, at 328–29.

198. *See id.* at 324–25 (arguing terrorists may be treated as *hostes humani generis*, in a similar fashion as pirates and slavers, to identify their combatant status).

199. Kissinger, *supra* note 54, at 274.

200. Bruce A. Elleman, *Foreward* to Naval War Coll., *in* PIRACY AND MARITIME CRIME v–vi (Bruce A. Elleman, Andrew Forbes & David Rosenberg eds., 2010), *available at* http://www.virginia.edu/colp/pdf/Piracy-and-Maritime-Crime-NWC-2010.pdf. *See also* Charles W. Koburger, Jr., *Selamat Datang, Kapitan: Post-World War II Piracy in the South China Sea*, *in* PIRACY AND MARITIME CRIME 65 (Bruce A. Elleman, Andrew Forbes & David Rosenberg eds., 2010), *available at* http://www.virginia.edu.colp/pdf/Piracy-and-Maritime-Crime-NWC-2010.pdf (describing the ability of the British Navy to pursue pirates in foreign jurisdictions).

201. Joshua Michael Goodwin, *Universal Jurisdiction & the Pirate: Time for an Old Couple to Part*, 39 VAND. J. TRANSNAT'L L. 973, 997–98 (2006).

202. Elisabeth Bumiller, *In bin Laden's Compound, Seals' All-Star Team*, N.Y. TIMES, May 4, 2011, http://www.nytimes.com/2011/05/05/world/middleeast/05seals.html?pagewanted=all.

response to terrorist attacks.[203] Notably, the United States may also rely on the pre-raid and post-raid UN statements as justification for the legality of the raid.[204] This includes statements by members of the UN Security Council and by UN Secretary-General Ban Ki Moon, who stated that Osama bin Laden's death was a "watershed" moment,[205] thus effectively ratifying the raid. Therefore, the UN leadership has already approved the mission on the grounds of "international peace and security."[206] Another factor that legitimizes Operation Neptune Spear is the pre-attack notification. There is some indication that the United States provided Pakistan with information that it was crossing the border to attack a "high value target."[207] Although Pakistani officials decried Operation Neptune Spear in public statements,[208] no formal complaint was filed with the UN, the American embassy was not sacked by an angry mob, and diplomatic ties have not been cut.[209]

Regardless of whether the raid is legitimized under international law under wartime or peacetime paradigms,[210]

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203. Bobbitt, *supra* note 62, at 261 (noting that UNSEC Resolution No. 1368 "called 'on all States . . . to bring justice to perpetrators, organizers and sponsors of the [9/11] terrorist attacks' and which, in its preamble, explicitly recognized the U.S. right of self-defense under the U.N. Charter in response to the attacks").

204. *See id.* at 261–62 (arguing the case for legality may be strengthened by statements, both before and after hostile action, and using as examples the U.N. Secretary General's statements following allied involvement in Afghanistan in 2001, and bin Laden's historical statements regarding his own capture).

205. Press Release, Secretary General, Secretary-General Calling Osama bin Laden's Death a 'Watershed Moment', Pledges Continuing United Nations Leadership in Global terrorism Campaign, U.N. Press Release SG/SM/13535 (May 2, 2011).

206. *See* U.N. Charter art. 51.

207. Vlasic, *supra* note 2, at 314.

208. *Id.* at 318–19.

209. *See* Aidan Lewis, *Osama bin Laden: Legality of Killing Questioned*, BBC NEWS (May 12, 2011, 7:38 PM), http://www.bbc.co.uk/news/world-south-asia-13318372 (speculating there is little prospect for any serious Pakistani legal action resulting from the raid).

210. Different international laws apply to actions during wartime and peacetime, when there is no active armed conflict. *See generally* Vlasic, *supra* note 2, at 268, 276 (discussing the differences between international law that governs actions during wartime and during peacetime). Numerous legal scholars have determined that the raid would be legal as a measure of self-defense under Article 51. *See* Paust, *Propriety of Self-Defense Targeting*, *supra* note 79, at 573–74 (concluding that members of terrorist

three core principles of international law generally apply: distinction among persons; reasonable necessity; and proportionality.[211] These principles are derived from legal treaties and customary international law, including Protocol I to the Geneva Conventions, such as Articles 48, 50, and 51.[212] It should be noted that these principles, if taken to their extreme, could mean that only rich, developed nations will be able to engage in legal war because only they possess the smart bombs capable of making surgical strikes.[213]

Although SEAL Team Six is part of the United States Navy Special Warfare Development Group (DEVGRU),[214] its execution of Operation Neptune Spear was more like that of a police SWAT action: the use of handcuffs, the protection of civilians, and the collection of DNA and evidence are not typical of military strikes.[215] During the operation, the SEALs distinguished between civilians and combatants, restrained their fire, and killed targets only out of reasonable necessity.[216] Thus, despite some consternation regarding its brazenness, Operation Neptune Spear has met the core principles of international law outlined above.

