

2005

## Were The Atrocities Committed By Saddam Hussein Against The Citizens Of Al-Dujail, In Response To A Failed Assassination Attempt In 1982, Justified As A Lawful Exercise Of Self Defense Under International Law?

Eric Reeves

Follow this and additional works at: [https://scholarlycommons.law.case.edu/war\\_crimes\\_memos](https://scholarlycommons.law.case.edu/war_crimes_memos)

 Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Reeves, Eric, "Were The Atrocities Committed By Saddam Hussein Against The Citizens Of Al-Dujail, In Response To A Failed Assassination Attempt In 1982, Justified As A Lawful Exercise Of Self Defense Under International Law?" (2005). *War Crimes Memoranda*. 171.

[https://scholarlycommons.law.case.edu/war\\_crimes\\_memos/171](https://scholarlycommons.law.case.edu/war_crimes_memos/171)

This Memo is brought to you for free and open access by the War Crimes at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in War Crimes Memoranda by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

---

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW  
INTERNATIONAL WAR CRIMES RESEARCH LAB

---

MEMORANDUM FOR THE  
IRAQI SPECIAL TRIBUNAL

---

ISSUE #5:

WERE THE ATROCITIES COMMITTED BY SADDAM HUSSEIN AGAINST THE  
CITIZENS OF AL-DUJAIL, IN RESPONSE TO A FAILED ASSASSINATION ATTEMPT IN  
1982, JUSTIFIED AS A LAWFUL EXERCISE OF SELF DEFENSE UNDER  
INTERNATIONAL LAW?

---

Prepared by Eric Reeves  
Fall 2005

## TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	vi
<b>I. <u>INTRODUCTION AND SUMMARY OF CONCLUSIONS</u>.....</b>	<b>1</b>
<b>A. Issues.....</b>	<b>1</b>
<b>B. Summary of Conclusions</b>	
<b>1. Self-Defense is an Inherent Right and Valid Defense to “Armed Attacks” Under Codified and Customary International Law.....</b>	<b>2</b>
<b>2. Customary International Law Supports the Use of Self-Defense Against Non-State Actors.....</b>	<b>2</b>
<b>3. The Assassination Attempt by the Alleged Terrorists in Al-Dujail May Not be Considered an “Armed Attack” as Required under Article 51 of the U.N. Charter.....</b>	<b>3</b>
<b>4. Saddam Hussein’s Actions Against the Town of Al-Dujail Will Probably Not Satisfy the Requirement of Necessity or Proportionality.....</b>	<b>5</b>
<b>5. The Inability to Distinguish Terrorists or Insurgents from Innocent Civilians is Not Sufficient to Justify Murder or Crimes Against Humanity as An Act of Self-Defense.....</b>	<b>6</b>
<b>6. Armed Reprisal or Acts of Revenge Against Civilians Are Prohibited Under International Law.....</b>	<b>7</b>
<b>7. Saddam Hussein Will Not Successfully Avoid Liability for His Crimes Under Tu Quoque Defense.....</b>	<b>8</b>
<b>II. <u>FACTUAL BACKGROUND</u></b>	
<b>A. Investigation Concludes Regarding Massacre of Al-Dujail.....</b>	<b>9</b>
<b>B. Assassination Attempt and Destruction of Al-Dujail.....</b>	<b>10</b>
<b>C. Saddam Hussein will Likely Argue that Crimes Committed in Al-Dujail Were Justified as Acts of Self-Defense.....</b>	<b>13</b>

**III. HISTORICAL USE OF SELF-DEFENSE AS JUSTIFICATION FOR USING ARMED FORCE AGAINST TERRORISTS.**

**A. U.S. Justifies Bombing of Libya in 1986 as Lawful Exercise of Self-Defense Because Libya Sponsored Terrorist Attack on United States.....14**

**B. U.S. Argues Self-Defense as Justification for Launching Cruise Missiles into Iraq in 1993 After Assassination Attempt on Former President Bush.....16**

**C. U.S. Justifies Invasion of Afghanistan as Act of Self-Defense in Response to Terrorist Attacks of 9/11.....18**

**IV. LEGAL ANALYSIS**

**A. Introduction and Roadmap to Legal Analysis Section.....20**

**B. Self-Defense is an Inherent Right and Valid Defense to “Armed Attacks” Under Codified and Customary International Law.....22**

