The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications

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I. Introduction

On September 4, 1998, members of the Senate Judiciary Committee asked Federal Bureau of Investigation (FBI) Director Louis Freeh to research the legality of assassinating terrorist leaders.1 Specifically, the Senators wanted a clarification as to whether the prohibition on assassinations of heads of state embodied in Executive Order 12,3332 also applies to terrorist groups.3 This request followed the August 7, 1998 bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania.4

The alleged mastermind behind these bombings, which killed 224 people, including twelve Americans, is Osama bin Laden.5 Bin Laden is a fundamentalist Muslim multimillionaire6 who was exiled from his homeland, Saudi Arabia, because of his terrorist activities.7 Although between twenty and twenty-five terrorist groups are currently active in the United States, Freeh identified bin Laden’s group, al Qaeda, or “the Base,” as “particularly dangerous because of its great resources and multinational

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3 See Senators Ask Legality, supra note 1.
5 See id.
following."  

The United States has made attempts to lessen bin Laden's threat. The U.S. military responded to the embassy bombings with bombings of bin Laden's training camps in Afghanistan. More recently, a U.S. federal grand jury indicted bin Laden, charging him with the embassy bombings. In addition to using FBI agents to track him, the U.S. government is offering a $5 million reward for the capture of bin Laden in order to encourage his extradition. Despite these efforts, FBI officials concede that it is unlikely that bin Laden will be brought to justice: "There's no doubt he has the

8 Freeh Says Threat of Terrorist Retaliation Is Stronger Than Ever, COM. APPEAL, Sept. 4, 1998, at A5, available in 1998 WL 13975508; see also bin Laden Financing Muslim Militants in Bangladesh, DALLAS MORNING NEWS, Feb. 20, 1999, at 23A, available in 1999 WL 4101604 (discussing bin Laden's alleged attempts to finance an extremist Islamic group in Bangladesh). In fact, bin Laden has maintained connections in the United States at least since the 1980s when he opened an office in Brooklyn, New York to aid refugees from the war in Afghanistan. See Neumeister, supra note 4, at 1A; see also Steve McGonigle, Arlington Man, bin Laden Linked for Years, Files Show: Muslim Cleric Denies Involvement with Terrorism, DALLAS MORNING NEWS, Feb. 17, 1999, at IA, available in 1999 WL 4100860 (discussing the discovery of a connection between bin Laden's terrorist activities and an Arlington, Texas Muslim cleric).


10 See Matthews, supra note 6, at 1A. The grand jury indictment was issued on November 4, 1998. See id. Muhammad Atef, bin Laden's military commander, was also indicted. See id. Bin Laden denies any involvement in the bombings, although he says he is not sorry about what happened. See Bin Laden Reportedly Denies Role in Bombing of U.S. Embassies in Africa, BOSTON GLOBE, Dec. 25, 1998, at A2, available in 1998 WL 22241183.

In addition to the embassy bombings, the indictment charges bin Laden with leading terrorist groups in 20 countries. See Matthews, supra note 6, at 1A. It also charges that bin Laden and his followers attempted to kill U.S. military personnel located in Somalia and Saudi Arabia. See id. Further, the indictment alleges that they tried to obtain nuclear and chemical weapons. See id. The indictment cites bin Laden's and al Qaeda's opposition to U.S. involvement in the Persian Gulf War and in Somalia as the motive for terrorist acts. See id. The terrorists viewed these actions as a U.S. attempt to occupy Islamic countries. See id.

Bin Laden was previously indicted for conspiring to kill Americans in June 1998 in a secret U.S. grand jury proceeding. See id.

11 See Neumeister, supra note 4, at 1A.
resources to stay hidden." In light of bin Laden's February 1998 command for Muslims "to kill Americans anywhere in the world they can be found[,]" the United States must consider other options to ensure the elimination of bin Laden as a threat to its citizenry. As a U.S. Justice Department official noted, Americans are not the only ones who suffer from a terrorist attack: "In a greater sense, all of the citizens of the world are also victims whenever and wherever the cruel and cowardly acts of international terrorism strikes . . . . And it is up to the authorities of the world [such as the United States] to respond vigorously and unrelentingly to such terrorist attacks."

Part II of this Comment examines the legality of assassination of a terrorist leader in light of U.S. national law and Executive Order 12,333. In Part III the Comment discusses the international implications of assassinations of terrorist leaders under the United Nations Charter and customary international law. Part IV explores other alternatives in preventing terrorism. Finally, Part V concludes that the assassination of bin Laden is a viable option for the U.S. government because it not only eliminates the immediate threat of bin Laden but also provides a clear deterrent for other persons or groups considering attacks on Americans.

II. National Law and Executive Order 12,333

Ostensibly, U.S. national policy prohibits assassinations. The ban on assassinations, in the context of war, dates to the Hague Regulations of 1907, which prohibit the treacherous killings of adversaries during war. This standard was included in the 1956

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12 Id.
13 Id.
14 Id.
15 See infra notes 19-70 and accompanying text.
16 See infra notes 71-147 and accompanying text.
17 See infra notes 148-83 and accompanying text.
18 See infra notes 184-206 and accompanying text.
19 See Francis A. Boyle, Remarks, Military Responses to Terrorism, 81 AM. SOC'Y INT'L L. PROC. 287, 296 (1987).
U.S. Army Field Manual 27-10 on the Law of Land Warfare.\textsuperscript{20} The manual notes that since political assassination is a war crime, any person, military or civilian, who commits such an act is subject to punishment.\textsuperscript{21} Further, the “act of state” defense is not applicable; thus, government officials are also subject to penalties for committing an assassination.\textsuperscript{22} This policy, however, mandates standards for behavior during war. Since the United States is not officially at war with bin Laden or his group, these guidelines do not govern this particular situation.

The relevance or irrelevance of Executive Order 12,333, banning assassinations,\textsuperscript{23} is not as clear, hence the request by the Senate Judiciary Committee to research the implications of an order on the assassination of bin Laden.\textsuperscript{24} The Executive Order, issued by President Reagan in 1981,\textsuperscript{25} provides: “No person employed by or acting on behalf of the United States government shall engage in, or conspire to engage in, assassination.”\textsuperscript{26} Furthermore, “[n]o agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order.”\textsuperscript{27}

Reagan’s mandate was based on a 1976 Executive Order, also prohibiting government officials and agents from engaging in assassinations, issued by President Ford.\textsuperscript{28} Ford adopted this

\textsuperscript{20} See id.; Abraham D. Sofaer, Terrorism, the Law, and the National Defense, 126 MIL. L. REV. 89, 120 (1989). This rule “does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.” Id. For example, the United States intentionally attacked a Japanese military plane carrying Admiral Yamamoto on April 18, 1943. See id. at 121.

\textsuperscript{21} See Boyle, supra note 19, at 296.

\textsuperscript{22} See id. at 297. The “act of state” defense allows government officials to avoid individual liability for actions taken in their official capacities as representatives of states. See id. In the context of war crimes, regardless of title or position, a person is personally responsible for such acts, even if ordered pursuant to state policy. See id.


\textsuperscript{24} See Senators Ask Legality, supra note 1, at 13A.