V. TOWARDS A LEGAL FRAMEWORK FOR RESPONDING TO THE EMBASSY ATTACKS

On September 11, 2012, American embassies and consulates

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organizations who "directly participate in armed attacks" may be targeted in self-defense).

211. *See* Paust, *Propriety of Self-Defense Targeting*, *supra* note 79, at 577 (noting that the Epps criteria "provide useful guidance with respect to methods and means of self-defense outside the context of war, because all measures of self-defense must comply with the same general principles . . .").

212. *Id.* (referring to the three core principles and citing to Protocol I of the 1949 Geneva Conventions).

213. James R. Lisher II, *"Shock and Awe": Should Developed States be Subject to a Higher Standard of Care in Target Selection?*, 2 ISR. DEF. FORCES L. R. 149, 165–66 (2005–2006).

214. Jeff Mustin & Harvey Rishikof, *Projecting Force in the 21st Century—Legitimacy and the Rule of Law: Title 50, Title 10, Title 18, and Art. 7*, 63 RUT. L. REV. 1235, 1237 (2011).

215. *See supra* notes 164, 172–73 and accompanying text.

216. *See supra* Part IV (A).

were attacked, first by organized gunmen with military-grade assault weapons, then by angry mobs.[217] This was not the first time that American embassies have been attacked in a coordinated manner.[218] Following the 1998 bombings of American embassies in Kenya and Tanzania, President Bill Clinton relied on a secret legal opinion in his decision to launch seventy-five Tomahawk cruise missiles into Afghanistan.[219] This effort was primarily political and failed to take out the head of the hostile terrorist group responsible for the attacks: Osama bin Laden.[220] However, shooting another seventy-five cruise missiles into the desert will not solve the problem, neither legally nor practically. Our response must be overt and targeted.

Explicit retaliation against terrorist-linked embassy attackers would be legal under international law, but any response should follow an international legal framework to prevent the international community from shirking at the assertion of United States power and providing further fodder for enraging anti-American sentiment.[221] We should not rely solely on Article 51. Given the fragile nature of international law, it is critical to justify American military action in response to the attacks.[222] Moreover, "to operate tactically outside the law

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217. *See* Sarah Aarthun, *4 Hours of Fire and Chaos: How the Benghazi Attack Unfolded*, CNN (Sept. 13, 2012, 9:49 AM), http://www.cnn.com/2012/09/12/world/africa/libya-consulate-attack-scene/index.html (describing the attack on the U.S. consulate in Benghazi, Libya that that lead to the death of Ambassador Chris Stevens).

218. *See* Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT'L L. 559, 560 (1999) (discussing the attacks against the U.S. embassies in Nairobi, Kenya and Dar es Salam, Tanzania in 1998).

219. Blum & Heymann, *supra* note 169, at 150.

220. *Cf.* Bob Woodward & Thomas E. Ricks, *U.S. Was Foiled Multiple Times in Efforts To Capture bin Laden or Have Him Killed: CIA Trained Pakistanis to Nab Terrorist but Military Coup Put an End to 1999 Plot*, WASH. POST, Oct. 3, 2001, at A01 (indicating that the decision to attack with unmanned Tomahawk cruise missiles was made to avoid endangering American lives).

221. *See generally* Vlasic, *supra* note 2, at 272–73 n.76 (noting that the United States followed a legal framework by relying on Article 51 and Security Council Resolutions 678 and 687 for its Iraq invasion) (citing Geoffrey Corn & Dennis Gyllensporre, *International Legality, the Use of Force, and Burdens of Persuasion: Self-Defense, the Initiation of Hostilities, and Impact of the Choice Between Two Evils on the Perception of International Legitimacy*, 30 PACE L. REV. 484, 515–16 (2010)).

222. *See* Philip C. Bobbitt, *Inter Arma Enim Non Silent Leges*, 45 SUFFOLK U. L. REV. 253, 260–61 (2012) (arguing that contemporary warfare demands that governments

is to attack one's own war aim."[223] The ability to articulate a justification for one's actions is equally important in psychology as it is in international diplomacy. There are several ways that the United States should incorporate international law into its response to the attacks.[224]

First, the current administration needs to admit that taking out bin Laden did not end the fight, and, that while the United States was successful in the mission, it did not execute a checkmate against active terrorist networks.[225] The White House's reaction to the embassy and consulate attacks was hampered due to pure bureaucratic ego.[226] The political rationale was that America took out bin Laden and thus there was no way that the embassy attacks were linked to Al Qaeda.[227] It is no better for the United States to link the attacks to a YouTube video.[228] Before the United States can start to

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legally justify their operations).