**1. Foundation for Self-Defense Doctrine in Customary International Law—Caroline Incident.....22**

**2. United Nations Supports Self-Defense In Article 51 of U.N. Charter...23**

**3. The Statute of the International Criminal Court Provides Grounds for Excluding Criminal Responsibility.....25**

**C. International Law Supports The Use of Self-Defense against Non-State Actors.26**

**D. Requirements for Lawful Exercise of Self-Defense Under Article 51 of U.N. Charter.....28**

**1. Armed Attack on State.....28**

**a) The Assassination Attempt on Saddam Hussein May Not Meet the Threshold Level of Intensity to be Considered an “Armed Attack.”29**

**(1) The Terrorist Attacks of 9/11 Meet the Requisite Threshold Level of Intensity Needed for Classification as an “Armed Attack,” but the Attack on Saddam Hussein Might not Qualify as Such under International Law.....29**

**(2) Saddam Will Probably not be Able to Aggregate Past Terrorist Attacks Against the Iraqi Government to Reach the Threshold Level of Intensity Required Under International Law for a Finding of an Armed Attack.....31**

b) An Attack May be Deemed an Armed Attack if Performed by a “Regular Armed Force.” .....	32
(1) The Assassination Attempt on Saddam Hussein May not be Deemed an “Armed Attack” under International Law Because the Attackers Are Probably Not Considered a “Regular Armed Force.” .....	32
(2) Though the Assassination Attempt Against George Bush Sr. Was Deemed by the International Community to be an “Armed Attack,” the Attack Against Saddam Hussein is Distinguishable Because it was Probably Not Committed by an “Armed Regular Force.” .....	34
c) Saddam Hussein Has not Provided the Conclusive Evidence Linking the Citizens of Al-Dujail to the Attack.....	35
d) Providing Logistical Support, Shelter, Weapons, or other Support is Insufficient for Finding of “Armed Attack” under International Law.....	37
2. Nations Exercising Lawful Right of Self-Defense must Notify the U.N. Security Council.....	37
E. Customary International Law Requirements of “Necessity” and “Proportionality.” .....	38
1. The Lawful Exercise of Self-Defense Must be Deemed “Necessary” under the Circumstances.....	39
a) The Assault on Al-Dujail was Not Necessary Since Saddam Hussein Had Alternative Means at his Disposal to Handle the Attackers.....	39
b) Unlike the United States’ Response after 9/11, Saddam Hussein’s Actions Against Al-Dujail Will Probably Not be Deemed Necessary Under International Law.....	40
2. Any Defensive Actions taken Must be “Proportionate” to the Initial “Armed Attack.” .....	41
a) Saddam Hussein’s Retaliation Against the People of Al-Dujail will Probably Not Satisfy the Requirement of Proportionality.....	43
b) Even if Citizens are Classified as Terrorists, Saddam Hussein’s Actions were still Not Proportional to the Original Attack.....	44

**F. Reprisal or Acts of Revenge Prohibited Against Civilians Under International Law.....45**

**G. Inability to Distinguish Terrorists from Innocent Civilians not Sufficient to Justify Murder or Crimes Against Humanity as an Act of Self-Defense.....46**

**H. Saddam Hussein Will Not Successfully Avoid Liability for His Crimes Under Tu Quoque Defense.....49**

**V. CONCLUSION**

## Index of Authorities

### Legislation

1. Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat 224 (2001).
2. GA Res. 2625, U.N. GAOR, 6<sup>th</sup> Comm., 25<sup>th</sup> Sess., Annex, at 122, U.N. Doc. A/8082 (1970).
3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 4, 16 I.L.M. 1391.
4. Report of the Secretary-General's High-level Panel on threats, Challenges and Change; A More Secure world: Our Shared Responsibility, p. 63, pp 188-191 (2004).
5. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF, 183/9 (1998).
6. U.N. A/RES/41/38 (1986).
7. U.N. Charter (1945).
8. Letter from the Permanent U.N. Representative of the United States to the President of the U.N. Security Council (Oct. 7, 2001), U.N. Doc. S/2001/946, at <http://www.un.int/usa/s-2001-946.htm>
9. U.N. SCOR, 2615th mtg., U.N. Doc. S/PV.2615 (prov. ed. 1985).
10. U.N. SCOR, 41st Sess., 2674th mtg., U.N. Doc. S/PV.2674 (1986).
11. U.N. SCOR, 41st Sess., 2675th mtg., U.N. Doc. S/PV .2675 (1986).
12. U.N. SCOR, 41st Sess., 2676th mtg., U.N. Doc. S/PV .2676 (1986).
13. U.N. SCOR, 41st Sess., 2680th mtg., U.N. Doc. S/PV .2680 (1986).
14. U.N. SCOR, 48th Sess., 3245th mtg., U.N. Doc. S/PV.3245 (1993).
15. U.N. 4370th mtg., S/RES/1368 (2001).
16. U.N. 4385th mtg., S/RES/1373 (2001).
17. Laws of Iraqi Special Tribunal, PART TWO: Crimes Against Humanity, art. 12, available at <http://law.case.edu/saddamtrial/content.asp?id=2>