\textsuperscript{25} See Sofaer, supra note 20, at 116.

\textsuperscript{26} 3 C.F.R. 213.

\textsuperscript{27} Id. at 214.

\textsuperscript{28} See Sofaer, supra note 20, at 116 (citing Exec. Order No. 11905, 3 C.F.R. § 5(g), at 90, 101 (1977) as the order issued by President Ford). The order was also
policy after the Central Intelligence Agency (CIA) was implicated in plots to kill several high-ranking foreign leaders.\textsuperscript{29} A Senate investigation in 1975 focused on the role of the CIA in five assassination plots.\textsuperscript{30} The Senate Committee found that outside of the context of war, assassination is not an appropriate measure of foreign policy, considering that assassination ""is incompatible with American principle, international order and morality.""\textsuperscript{31} Further, assassination of a leader might prove to be a greater problem due to resulting political instability or retaliation against Americans.\textsuperscript{32} After concluding that agency officials might have acted without presidential approval, the Senate Committee endorsed the Executive Order.\textsuperscript{33}

The order does not provide any insight into the meaning of, or

\textsuperscript{29} See id. at 118; Patricia Zengel, Assassination and the Law of Armed Conflict, 43 MERCR. L. REV. 615, 632 (1992).

The CIA also responded to press allegations of its participation in assassination attempts against foreign leaders. See Boyd M. Johnson III, Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader, 25 CORNELL INT' L.J. 401, 407 (1992). In 1972 Director Richard Helms issued the first of several agency directives that prohibited assassinations. See id. Subsequently, in 1973 his successor William Colby issued orders banning assassination following an internal investigation. See id.\textsuperscript{30}

\textsuperscript{30} See Sofaer, supra note 20, at 118. The House of Representatives also conducted an investigation. See id. The Senate Committee examined assassination plots against Patrice Lumumba, Premier of the Congo; Fidel Castro, President of Cuba; Rafael Trujillo, President of the Dominican Republic; Ngo Dinh Diem, President of South Vietnam; and Rene Schneider, Commander-in-Chief of the Army of Chile. See id.; see also Zengel, supra note 29, at 632-33 (detailing the Senate Committee's findings on the CIA's role in these plots).

\textsuperscript{31} Zengel, supra note 29, at 633 (quoting S. REP. No. 465, 94th Cong., 2nd Sess. (1975)). The Senate Committee conducting the investigation was the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities. See id.\textsuperscript{31}

\textsuperscript{32} See id.\textsuperscript{32}

\textsuperscript{33} See Sofaer, supra note 20, at 118-19.
the limitations of assassination. As a result, some interpret the Executive Order as prohibiting the United States from participating in any killings of specific persons. However, the context of the initial Executive Order, issued by Ford, differs from the current situation. The prohibition was issued in reaction to the assassination of foreign government officials. Since Osama bin Laden is not a head of state, it is argued that the prohibition on assassination does not apply to him. Further, these earlier plots were not motivated by a legal justification, such as self-defense, but by politics. Thus, “this background—and the types of killings being criticized at the time—lends no support to applying the Executive Order to lawful killings undertaken in self defense against terrorists who attack Americans or against their sponsors.” The U.S. Army supported this interpretation of the Executive Order addressing assassinations in its recent memorandum to President Clinton’s Administration: “The clandestine, low visibility, or overt use of force against legitimate targets in time of war, or against similar targets in time of peace, where such individuals or groups pose an immediate threat ... does not constitute assassination.”

Moreover, the imprecise use of the word “assassination” may

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34 See Zengel, supra note 29, at 635; W. Hays Parks, Memorandum of Law: Executive Order 12,333 and Assassination, ARMY LAW., Dec. 1989, at 4, 4. Despite public discussion, the Reagan Administration declined to specifically exclude punitive raids against terrorists from the ban on assassinations. See Johnson, supra note 29, at 420-21. However, based on its subsequent bombing raid of Libya, the Administration did not believe this type of activity violated the ban. See id. at 421; see also infra notes 51-53 and accompanying text (discussing the Libyan bombing).

35 See Zengel, supra note 29, at 636.

36 See Sofaer, supra note 20, at 119.

37 See Trainor, supra note 7, at A19.

38 See Sofaer, supra note 20, at 119.

39 Id. However, the ban should apply not only to the assassination of government officials, but also “to the illegal killing of any person, even an ordinary citizen, so long as the act has a political purpose.” Id. at 119; see also Parks, supra note 34, at 4 (noting that the characterization as assassination is not only based on the identity of the victim but also the “covert nature” of the operation).

40 Richter, supra note 9, at A1. The memorandum was issued by the office of the Army judge advocate general. See id.
have been intentional.\textsuperscript{41} Although the order provided a response to the outrage at alleged assassination plots, it preserved flexibility in interpretation.\textsuperscript{42} This flexibility is advantageous in that it "leav[es] potential adversaries unsure as to exactly what action the United States might be prepared to take if sufficiently provoked."\textsuperscript{43} Further, by issuing the order, Ford eliminated the need for legislation on assassination, which may have been more stringent.\textsuperscript{44} The President retains the power to modify or revoke the Executive Order.\textsuperscript{45} Congress also has the authority to revoke or amend the Executive Order.\textsuperscript{46} Their failure to exercise this power, along with the fact that Congress has failed to pass three legislative proposals prohibiting assassinations between 1976 and 1980,\textsuperscript{47} "might be interpreted as implicit authority for the President

\textsuperscript{41} See Zengel, supra note 29, at 635 (noting that the Executive Order "contains no definition or further elaboration of what constitutes assassination").

\textsuperscript{42} See id.

\textsuperscript{43} Id.

\textsuperscript{44} See id.

\textsuperscript{45} See id. at 637. Both former Vice President Quayle and former President Nixon recommended the revocation of the Executive Order's ban on assassinations in order to provide the President with this option should he deem it appropriate in extreme situations. See Teplitz, supra note 28, at 599 n.242. However, it should be noted that the President is not required to publicly publish a complete or partial revocation of Executive Order 12,333. See Johnson, supra note 29, at 427. Since the order deals with intelligence activities, any modifications may be classified information, thus preventing publication of the revised order in the Federal Register. See id. (citing Bert Brandenburg, \textit{Legality of Assassination}, 27 \textit{VA. J. INT'L LAW} 687 n.203 (1987) (discussing § 1.3(a)(4) of Executive Order 12, 356)).

\textsuperscript{46} See Johnson, supra note 29, at 426.

\textsuperscript{47} See Zengel, supra note 29, at 634. In 1980 both houses of Congress introduced bills banning assassination that duplicated the language in Carter's order. See Johnson, supra note 29, at 411 (referring to H.R. 6588, 96th Cong. § 131 (1980) and S. 2284, 96\textsuperscript{th} Cong. § 131 (1980)); supra note 28 (discussing the language in Carter's executive order). Critics have given several reasons for the lack of success of these bills: (1) the Iran hostage crisis; (2) the situation in Afghanistan following the Soviet Union's invasion; and (3) the lack of support from President Carter. See Johnson, supra note 29, at 411 (citing Charles Hohr, \textit{Effort to Enact Intelligence Charter Is Abandoned by Senate Advocates}, N.Y. TIMES, May 2, 1980, at A1). Additionally, commentators have hypothesized reasons why Congress has never been successful in passing legislation banning assassination: (1) since the public did not support the ban, members of Congress had no motivation; (2) the Senate Committee allowed public interest to wane by turning attention away from the CIA and other intelligence agencies; (3) the different approaches the houses took in their investigations caused conflict—the House preferred
to retain such action as a policy option." Thus, instead of being an absolute ban on assassination, the order reserves the right to mandate such an action solely to the President.