223. *Id.* (quoting General Sir Rupert Smith and discussing the costs suffered when the U.S. defies international law, such as Abu Ghraib and further asserting that such losses are no less bitter than a loss on the battlefield).

224. Concerns of mixing law with military strategy are always compelling, but should not be used as a legal safety zone in which the U.S. justifies any military actions. *See generally* Bobbitt, *supra* note 62, at 265–66 (observing the Obama Administration's "evident concern with melding law and strategy").

225. Although the White House "[i]nitially . . . described the violence as part of riots that had broken out in Benghazi and Cairo on Sept. 11 in response to an American-made video promoting an Muslim film called 'Innocence of Muslims' . . . later accounts provided by the State Department made no mention of a protest. Instead, they pointed to the extremist militia Ansar al-Shariah, as well as Al Qaeda's arm in North Africa, Al Qaeda in the Islamic Maghreb." *Libya-the Benghazi Attacks*, N.Y. TIMES, Oct. 30, 2012, http://topics.nytimes.com/top/news/international/countriesandterritories/libya/index.html.

226. Maureen Dowd, *Complicity in Duplicity?*, N.Y. TIMES, Oct. 3, 2012, at A27.

227. In the alternative, the United States' subdued reaction to the protester's attacks on the embassies and consulates may reveal its reluctance to frame the attacks as acts of war by the nations in which the attacks occurred. *See generally* David Blair, *U.S. consulate attack in Libya: death of U.S. ambassador would be act of war*, THE TELEGRAPH (Sept. 12, 2012, 11:34 AM), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9537867/U.S.-consulate-attack-in-Libya-death-of-U.S.-ambassador-would-be-act-of-war.html (discussing circumstances under which the embassy attacks in Benghazi may have constituted acts of war). Because of the intricacies of such a theory, and page constraints, it will not be addressed in this article.

228. Dowd, *supra* note 226. As of the date of publication of this Article, the White House and/or the State Department may have disavowed the link between the video and

justify a military response to the embassy attacks, the White House will have to admit that the attacks were not solely related to an eight-day-old video on the Internet. The United States must be able to frame the response as a reaction to terrorist aggressors.[229]

Second, the United States should seek a formal resolution within the UN Security Council. Acting alone, without first seeking redress before the Security Council, the United States may claim moral righteousness, but the aftermath of an attack may determine its legality, adversely affect its global image, and further foment additional aggression by even middle-of-the-road Muslims.[230] France has already cautioned that unilateral U.S. action may only fuel the fire of radical Islam.[231] Employing legal criteria under international law—while not required to do so—will greatly enhance the world's view of American leadership and assist in legitimizing the action.[232] Article 51 of the UN Charter recognizes the "inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations" and refers directly to the Security Council.[233] By the same token, action without UN

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the attack in Benghazi. Such a public declaration would be a move in the right direction and help to justify any American military response.

229. *See generally* Bobbitt, *supra* note 62, at 261 (discussing the recognized right to self-defense under the U.N. Charter in response to terrorist attacks).

230. *See* Kibbe, *supra* note 9, at 389–90 ("[T]he United States could suffer significant damage to its global image at a time when the real battle involves turning people in 'at risk' populations away from terrorism on the grounds that terrorism violates national and international law, international human rights standards, and basic human values . . . to suffer the additional cost of losing the support of other countries that will no longer be willing to support the U.S. agenda on any number of bilateral or multilateral issues.").

231. *France steps up criticism of U.S.*, CNN (Feb. 8, 2002), http://articles.cnn.com/2002-02-08/world/france.jospin_1_terror-post-afghanistan-world-politics?_s=PM:WORLD.

232. *See* Mogami Toshiki, UN Chronicle, Legality, Legitimacy, and Multilateralism, (Nov. 9, 2012), http://www.un.org/wcm/content/site/chronicle/home/archive/issues2011/pursuingpeace/legalitylegitimacyandmultilateralism (discussing the legitimizing effect of international law). Should the UN disapprove a proportionate military response by the U.S., then it is time that the split between the Western powers come to a head.

233. U.N. Charter art. 51.

support may be regarded as illegal.[234] Notably, the term "armed attack" is not defined and thus many learned commentators have opined that Article 51 self-defense authority includes inter-state actions against a state enabling or allowing terrorists to launch their activities from within its territory.[235] However, as previously noted, Article 51 should not provide the sole legal basis for responsive American military action.[236]

Third, the UN should be pressured to acknowledge that attacks on embassies (and consulates) present a unique and dangerous threat to "international peace and security."[237] After all, without formal diplomatic ties, more states are likely to engage in armed conflict. Embassies and consulates exist on foreign soil, and, without them, diplomats have no safety measure available to contain a conflict or diffuse potentially more dangerous scenarios.[238] One can scarcely imagine the result of the Cuban Missile Crisis without the opportunity to use diplomatic back channels.