## Cases

18. *Hadzihasanovic et al.*, The Prosecutor of the Tribunal, Transcript (IT-01-47), (ICTY Nov. 28, 2003); 2003 WL 23697684.
19. *Iran v. U.S.*, 2003 WL 23335678 (I.C.J. 2003).
20. *Nicaragua v. U.S.*, 1986 I.C.J. 14 (I.C.J. 1986).
21. *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment (ICTY Trial Chamb. Feb. 26, 2001).
22. *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judicial Supplement 2, (ICTY Trial Chamb. February 17, 1999).
23. *Simic et al.*, The Prosecutor of the Tribunal, Transcript, (IT-95-9), (ICTY Nov. 7, 2002); 2002 WL 32598495.
24. *Prosecutor v. Stakic*, Case No. IT-97-24-T, Judgment (ICTY Trial Chamb. July 31, 2003).
25. *United States v. Calley*, 46 C.M.R. 1131 (U.S. Army Ct. Mil. Rev. 1973).

## Treatises and Books

26. JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* (2004).
27. 1 RAINER HOFMANN, JULIANE KOKOTT, KARIN OELLERS-FRAHM, *WORLD COURT DIGEST, 1986-1990* (1993).
28. KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* (2001).
29. 2 JOHN BASSETT MOORE, *DIGEST OF INTERNATIONAL LAW* (1906).
30. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* (1995).
31. 2 RUDIGER WOLFRUM, CHRISTIANE PHILLIP, *UNITED NATIONS: LAW, POLICIES AND PRACTICE* (1995).

## Journals and Law Review Articles

32. Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559 (Spring 2002).



33. Frank A. Biggio, *Neutralizing The Threat: Reconsidering Existing Doctrines In The Emerging War on Terrorism*, 34 CASE W. RES. J. INT'L L. 1 (Fall 2002).
34. D.W. Bowett, *Reprisals involving Recourse to Armed Force*, 66 AM.J.INT. L. 1 (1972).
35. Thomas M. Franck, *Preemption, Prevention and Anticipatory Self-Defense: New Law Regarding Recourse to Force?*, 27 HASTINGS INT'L & COMP. L. REV. 425 (Spring 2004).
36. Gregory Francis Intoccia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177 (Spring 1987).
37. Major Joshua E. Kastenberg, *The Use of Conventional International Law In Combating Terrorism: A Maginot Line For Modern Civilization Employing The Principles of Anticipatory Self-Defense & Preemption*, 55 A.F. L. REV. 87 (2004).
38. Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41 (Winter 2002).
39. Ferrando Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer*, 1 J. INT'L CRIM. JUST. 26 (April 2003).
40. Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41 (Winter 2002).
41. Donald Nungesser, *United States' Use of the Doctrine of Anticipatory Self-Defense in Iraqi Conflicts*, 16 PACE INT'L L. REV. 193 (Spring 2004).
42. Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889 (Summer 2002).
43. John J. Paust, *Use of Armed Force Against terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533 (Winter 2002).
44. Charles Pierson, *Preemptive Self-Defense In An Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DENV. J. INT'L L. & POL'Y 150 (Winter 2004).
45. Christopher Clarke Posteraro, *Intervention in Iraq: Towards a Doctrine of Anticipatory Counter-Terrorism, Counter-Proliferation Intervention*, 15 FLA. J. INT'L L. 151 (2002).
46. Steven R. Ratner, *Jus Ad Bellum and Jus In Bello After September 11*, 96 AM. J. INT'L L. 905 (October 2002).
47. Brad R. Roth, *Terrorism and the Inherent Right to Self-Defense*, 10 MSU-DCL J. INT'L L. 542 (Fall 2001).
48. Leo Van den hole, *Anticipatory Self-Defence under International Law*, 19 AM. U. INT'L L. REV. 69 (2003).