Further evidence that the ban on assassination was meant to have a limited scope is that the United States has continued to engage in "the use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to U.S. citizens or U.S. national security." For example, the 1986 raid on Libya in response to continued attacks by the Libyan government has been characterized as an assassination attempt. In addition to military targets, the United States bombed Colonel Qadhafi's headquarters. This action has been justified as a legitimate use of military force in self-defense. One commentator has suggested that since this was a military action, rather than an intelligence action, the Executive Order was inapplicable. Instead, the proper analysis is to examine whether the use of force by the United States was justified.

an open investigation, while the Senate participated in covert communications with the White House; and (4) the problems gathering information about the inner workings of the intelligence committee hindered the investigations by both the House and the Senate. See id.

48 Zengel, supra note 29, at 634.

49 See id. at 637. Reserving this power to the President has the benefit of insuring accountability for such actions: "It discourages the establishment of 'plausible deniability' within the government, which caused such difficulty for congressional investigators seeking to trace ultimate responsibility for activities of the 1960s and early 1970s." Id.; see also Parks, supra note 34, at 8 (noting the purpose of the order was to prevent "unilateral actions by individual agents or agencies").

50 Parks, supra note 34, at 7 (listing examples of the use of force by the United States during peacetime).

51 See Zengel, supra note 29, at 639. The 1986 U.S. attack on Libya was in response to the Libyan government's alleged bombing of a Berlin discotheque, injuring 200 people, including 50 Americans. See id.

52 See id.

53 See id.; Sofaer, supra note 20, at 119-20. But see Boyle, supra note 19, at 296 (stating that "the attack on the compound was obviously intended to kill Qadhafi[;]...[t]he attack clearly violated the Reagan Administration's own standing Executive Order that prohibited U.S. participation in assassinations").

54 See Zengel, supra note 29, at 639.

55 See id.
use of self-defense against continuing threats, the right of self-defense would justify attacks against terrorist leaders who represent a continuing threat to the safety of U.S. citizens and/or to U.S. national security. This same analysis can be used to evaluate the U.S. attacks on Iraq, which threatened Saddam Hussein’s life. In that case military action was justified as self-defense based on the state of continued conflict between the United States and Iraq. Thus, the attacks on Libya and Qadhafi, and Iraq and Hussein were deemed legitimate despite the Executive Order banning assassination.

Osama bin Laden, unlike Qadhafi and Hussein, is not the leader or representative of any country. Therefore, a military attack in self-defense against him would realistically result in his assassination. However, this action would be justified as well because “[t]he purpose of Executive Order 12,333 and its predecessors was to preclude unilateral actions by individual agents or agencies[,] . . . not to limit lawful self defense options against legitimate threats to the national security of the United

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56 See Parks, supra note 34, at 7.
57 See id. at 7 n.8. On April 17, 1986, some members of Congress, in light of questions of the legality of the Libyan raid, proposed a bill allowing the President to use force in response to foreign terrorist activities without prior approval of or consultation with Congress. See Johnson, supra note 29, at 422.
58 See Teplitz, supra note 28, at 605. The June 26, 1993 bombing of Baghdad was in response to a failed Iraqi assassination plot against former President Bush during his April 1993 visit to Kuwait. See id. at 601-05.
59 See Zengel, supra note 29, at 638.
60 The Iraqi attack was also legitimate under then-President Bush’s expanded interpretation of Executive Order 12,333. Bush read the order to allow military actions that could result in the unintentional death of a foreign leader. See Teplitz, supra note 28, at 599 n.242. Further, Bush’s stance was bolstered by Congress’s grant of approval for Hussein’s death in its January 12, 1991 joint resolution allowing the President to use military force against Iraqi combatants, which would include Hussein. See Chris A. Anderson, Assassination, Lawful Homicide, and the Butcher of Baghdad, 13 HAMLINE J. PUB. L. & POL’Y 291, 311 (1992) (citing H.R.J. Res. 77, 102d Cong., 1st Sess.).
61 See Trainor, supra note 7, at A19.
62 See Liam G.B. Murphy, A Proposal on International Legal Responses to Terrorism, 2 TOURO J. TRANSNAT’L L., 67, 70 (1991) (observing that “[p]rivate terrorists cannot be attacked in the same way as a state because they have no territory or government; their status as individuals changes the status of such an act against them by a state from reprisal to, at least, execution”).
States or individual U.S. citizens." And, as FBI Director Louis Freeh noted, "Mr. bin Laden... poses 'about as serious and imminent threat as I can imagine.'"64

Moreover, despite the Senate’s uncertainty, the Clinton Administration believes that regardless of the Executive Order, deadly force is a viable option against bin Laden.65 In fact, although the August 1998 bombing of one of bin Laden’s training camps in Afghanistan was ostensibly to destroy the camp and materials, officials admitted that the administration would not have been disappointed if the bombing had resulted in bin Laden’s death.66 As the administration interprets the Executive Order, they are not required “to direct their attacks solely at inanimate ‘infrastructure’ targets rather than at individuals.”67 If an organization harms or threatens U.S. citizens, under the administration’s interpretation, they can authorize military or undercover use of lethal force against the organization’s leaders.68 Although this interpretation permits actions that indirectly result in a person’s death, the President may not issue a written order for the death of a specific person.69 Since the order was issued by the executive branch, Clinton’s interpretation of the limits of this executive law, which he left in force, should be given weight.70

63 Parks, supra note 34, at 8. But see Anderson, supra note 60, at 313 (observing that without a state of war, the Executive Order 12,333 ban on the intentional killing of a combatant is applicable).

64 Senators Ask Legality, supra note 1, at 13A.

65 See Richter, supra note 9, at A1; see also supra note 60 (discussing President Bush’s interpretation of the executive order).

66 See Richter, supra note 9, at A1.

67 Id.

68 See id.

69 See id.

70 Although lawmaking is a traditionally legislative function, the Supreme Court determined that an executive order is constitutional if the President’s actions have statutory or constitutional support. See Johnson, supra note 29, at 413 (citing Youngstown Co. v. Sawyer, 343 U.S. 579, 585 (1952)). Further, the Court held that the failure of Congress to legislate in a certain area, such as foreign policy or national security, does not implicate disapproval for the presidential action; rather, “the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to ‘invite’ measures on independent presidential responsibility.” Id.
III. The Charter of the United Nations and International Law

A. United Nations Considerations

In addition to considering the legality of the assassination of bin Laden under national law, the U.S. government must also consider the international implications of such an undertaking. As a member of the United Nations (U.N.), the United States is bound to uphold the principles of the U.N. Charter (Charter). To meet this objective, Article 2(4) prohibits the use of force: Member States "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations." Actions of reprisal are prohibited under the Charter; such actions are punitive in nature and invite retaliation.