Another critical reason for going through the UN is that international law will continue to evolve without United States involvement. With America's withdrawal from the ICC Treaty, the law which will naturally flow from such a permanent international court will inevitably develop outside the influence of the United States and evolve into its own, probably European form, thus allowing international law to become a European construct.[239] Relying upon international criminal law in its response to the embassy attacks, the United States may re-enter

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234. *See Iraq War Illegal, Says Anan*, BBC NEWS (Sept. 16, 2004, 9:21 AM), http://news.bbc.co.uk/2/hi/middle_east/3661134.stm.

235. Vlasic, *supra* note 2, at 273 (citing Article 51 as the legal basis for the specific targeting of Osama bin Laden during the 1998 cruise missile attack on Afghanistan and in Pakistan in 2011).

236. *See supra* notes 195–197 and accompanying text.

237. U.N. Charter art. 39.

238. *See generally* Frank Przetacznik, *Reaffirmation of Basic Principles of Diplomatic and Consular Law by the International Court of Justice in the American Diplomatic Case in Iran*, 3 SRI LANKA J. INT'L L. 119 (1991) (enumerating the protections afforded foreign diplomats, embassies, and consulates under international law).

239. *See* England, *supra* note 17, at 975 (noting that the United States should remain engaged in the evolution of the ICC to ensure that American interests are represented).

the international legal environment that many faulted it for leaving.[240] It would also help satisfy worried diplomats and those who believe that invading Pakistan on a mission to kill or capture Osama bin Laden was illegal under international law.

The involvement of the FBI, including a physical investigation of the Benghazi consulate on October 3, 2012,[241] will help the United States frame the response to the embassy attacks as a legal one, one which will rely on the established procedures of a pre-attack investigative body.[242]

Finally, the U.S. response must be articulated and acknowledged by the U.S. government as a publicly declared campaign in response to past and future attacks. Recently, the official legal justification for targeted killing came to light. In January 2013, the Department of Justice declassified an official memorandum of law that the United States has full legal authority to use "lethal force" on any American citizen operating as a "senior operational leader of al-Qa'ida or *an associated force* if a senior American official has determined that (1) the threat is imminent, (2) capture is infeasible, and (3) the targeted killing would be "conducted in a manner consistent with applicable law of war principles."[243] The declassification of this memorandum is only a preliminary step in any potential response to the embassy attacks. Any U.S. action must include a legal justification with

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240. *See* Harold Koh, *Why Obey International Law?: The Value of Process*, 11 INT'L LEGAL THEORY 27, 34 (2005) (noting that the U.S. has repeatedly "expressed a disdain for international law").

241. Elisabeth Bumiller & Michael S. Schimdt, *F.B.I. Agents Scour Ruins of Attacked U.S. Diplomatic Compound in Libya*, N.Y. TIMES, Oct. 5, 2012, at A4. It is unclear, however, how much meaningful investigation the FBI could have completed in only 24 hours on the scene.

242. *See* 28 C.F.R. § 0.85 (2012) (listing the general functions of the FBI, including the investigation of "matters relating to espionage, sabotage, subversive activities, and related matters" and crimes that involve terrorist activities).

243. *See* Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force* 1, *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (last visited Mar. 1, 2013) (pages *1,*6) (explicitly asserting that "a targeted killing of a U.S. citizen who has joined al-Qa'ida or its associated forces would be lawful under U.S. and international law. Targeting a member of an enemy force who poses an imminent threat of violent attack to the United States is not unlawful. It is a lawful act of national self-defense").

citation to international law, must be proportionate to the attacks, and should come with minimal collateral damage.[244] If it rises to the level of the Shehadah bombing, America will lose its ability to restore true balance to international law. If it is within the constraints of the same confines with which Operation Neptune Spear was carried out, the United States may be able to finally become the international benevolent Leviathan it has wanted to be since the era of Alexander Hamilton.

How the United States responds to the most recent string of attacks on its embassies, especially the attack in Libya, will have far-reaching implications for international law and the future of American world leadership. Many seem to believe that the law, especially international law, is an "obstacle to be surmounted."[245] However, the legal machinery exists for justifying the United States' response to the attacks on American embassies. Use of that machinery requires only U.S. political will.

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244. *See id.* at p. *8 (noting that "it is a premise here that any such lethal operation by the United States would comply with the four fundamental law-of-war principles governing the use of force: necessity, distinction, proportionality, and humanity").

245. Bobbitt, *supra* note 62, at 260.