49. Wallace F Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the U.S. Raid on Libya April 14, 1986*, 37 NAVAL L. REV. 49 (1988).
50. Ruth Wedgwood, *Future Implication of the Iraq Conflict: The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576 (July 2003).
51. Ruth Wedgwood, *NATO's Kosovo Intervention: NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828 (1999).

### **Miscellaneous/Newspapers/Websites**

52. AP News, *Survivors tell story of early attempt on Saddam's life\_and punishment it brought*, at <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2003/05/27/international0134EDT0414.DTL>
53. United States Institute of Peace, *Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice*, Special Report 122 (June 2004).
54. John F. Burns, *Bombings and Shootings Leave 30 Dead in Baghdad*, N.Y. TIMES, Section: A, June 20, 2005, 2005 WLNR 9731037 (2005).
55. John F. Burns, *Iraqi Tribunal Details Plan to Prosecute Saddam Hussein*, N.Y. TIMES, June 5, 2005.
56. John F. Burns, *The Struggle for IRAQ: THE RECKONING; A Town That Bled Under Hussein Hails His Trial*, N.Y. TIMES, Section: 1, July 3, 2005, 2005 WLNR 10446389 (2005).
57. John F. Burns, *The Struggle for IRAQ: Tribunal; First Case Against Hussein, Involving Killings in 1982, Is Sent to a Trial Court*, N.Y. TIMES, Section: A, July 22, 2005, 2005 WLNR 11486440 (2005).
58. Frederic L. Kirgis, *International Law and the Report of the High-Level U.N. Panel on Threats, Challenges and Change*, ASIL Insight (December 2004), at <http://www.asil.org/insights/2004/12/insight041216.htm>
59. Iraq Special Tribunal Website, *Investigation into Al-Dujail Crimes Concludes*, at <http://www.iraqspecialtribunal.org/en/press/releasaes/0014a.htm>
60. Iraq Special Tribunal Website, *Sharing of Evidence and Notification of Trial Date*, at <http://www.iraqspecialtribunal.org/en/press/releases/0024e.htm>
61. IRIN News.ORG, *IRAQ: Focus on forthcoming trial of Saddam Hussein*, at [http://www.irinnews.org/report.asp?ReportID=47858&SelectRegion=Middle\\_East&SelectCountry=IRAQ](http://www.irinnews.org/report.asp?ReportID=47858&SelectRegion=Middle_East&SelectCountry=IRAQ)

62. James M. Markham, *Gorbachev Says Libya Raid May Hurt U.S.-Soviet Ties*, N.Y. TIMES, Sect. 1, Apr. 19, 1986, 1986 WLNR 809540 (1986).
63. Mona Mahmoud, USA Today, Oct. 13, 2005, 2005 WLNR 16584572 (2005).
64. *Raid on Baghdad: Iraq Reports Many Killed*, N.Y. Times, Sect., 1, June 27, 1993, 1993 WLNR 3397390 (1993).
65. *Raid on Baghdad: Pentagon Statements on the Missile Attack*, N.Y. TIMES, Sect., 1, June 27, 1993, 1993 WLNR 3397382 (1993).
66. Michael P. Scharf, Fox News special: *Big Story Weekend, Saddam Hussein On Trial*, Oct. 1, 2005.
67. Michael P. Scharf, *Grotian Moment: The Saddam Hussein Trial Blog; Issue #13: Does Saddam Hussein Have a Viable Defense Based on the Necessity to Combat Insurgents and Terrorists?*, at <http://law.case.edu/grotian-moment-blog/>.
68. Edward Schumacher, *Tension over Libya: A Day of Bitterness*, N.Y. TIMES, Sect. 1, Apr. 19, 1986, 1986 WLNR 809624 (1996).
69. Craig S. Smith, *The Struggle for IRAQ: The Insurgency*, N.Y. TIMES, Section: A, August 19, 2005, 2005 WLNR 13054104 (2005).
70. Patrick E. Tyler, *A Nation Challenged: The Attack; U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps*, N.Y. TIMES, Sect., A, Oct. 8, 2001, 2001 WLNR 3365194 (2001).
71. Bernard Weinraub, *U.S. Jets Hit "Terrorist Centers" In Libya*, N.Y. TIMES, Sect. A, Apr. 15, 1986, 1986 WLNR 827539 (1986).
72. Wikipedia, *Dujail*, at <http://en.wikipedia.org/wiki/Dujail>
73. Wikipedia, *International Criminal Court*, at [http://en.wikipedia.org/wiki/International\\_Criminal\\_Court](http://en.wikipedia.org/wiki/International_Criminal_Court)
74. Wikipedia, *Islamic Dawa Party*, at [http://en.wikipedia.org/wiki/Islamic\\_Dawa\\_Party](http://en.wikipedia.org/wiki/Islamic_Dawa_Party)
75. Edward Wong, *Charges Presented Against 5 Former Allies of Saddam Hussein*, N.Y. TIMES, Section: A, March 1, 2005, 2005 WLNR 3081387 (2005).