(Quoting Dames & Moore v. Regan, 453 U.S. 654, 678 (1981) (quoting Haig v. Agee, 453 U.S. 280, 291 (1981) and Youngstown Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))). Presidents Ford, Carter, and Reagan have looked to the Constitution for the authority to issue the executive order banning assassinations. See id. Four sections of the Constitution could be cited for the power to issue executive orders: (1) Article II, Section I, granting executive power to the President; (2) Article II, Section 2, Clause 1, naming the President as Commander-in-Chief; (3) Article II, Section 3, requiring faithful execution by the President; and (4) making the President "exclusively responsible for the conduct of diplomatic and foreign affairs." Id. at 415 (referring to U.S. Const. art. II, § 1, cl. 1; art. II, § 2, cl. 1; art. II, § 3). Additionally, the Presidents have found statutory authority for executive orders banning assassinations in the National Security Act of 1947. See id. (citing National Security Act of 1947, as amended, 50 U.S.C.S. §§ 401-432 (1992) [hereinafter NSA]). This statute appoints the President as the head of the National Security Council (NSC). See id. at 415-16 (citing NSA § 402(a)). Since this legislation allows the President to direct the NSC, the statute is closely related to the President's authority, thereby showing the legislative intent required by Dames & Moore to grant the President broad discretion. See id. at 416.

71 See Parks, supra note 34, at 8 (noting "a decision by the President to employ clandestine, low visibility or overt military force would not constitute assassination if U.S. military forces were employed against... a terrorist... whose actions pose a threat to the security of the United States" as long as the action was also consistent with the Charter of the United Nations).


73 U.N. CHARTER art. 2, para. 4.

74 See John Quigley, Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters, 17 HASTINGS INT'L & COMP. L. REV. 241,
However, the Charter recognizes the right of self-defense as an exception to this ban.\textsuperscript{75}

The scope of the self-defense exception is unclear. One interpretation is that Article 2(4) permits actions of self-defense in response to "a use of force that materially threatens a State's 'territorial integrity or political independence.'\textsuperscript{76} The International Court of Justice (ICJ) also adopted a narrow interpretation of self-defense.\textsuperscript{77} A stringent interpretation, however, "ignores the Charter's preservation of the 'inherent' scope of the right" of self-defense.\textsuperscript{78} No distinction was made between the concept of self-defense and defense in general by the drafters of the Charter or by customary law.\textsuperscript{79} Furthermore, nations have historically protected their citizens and national interest from attacks despite the absence of any threat to the nation's existence.\textsuperscript{80} As a result, self-defense could be interpreted to include "measures necessary to protect the state and its people from outside armed attack in all its conventional and nonconventional forms."\textsuperscript{81}

Article 51 of the Charter is the provision that explicitly recognizes the right of self-defense: "Nothing in the present Charter shall impair the inherent right of individual or collective

\textsuperscript{75} See Rowles, supra note 72, at 310 (referring to U.N. CHARTER art. 51). The other exception is the use of force upon approval of the U.N. Security Council. See Teplitz, supra note 28, at 574 (citing U.N. CHARTER arts. 39, 42-43, 48).

\textsuperscript{76} Sofaer, supra note 20, at 96.

\textsuperscript{77} See id. at 91 n.5. (citing Military and Paramilitary Activities in and against Nicaragua, 1986 I.C.J. 14 (Judgment on the Merits of June 27, 1986) (holding that an attack against Nicaragua was an illegitimate exercise of self-defense because Nicaragua's act of supplying weaponry to El Salvadorian rebels did not constitute an armed attack)).

\textsuperscript{78} Id. at 96.


\textsuperscript{80} See Sofaer, supra note 20, at 96.

\textsuperscript{81} Coll, supra note 79, at 307; cf. Murphy, supra note 62, at 71 (noting one problem associated with allowing acts of self-defense in response to terrorism is that since there is no uniformly accepted definition of terrorism, a state may use force in inappropriate situations, which would undermine the Charter's primary goal of ending war).
self-defense if an armed attack occurs against a member of the United Nations." Critics of the use of the self-defense justification advocate interpreting this provision based on international customary law, embodied in the 1837 statement of U.S. Secretary of State Daniel Webster, known as the "Caroline Doctrine." Webster suggested that self-defense applies only in extraordinary circumstances where the "necessity of self-defense [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation." Critics argue that responses to terrorist acts do not meet this standard. One commentator has suggested that Article 51 prohibits acts of retaliation or reprisal against terrorists since they occur after the attack. Additionally, any anticipatory actions are prohibited by this standard. Further, although there is no requirement as to the scale of an attack, one view of Article 51 is that it does require an attack against another

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82 U.N. CHARTER art. 51. One commentator has suggested that the purpose of the prerequisite in Article 51 of an armed attack "limits the use of force to situations involving the type of serious attack on a state that can be verified by independent observers." Rowles, supra note 72, at 310.

83 Coll, supra note 79, at 301. The Caroline Incident has roots in the Canadian rebellions against British rule that occurred in 1837. See Teplitz, supra note 28, at 574. The United States remained neutral, but some U.S. citizens along the border provided assistance to the Canadian cause. See id. at 574-75. On December 29, 1837, supplies were sent from Buffalo, New York to Navy Island on the privately owned U.S. steamboat Caroline. See id. at 575. The British commander, Colonel Adam McNabb, ordered the destruction of the Caroline to insure that no other provisions reached the Canadians. See id. at 576. Henry Fox, British Ambassador to the United States, justified the action as a measure of self-defense. See id. at 577. U.S. Secretary of State, Daniel Webster disagreed with the British conclusion that the attack on the Caroline was in self-defense. See id. He responded with his interpretation of a legitimate exercise of self-defense, which came to be known as the "Caroline Doctrine." See id.

84 Id.

85 See Rowles, supra note 72, at 314.

86 See Boyle, supra note 19, at 294; see also supra note 74 and accompanying text (discussing the illegality of reprisal generally under the U.N. Charter). Boyle notes that traditionally the U.S. government accepted this restrictive interpretation of self-defense in order to reduce the use of force by other nations. See Boyle, supra note 19, at 294. He further suggests that President Reagan abandoned this interpretation in his use of self-defense to justify the April 14, 1986 bombing of Libya. See id. at 293; see also supra notes 51-54 and accompanying text (discussing the attack on Libya).

87 See Anderson, supra note 60, at 299.

88 See id. at 298.
This would also preclude an attack against non-state sponsored terrorist groups. The ICJ endorsed this view that terrorist acts do not rise to the level of "armed attacks," thus precluding the use of self-defense before the court as a justification for any forceful response to such acts. However, this restrictive interpretation of "armed attack" protects terrorists "who attack sporadically on foreign territory, even though they can be counted on to attack specific States repeatedly."

In light of the fact that the world and military capabilities have changed in the last 150 years, the language of Article 51 should be interpreted more expansively. Application of the Caroline Doctrine to Article 51 fails to account for the right of a state to protect itself before suffering an attack. Thus, in the nuclear age, a state may be forced to suffer total annihilation before being allowed to respond. Therefore, "[a] sound construction of [A]rticle 51 would allow any State, once a terrorist 'attack occurs' or is about to occur, to use force against those responsible for the attack in order to prevent the attack or to deter further attacks unless reasonable ground exists to believe that no further attack will be undertaken." Such action would be consistent with the Charter's ultimate aim of deterrence against armed conflict. Further, if the U.N. refuses to adapt its view of self-defense, nations may individually choose to determine when an attack in

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89 See Quigley, supra note 74, at 250. This view also queries whether in order to justify the use of self-defense, the initial attack must also be against the state, rather than against nationals of a state. See id. at 255-56. However, others believe that an attack on nationals is in fact an attack on the state itself, thereby justifying use of force in self-defense. See id. at 256.


91 Sofaer, supra note 20, at 95-96.

92 See Coll, supra note 79, at 302.


94 See id.

95 Sofaer, supra note 20, at 95.

96 See id. But see Quigley, supra note 74, at 265 (noting that deterrence suggests reprisal, which is prohibited under the Charter, rather than self-defense).
self-defense is appropriate, thereby lessening the U.N.’s control over the use of force.\footnote{97}{See Teplitz, supra note 28, at 614.}

The United States interprets Article 51 to allow three forms of self-defense: “(1) self-defense against an actual use of force or hostile act; (2) preemptive self-defense against an imminent use of force; and (3) self-defense against a continuing threat.”\footnote{98}{Johnson, supra note 29, at 420.} Based on this view, U.S. Presidents have authorized the use of assassination in self-defense when another country fails to uphold its international duty to prevent violent attacks from originating in its territory and when a country assists in international criminal activities, such as terrorism.\footnote{99}{See id.} The United States used this interpretation to justify its attack on Qadhafi’s headquarters\footnote{100}{See id.; supra notes 51-53 and accompanying text.} and its attack on Iraq.\footnote{101}{See Teplitz, supra note 28, at 600-01; supra notes 58-59 and accompanying text.} Since Afghanistan’s Taliban government does not want to cooperate with the U.S. efforts to apprehend bin Laden,\footnote{102}{See Suspected Terrorist in Afghanistan, Houston Chron., Mar. 11, 1999, at 7, available in 1999 WL 3978434. The Taliban, Afghanistan’s military government, has refused to allow bin Laden’s extradition. See id. The Taliban justifies this inaction by claiming there is no evidence linking bin Laden to the embassy bombings and that he is a guest in their country. See Kathy Gannon, Taliban Promises to Help bin Laden, Associated Press, Nov. 5, 1998, available in 1998 WL 21783382. The Taliban does, however, have concerns about bin Laden’s presence in their country because of international reaction, which could result in the loss of “recognition or foreign aid.” Suspected Terrorist in Afghanistan, supra, at 7.} an assassination attempt would be justifiable under this interpretation. However, the other members of the U.N. do not seem to adopt this expansive view of the right of self-defense as evidenced by a Security Council draft resolution that condemned the U.S. actions against Libya\footnote{103}{See Teplitz, supra note 28, at 586 (citing U.N. SCOR, 41st Sess., 2682d mtg. at 43, U.N. Doc. S/PV.2682 (1986)). The draft resolution, condemning the U.S. attack as a violation of the Charter and customary international law, was proposed on April 21, 1986 by the Congo, Ghana, Madagascar, Trinidad and Tobago, and the United Arab Emirates. See id. The resolution failed because of vetoes by the United States, Great Britain, and France. See id.} and a subsequent condemnation.
by the General Assembly. However, the U.N. has been inconsistent in its evaluation of U.S. actions. In reaction to the bombing of Iraq, the Security Council took no action and merely acknowledged the U.S. explanation. Nevertheless, despite the unpopularity of its interpretation of self-defense under Article 51, the United States is still able to act as it deems appropriate without U.N. censure since the United States is a permanent member of the Security Council and any resolution requires its approval. Although the United States is still subject to measures by the General Assembly, cooperation is on a voluntary basis.

The inapplicability of the preventive measures of the Charter to a response to a terrorist attack also supports the conclusion that force against a terrorist leader is acceptable. Article 33 requires parties to a dispute that threatens international peace to exhaust all peaceful means to reach an agreement. These means “include negotiation, enquiry [sic], mediation, conciliation, arbitration or judicial settlement.” Since bin Laden is not the representative of

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Senegal, and Yugoslavia. See id. at 591 (citing U.N. SCOR, 44th Sess., 2902d mtg. at 18-20, U.N. Doc. S/PV.2902 (1989)). Once again, the resolution was rejected by the United States, Great Britain, and France. See id.

104 See id. at 586. The General Assembly issued the condemnation, which also required compensation for losses suffered, at the behest of Libya. See id.

105 See id. at 607. Furthermore, the U.N. participated with the United States in an effort to capture Mohammed Farah Aideed in Somalia, which could have resulted in his death. See Reisman, supra note 90, at 422-23.

106 See Teplitz, supra note 28, at 593. The United States is unlikely to lend its support for a resolution condemning its own actions. The requirement of the approval of all of the permanent members of the Security Council (China, France, Russia, the United Kingdom, and the United States) is known as the “Great Power Veto.” See id.

107 See id. at 594. The General Assembly procedure was created in 1950 in response to situations, such as the United States’ actions in Libya and Panama, in which the veto powers of the permanent members prevented the Security Council from issuing resolutions. See id. at 593 (referring to the “Uniting for Peace” Resolution, G.A. Res. 377, U.N. GAOR, 5th Sess., 302d plen. mtg., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950)).

108 The use of force in self-defense may still be a viable option in cases of state-sponsored terrorism. See John F. Murphy, Remarks, Military Responses to Terrorism, 81 AM. SOC’Y INT’L L. PROC. 287, 319 (1987).

109 See Boyle, supra note 19, at 289 (citing U.N. CHARTER art. 33).

110 Id.
any state,\textsuperscript{111} he is not a party to the United Nations. Therefore, he is not bound by these requirements, nor would these solutions prove effective. Furthermore, negotiation with bin Laden would give recognition and legitimacy to his organization and activities.\textsuperscript{112} Also, "since terrorist groups are not structured like states, they are incapable of negotiating effectively or enforcing their agreements."\textsuperscript{113} Submission of the dispute to an international arbitration tribunal would involve similar problems.

\textbf{B. Customary International Law Considerations}

The permissibility of an assassination of a terrorist leader under customary international law\textsuperscript{114} generally is as debatable as its legality under the Charter of the United Nations. Nations have the right of self-defense as articulated by Webster in the Caroline Doctrine, providing there is an imminent threat, necessary response, proportionate reaction, and exhaustion of all peaceful means.\textsuperscript{115} However, as in the U.N. Charter, the boundaries of self-defense are not clearly defined.