## **I. INTRODUCTION AND SUMMARY OF CONCLUSIONS**

### **A. Issue<sup>1</sup>**

Saddam Hussein has been charged with murder and crimes against humanity for crimes he committed against the people of Al-Dujail in response to an assassination attempt against him in 1982. Saddam escaped unharmed, but unleashed his vengeance on Al-Dujail. Several individuals were summarily executed immediately following the incident. Fifteen hundred others were subsequently arrested and taken to prison, where many were tortured and remained for four years. Approximately 143 of those arrested were executed in show trials. Saddam also ordered the destruction of the town's main source of income, the palm groves and orchards.

Saddam Hussein is likely to argue that his actions against the citizens of Al-Dujail are no different than those taken by the United States in Afghanistan after 9/11. He believes that the people of Al-Dujail are terrorists and that he was merely protecting the country against an insurgency. In this view, his actions were nothing more than self-defense and were necessary to prevent destabilization of the Iraqi government. This memorandum will address the historical use of self-defense as justification for retaliation against terrorists, its effectiveness, and whether it is a legitimate defense to the heinous crimes committed in Al-Dujail by the former dictator.

---

<sup>1</sup>Issue as presented: Saddam Hussein has been charged with destroying the town of Al-Dujail in response to an assassination attempt against him. The defense is likely to equate Hussein's actions to those of the United States in Afghanistan in response to the attacks of 9/11, and to those of the United States and Iraqi forces in Iraq in response to the current insurgency. This is similar to the strategy Slobodan Milosevic has employed before the ICTY with respect to charges that he ordered the ethnic cleansing of the Kosovar Albanians in Kosovo, who he claimed were terrorists. Provide an analysis of the legitimacy of this defense strategy.

## **B. Summary of Conclusions**

### **1. The “Self-Defense” Defense is a Valid Defense Recognized by the International Community.**

Self-defense is recognized by the international community as an “inherent right” and is a valid justification for an armed response against an aggressor. The right has been recognized in modern customary international law since 1837 when the defense was argued by Great Britain after its troops attacked an American steamship suspected of harboring and assisting Canadian insurgents (hereinafter, the “*Caroline* incident”).<sup>2</sup> The United Nations also recognizes this “inherent” and long-established right under customary international law in Article 51 of the U.N. Charter, if “an armed attack has occurred.”<sup>3</sup> The International Criminal Court<sup>4</sup> has even codified the validity of the defense in its statutes. Self-defense is a valid and recognized defense under international law and Saddam Hussein should be allowed to argue the defense in response to the charges that have been brought against him.

### **2. International Law Supports The Use of Self-Defense against Non-State Actors.**

International law does not restrict the application of self-defense only to conflicts that arise between two separate nations or states. A state or government may also defend itself against an “armed attack” by insurgents or terrorists that are non-state actors. The first example in recent history of a government attacking a non-state actor was seen in the *Caroline* incident where the British attacked an American ship that had been assisting Canadian insurgents who

---

<sup>2</sup> For a full accounting of the *Caroline* incident, see 2 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW, § 217, 409-414 (1906) [Reproduced in the accompanying notebook at Tab 29].