It is generally accepted that nations may respond to terrorist acts with force within their own territories.\textsuperscript{116} However, this power is subject to some limitations. A terrorist may not be executed on the spot if he is not an immediate threat, and a terrorist may not be executed for past acts without due process of law.\textsuperscript{117} Additionally, torture is never allowed.\textsuperscript{118} States are also allowed to use force

\begin{footnotes}
\item[111] See Senators Ask Legality, supra note 1, at 13A.
\item[112] See Murphy, supra note 62, at 72.
\item[113] Id.
\item[114] Customary international law is comprised of preemptory norms, usually dealing with issues of human rights, that are accepted and followed by the international community. See Anderson, supra note 60, at 305. A preemptory norm prevails unless a contrary principle is internationally accepted. See id. Preemptory norms, unlike the U.N. Charter, do not govern relations among states but obligations of states to the international community as a whole. See id.
\item[115] See Teplitz, supra note 28, at 578, 608; see also supra notes 83-84 and accompanying text (discussing the Caroline Doctrine and its application to the interpretation of self-defense under U.N. Charter Article 51).
\item[116] See Rowles, supra note 72, at 312.
\item[117] See id.
\item[118] See id.
\end{footnotes}
against terrorists within the territory of other states with permission from those states. Problems arise in situations in which the other state has not granted consent.

Attacking a terrorist within another state without obtaining that state's permission is a violation of that nation's sovereignty. However, as one commentator noted, "territorial integrity is not entitled to absolute deference in international law." Moreover, although such an act may be technically illegal, kidnapping a terrorist in violation of another nation's territorial rights may be legal or tolerable because it is morally justified. Such an act would be a bloodless way to bring a terrorist to justice. Further, this may be the only option for obtaining justice against the terrorist. The states in which terrorists are commonly located are usually unwilling or unable to extradite them. Countries with whom the United States has an extradition treaty are often able to avoid carrying out their obligations because of the so-called "political exception." This exception allows a nation to refuse extradition if the nation concludes that the perpetrator's actions were carried out for political purposes or that the perpetrator may be subject to political persecution in the requesting state. This exception has broad application since each individual state

119 See id.
120 See Coll, supra note 79, at 306; see also Rowles, supra note 72, at 313-14 (noting that such an act also violates "the territorial state's right to freedom from the threat or use of force against its territorial integrity or political independence"). This prohibition parallels the impermissibility of the transnational assassination of a leader when two nations are engaged in a state of war. See The Permissibility of State-Sponsored Assassination, supra note 93, at 236. This ban does not preempt the right to wage war in the aggressor's territory and to take preemptive measures to prevent future acts of aggression. See Anderson, supra note 60, at 306.
121 Sofaer, supra note 20, at 106.
122 See Coll, supra note 79, at 306.
123 See id.
124 See Sofaer, supra note 20, at 106-07.
125 See id. at 106.
126 Murphy, supra note 62, at 76.
127 See id. For example, this political exception allows members of the Irish Republican Army to have freedom in the United States, despite their actions against the British government. See Coll, supra note 79, at 303.
128 See Murphy, supra note 62, at 77.
determines what constitutes a political offense.\textsuperscript{129} Further, a request for extradition may provide a warning to the terrorist that his location is known,\textsuperscript{130} which would most likely result in his flight. Thus, as one commentator concluded, permitting invasion of other nations' territories in order to eliminate a terrorist leader is in fact consistent with the aims of international law: "A world in which [terrorists] refrain from threatening innocent human beings with destruction . . . is as important an objective of international law and as conducive to genuine international legal order as one in which states scrupulously respect each other's formal sovereignty."\textsuperscript{131}

The question remains whether such exceptions to violations of sovereign rights would allow an assassination. Under customary international law, assassination is understood as "the selected killing of an individual enemy by treacherous means."\textsuperscript{132} In this context treachery is "a breach of a duty of good faith toward the victim."\textsuperscript{133} However, the scope of this duty is unclear.\textsuperscript{134} One commentator has suggested that since international law requires states to observe the same protections of no execution, no torture, and due process when dealing with terrorists outside their borders,\textsuperscript{135} the covert assassination of terrorists by hit squads violates international human rights law.\textsuperscript{136} Others note that although assassination is generally illegal, in times of war, this action is permissible since the victim is a combatant.\textsuperscript{137} The historical justification for preventing assassinations was based on "the premise that making war was a proper activity of sovereigns

\textsuperscript{129} See id. at 76.
\textsuperscript{130} See Sofaer, supra note 20, at 106.
\textsuperscript{131} Coll, supra note 79, at 306.
\textsuperscript{132} Zengel, supra note 29, at 622.
\textsuperscript{133} Id.
\textsuperscript{134} See id.
\textsuperscript{135} See Rowles, supra note 72, at 312.
\textsuperscript{136} See id. at 313.
\textsuperscript{137} See Parks, supra note 34, at 4-5; Sofaer, supra note 20, at 119; The Permissibility of State-Sponsored Assassination, supra note 93, at 237. The term "combatants" embodies those who are actually involved in combat as well as those who provide support. See Anderson, supra note 60, at 302.
for which they ought not be required to sacrifice their personal safety." Since war is no longer perceived as a noble pursuit, this reason for a ban on assassination is no longer valid. Thus, assassination would be permissible despite the absence of a formal war, as in the situation between the United States and bin Laden. Further, this action may be desirable if assassination of a leader would result in fewer deaths and less damage.

The customary international law concept of self-defense also diverges from the U.N. Charter in its allowance of preemptive actions. The recognition of this right dates to 1625 when Hugo Grotius noted that self-defense is available both in response to and in anticipation of military attacks. Assassination is arguably an appropriate use of self-defense in light of the destructiveness of modern weaponry. However, the use of assassination as a measure of self-defense should be subject to some limitations. First, states must ensure that only persons who pose a threat are subject to assassination. Second, the use of assassination must comply with the Caroline Doctrine requirements of proportionality and necessity. Third, the state’s evidence must indicate beyond a reasonable doubt that a destructive attack against the state is planned or being planned. Finally, the state must determine that the assassination would prevent the attack and would result in less harm to civilians. If these guidelines are followed, assassination can be used as a law enforcement mechanism to prevent devastating attacks.

138 Zengel, supra note 29, at 621.
139 See, e.g., U.N. CHARTER art. 2.
140 See Zengel, supra note 29, at 638-39 (discussing the legality of an assassination of Saddam Hussein during the Persian Gulf War).
141 See The Permissibility of State-Sponsored Assassination, supra note 93, at 231 (citing 2 HUGO GROTIUS, THE LAW OF WAR AND PEACE 169-85 (Francis W. Kelsey, trans., Clarendon Press 1925) (1646)).
142 See id. at 240.
143 See id.
144 See id.
145 See id.
146 See id.
147 See id. Beres also provides a summary account of a permissible assassination
IV. Alternatives to Assassination

Assassination is not the only possible solution to the problem with bin Laden. The United States can opt to employ other forceful or non-forceful methods. However, one commentator observed that none of these options provides an amenable solution: “[F]orceful options may lead to escalation and non-forceful options . . . are equally ineffective . . . [because] it is simply difficult, if not impossible, for a state to make a law with terrorists who are private individuals.”

The United States, in its August 1998 bombing of bin Laden’s training camps in Afghanistan, employed the short-term deterrence strategy of “destruction of facilities and infrastructure used in the preparation of terrorist acts.” This strategy is legally justifiable under the U.N. Charter as a measure of self-defense. However, such measures provide protection only for the immediate future. Illustratively, despite the U.S. action, bin Laden still remains a threat.

Since bin Laden’s indictment for the U.S. embassy bombings in Kenya and Tanzania, the United States has employed a record number of FBI agents to track him. This action is acceptable under international law since sovereign immunity protection against kidnapping would not apply to a stateless leader such as

under customary international law carried out by an Israeli group against Sheik Abbas Musawi, the leader of the pro-Iranian Party of God in Lebanon. See id. at 242. However, the assassins did violate the discrimination requirement, allowing states to only kill those persons who pose a threat. See id. Not only was the target Musawi killed but also his family and bodyguards. See id. at 243-44.

Murphy, supra note 62, at 79.

See Richter, supra note 9, at A1.

Coll, supra note 79, at 299-300.

See id. at 300 (citing U.N. CHARTER art. 51). Despite its legality, this strategy does have disadvantages. Since terrorist activities are planned surreptitiously, “one cannot prove with absolute certainty that the particular group or facility that suffered the blow was going to be used against that state.” Id. Although states will be careful in selecting targets because of potential international censure for attacking innocent people, this possibility remains. See id. Further, a preemptive strike may be a violation of the sovereignty of the nation that, although it does not support the terrorist activity, is the location of the terrorist group activities.

See Neumeister, supra note 4, at 1A.
bin Laden. However, the agents face several potential problems. First, bin Laden’s vast resources will enable him to remain hidden. Moreover, there seems to be a lowered tolerance for covert activities across state borders; thus, operatives may be subject to local law despite their authorization from the U.S. government.

Additionally, the United States has employed the help of private citizens. The government has offered a $5 million reward for bin Laden’s capture so that he can be brought to the United States to face prosecution for the embassy bombings. However, this measure poses complications. To remove culpability from the U.S. government, U.S. officials would have to emphasize that diplomatic protection would not be extended to persons committing kidnappings overseas. The U.S. government would also have to exempt certain terrorists because of their presence in an allied country or other country with whom the United States has "a relationship of a sensitive nature.” Otherwise, relations between the United States and these countries would become

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155 See Reisman, supra note 90, at 422 (noting that this reaction resulted from international dissatisfaction with the U.S. Supreme Court decision in U.S. v. Alvarez-Machain, 504 U.S. 655 (1992), authorizing forcible extraditions).

156 See Neumeister, supra note 4, at 1A; see also Johnson, supra note 29, at 419 (noting that military law prohibits rewards on an enemy’s head or for his return “dead or alive”).

157 See Coll, supra note 79, at 306.

158 Id. at 306-07.
hostile. Thus, rewards would only be offered for the return of terrorists in countries with whom the United States has poor relations. However, this would result in the sanctioning and encouragement of vigilantism by the U.S. government. Setting this foreign policy precedent for other nations could result in similar acts being perpetrated against U.S. citizens or within U.S. borders.

If the efforts of the FBI agents and others fail to bring bin Laden to the United States for trial, a trial in his absence could still be held. However, such an action might violate due process under both national and international law. The U.N., in the Revised Draft Statute for an International Criminal Court, preserved the right of an accused to a "fair trial," which includes the right to be present throughout all of the proceedings. The European Convention for the Protection of Human Rights and Fundamental Freedoms also preserves the right to be present or to choose legal counsel to serve as one's representative. Thus, a trial in absentia without these protections might undermine guarantees of due process under the law.

Instead of focusing on bin Laden, the United States could expend its resources on strengthening the defenses of its facilities in other nations. However, the result could be that the terrorists would attack other targets. For example, if the United States strengthened protections of embassies in volatile areas, terrorists might attack embassies in other areas. Even if all embassies could be sufficiently guarded, terrorists would turn their attention to other U.S. government facilities. As one commentator

159 See id. at 307.
160 See Iraqi Crimes and International Law, supra note 153, at 352.
163 See Trainor, supra note 7, at A19.
164 See id.
165 See id.
observed, "The target does not matter, it is the shock value of destroying an American facility and killing Americans that counts with terrorists."

Use of intelligence agents to infiltrate bin Laden's group seems impossible. Unlike traditional criminal groups, terrorist organizations are comprised of religious or political extremists. Penetration of such groups requires skills that are beyond those of even the most experienced agents. Further, "committed terrorists are immune to bribes, blackmail, and coercion." U.S. officials claim that intelligence methods have resulted in disrupting some of bin Laden's operations. However, although these measures, including "arrests [of his associates], ... intercepted communications, satellite surveillance and financial detective work" have limited bin Laden's personnel, financial, and weapons resources, they do not have long-term effects. In fact, CIA Director George Tenet told the Senate: "[W]e are concerned that one or more of bin Laden's attacks could occur at any time."

Another possible solution is to place the onus on the governments of other countries to protect the United States against bin Laden. The responsibility for protecting U.S. property and officials in other countries falls on the host countries. However, despite the current plague of terrorist acts, which should prompt heightened security, host countries have been unable to fulfill this obligation, as evidenced by the African embassy bombings.

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166 Id.
167 See id.
168 See id.
169 Id.
171 Id.; see also Tim Weiner, bin Laden Now Hero for Islam, HOUS. CHRON., Feb. 21, 1999, at A31, available in 1999 WL 3975428 (quoting one counter-terrorism official as saying, "I don't think [bin Laden is] isolated, incommunicado or out of money").
172 Loeb, supra note 170, at A04.
173 See Trainor, supra note 7, at A19.
174 See id.
United States could also seek aid from the Afghani Taliban government. It is unlikely that this will be productive either. The U.S. government has withheld recognition of the Taliban as the official government of Afghanistan.\textsuperscript{175} Expectantly, these countries do not have an extradition treaty with the United States. Without such a treaty, Afghanistan has no duty to extradite bin Laden.\textsuperscript{176} Further, Afghanistan itself in a November 1998 Taliban Supreme Court hearing, exonerated bin Laden of all terrorist charges.\textsuperscript{177} Since the Taliban has provided protection for bin Laden,\textsuperscript{178} this proceeding is not conclusive; “there will inevitably be a suspicion of bias when a national court tries an international criminal.”\textsuperscript{179}

Nonforceful options are also fundamentally flawed in application to the terrorist situation. As discussed, negotiation with terrorists is not an option.\textsuperscript{180} Since bin Laden does not represent a country,\textsuperscript{181} economic sanctions are also inapplicable.\textsuperscript{182} Further, since there is no existing international criminal court\textsuperscript{183} and the ICJ only resolves problems between member countries, the


\textsuperscript{176} See Murphy, supra note 62, at 72-73; see also supra note 102 and accompanying text (discussing Afghanistan’s refusal to extradite bin Laden).

\textsuperscript{177} See Afghans Silence but Won’t Expel bin Laden, SUN-SENTINEL (Ft. Lauderdale), Feb. 13, 1999, at 32A, \textit{available in} 1999 WL 2470754.

\textsuperscript{178} See supra note 102 and accompanying text (discussing the Taliban’s refusal to extradite bin Laden and the Taliban’s view that he is a guest).

\textsuperscript{179} Murphy, supra note 62, at 78. Murphy added that “[t]he lack of ... agreement on a definition of terrorism makes it difficult, if not impossible, to obtain consistent, and therefore, deterrent judgments in extradition proceedings.” \textit{Id.} at 78-79. He suggested that these problems would be eliminated by the creation of an international court system. See \textit{id.} at 99. He noted that there would be considerable difficulty in establishing such a system because not only would nations have to cede some of their sovereign rights, but also they would have to agree on the applicable law. See \textit{id.} at 100, 103. However, since no such system is in place, this is not a viable option for the United States in dealing with bin Laden.

\textsuperscript{180} See supra notes 111-13 and accompanying text.

\textsuperscript{181} See Trainor, supra note 7, at A19.

\textsuperscript{182} See Murphy, supra note 62, at 72.

\textsuperscript{183} See \textit{id.} at 68 (noting that “[a]n international criminal court could provide consistent identification and punishment of international terrorism”); supra note 179 and accompanying text.
United States cannot bring international legal action against bin Laden.

V. Conclusion

It is unlikely that the threat of terrorism will abate because "[w]hile terrorism is viewed as a moral evil in the Western world, others see it as a legitimate strategic tool—a proper means to a desired end." The surge of terrorism as a method of political warfare requires reanalysis of acceptable defense measures. Individuals or groups of terrorists provide an even greater dilemma. Unlike state-sponsored terrorists, traditional retaliatory measures such as sanctions, international censure, and invasion are not applicable. However, these terrorists do not deserve special treatment. Thus, a military attack against a terrorist threat should not be viewed any differently from an attack against conventional forces in response to a threat. Since bin Laden is an individual, such an attack is likely to result in his assassination.

Assassination of terrorist leaders is arguably permissible under current national law. The history and application of Executive Order 12,333 indicates its ban was limited to assassinations of heads of state or other assassinations carried out without express authorization of the President. Despite this history, the prohibition on assassinations has been interpreted overbroadly; American citizens seem to disapprove of governmental killings, especially of specifically targeted people, and, as a result, officials want to avoid controversy. The limitation on the availability of this strategy is damaging to national security planning.

The legality of assassination under international law is less evident. The purpose of the U.N. Charter is to end war;

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185 See Parks, supra note 34, at 7.
186 See supra notes 34-70 and accompanying text.
187 See supra notes 28-40 and accompanying text.
188 See Anderson, supra note 60, at 294-95.
189 See id. at 295.
190 See supra notes 71-147 and accompanying text.
however, a right of self-defense is still recognized.\textsuperscript{191} The limits of this right are unclear, although acts of reprisal and preemption are explicitly unlawful.\textsuperscript{192} Arguably, the provisions of the U.N. Charter do not govern situations involving non-state sponsored terrorism. Non-military measures are inappropriate since economic sanctions cannot be carried out against individuals and negotiations with terrorists are not desirable.\textsuperscript{193} Further, the U.N. regulates behavior between states. Terrorists such as bin Laden are not states; thus, they may not be members of the U.N. even if they wish to be. This means they are not subject to the provisions of the U.N. Charter. Thus, it seems unfair and beyond the aims of the Charter to require states to limit the scope of their responses to terrorist activities to permissible acts as defined under the Charter.

Although assassination is not generally accepted under customary international law, it may be permissible as an act of self-defense, carried out pursuant to the Caroline Doctrine.\textsuperscript{194} However, the limitations and proper applications of this action are unclear.

To remedy this confusion in formal and customary international law, one commentator has suggested that officials encourage the development of an international nonmilitary system to work for the elimination of terrorism.\textsuperscript{195} However, until such mechanisms are effectively operational, in "the existing decentralized international system of sovereign nation-states lack[ing] effective institutions for impartially adjudicating claims and punishing unjust or unlawful conduct[,]... states have no choice, but to act as 'judges and avengers.'"\textsuperscript{196}

It is argued that despite a clear prohibition of assassination by Executive Order 12,333, assassination should not, in the future, be considered a viable option for the United States.\textsuperscript{197} Not only does

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\textsuperscript{191} See supra notes 71-82 and accompanying text.
\textsuperscript{192} See supra notes 74, 86-87 and accompanying text.
\textsuperscript{193} See supra notes 111-13 and accompanying text.
\textsuperscript{194} See supra notes 114-47 and accompanying text.
\textsuperscript{195} See Coll, supra note 79, at 304.
\textsuperscript{196} Id. at 300.
\textsuperscript{197} See Sofaer, supra note 20, at 116 (noting that "[p]rohibiting 'assassination' is legally, militarily, and morally sound").
such an act violate the United States’ moral standing, but also puts American leaders at risk of similar acts.\textsuperscript{198} The United States should not resort to terrorist acts itself.\textsuperscript{199} Moreover, a failed assassination attempt could be embarrassing for the United States on the international stage.\textsuperscript{200} Such action by the United States could also lead to retaliation.\textsuperscript{201} However, “[a] limitation on assassination undoubtedly disadvantages the United States in a contest with States or groups that routinely resort to murder.”\textsuperscript{202} Further, if terrorist acts continue, the attacks will become even deadlier since “[t]he bombs are getting smaller, more powerful, and more numerous.”\textsuperscript{203} Not only is a terrorist action a corporal threat, but it is also a psychological threat to the United States and its international stature.\textsuperscript{204} As one commentator concluded,

[T]oday’s law attempts first to prevent the outbreak of war and then, should these efforts fail, attempts to limit the resulting damage and bring the fighting to as rapid an end as possible. In this context, it makes little sense to preserve a special and unique provision of law that protects the lives of single individuals, regardless of their prominence, at the expense of the lives and well-being of hundreds or thousands of others.\textsuperscript{205}

Since war cannot be declared on the person of Osama bin Laden or his group, his elimination is the only way to be certain that innocent people are not harmed by his actions.\textsuperscript{206} Further, if

\begin{itemize}
\item\textsuperscript{198} See id. at 117.
\item\textsuperscript{199} See Johnson, supra note 29, at 434. Johnson characterizes assassination as “a brutal, cowardly, and inhuman act.” Id.
\item\textsuperscript{200} See Zengel, supra note 29, at 638.
\item\textsuperscript{201} Such a reaction may be expected considering the current threat of retaliation by a Pakistani Muslim group merely for bin Laden’s arrest. See Militant Group Threatens to Retaliate if U.S. Arrests bin Laden, DOW JONES INT’L NEWS, Nov. 5, 1998.
\item\textsuperscript{202} Sofaer, supra note 20, at 117.
\item\textsuperscript{203} Id. at 122.
\item\textsuperscript{204} See Trainor, supra note 7, at A19.
\item\textsuperscript{205} Zengel, supra note 29, at 643-44; see also Anderson, supra note 60, at 295 (distinguishing between assassination, “the intentional and unprivileged killing of a public figure for political, ideological or religious purposes,” and lawful homicide, “the taking of the life of one wrongdoer in self-defense to spare the lives of thousands”).
\item\textsuperscript{206} See Iraqi Crimes and International Law, supra note 153, at 356 (noting that in certain circumstances human rights are more important than a ban on transnational
the United States is willing to take such drastic action against bin Laden, other groups will be wary of similar retaliation should they choose to attack Americans. Thus, assassination must be an accepted solution for the terrorist plague.

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assassination). But see Johnson, supra note 29, at 434 (commenting that “[n]oble ends cannot justify the brutality of assassination”).