<sup>3</sup> U.N. Charter, Art. 51 (1945) [Reproduced in the accompanying notebook at Tab 7].

<sup>4</sup> Self-defense is allowed for defendants appearing before the International Criminal Court, see Rome Statute of the International Criminal Court, U.N. Doc. A/CONF, 183/9, art. 31(1)(c) (1998) [Reproduced in the accompanying notebook at Tab 5].

opposed the crown.<sup>5</sup> Since that time, it has generally been seen as acceptable for a nation to defend itself against a non-state actor so long as the appropriate steps have been taken.

The U.N. Charter does not prevent a nation from engaging in self-defense against a non-state actor. Though the U.N. Charter was created to prevent war and armed conflict between nations, nothing in the Charter precludes its application to armed conflicts between a state and citizens of that state. Article 51 provides for individual self-defense when an armed attack has occurred. The same Article, however, is silent on the source of the armed attack. The fact that Article 51 has made no modifications to previous international law on the subject supports the proposition that a state may respond to attacks from wherever they may originate. Saddam Hussein was not prohibited from defending himself or his government from an armed attack by insurgents that were non-state actors.

### **3. The Assassination Attempt by the Alleged Terrorists in Al-Dujail May Not be Considered an “Armed Attack” as Required under Article 51 of the U.N. Charter.**

Any armed response taken by a state in reaction to hostile action by a third party will be deemed illegal if the third party action does not rise to the level of an “armed attack” under customary international law. Not all attacks on a state or nation rise to the level of “armed attack” as required by the U.N. Charter. The International Court of Justice (“ICJ”) in *Nicaragua v. U.S.* stated that it is necessary to distinguish “the gravest forms of the use of force (those constituting an armed attack) from other less grave forms.”<sup>6</sup> Governments and experts disagree as to what forms of hostile action will rise to the threshold of intensity that justifies a nation’s use

---

<sup>5</sup> Moore, *supra* note 2, at 409-414 [Reproduced in the accompanying notebook at Tab 29].

<sup>6</sup> *Nicaragua v. U.S.*, 1986 I.C.J. 14, 101, para. 191, (I.C.J. 1986) [Reproduced in the accompanying notebook at Tab 20].

of self-defense. Though the international community has infrequently validated a nation's exercise of self-defense, it is generally agreed that the attacks of 9/11 are considered an "armed attack." The attack on Saddam Hussein, in contrast, probably does not rise to the required level of intensity to be deemed an "armed attack."

The ICJ provided some additional insight on the issue in *Nicaragua* where it held that an "armed attack" occurs when a regular armed force crosses an international border, or when a state sends an armed band to carry out acts of armed force against another state.<sup>7</sup> These actions must amount to an actual attack by regular forces. Those responsible for the assassination attempt against Saddam Hussein could hardly be considered a regular force in the traditional sense, since they more closely resembled a makeshift group of thugs or gangsters with assault rifles. The attack on Saddam Hussein would therefore probably not be considered an "armed attack" under international law.

Even if the assassination attempt were deemed to be an "armed attack" under international law, Saddam Hussein has not provided conclusive evidence linking the citizens of Al-Dujail to the attack, and providing assistance to those responsible for the attack would not rise to the level of attack justifying the counter-defense undertaken by Saddam Hussein. The ICJ has refused to validate a state's exercise of self-defense without first proving that the party against whom the counter-attack is launched is to blame for the original "armed attack."<sup>8</sup> Saddam Hussein has provided no evidence linking the attack to the citizens he retaliated against. Even if the townspeople provided support to Saddam's attackers, the ICJ in *Nicaragua* held that providing weapons or logistical support to rebels or insurgents does not amount to an armed

---

<sup>7</sup> *Id.* at 103, quoting from the U.N Definition of Aggression.

<sup>8</sup> *Iran v. U.S.*, 2003 WL 23335678, p. 21, para. 51 (I.C.J. 2003) [Reproduced in the accompanying notebook at Tab 19].

attack by regular forces.<sup>9</sup> Any logistical support, shelter, food, or even weapons that the citizens of Al-Dujail may have provided to the alleged terrorists are equivalent to criminal acts at best and do not rise to the level of an armed attack that justifies defensive actions under international law. Saddam Hussein's actions against the people of Al-Dujail were unlawful because any support they may have provided to the alleged insurgents is not considered an armed attack under international law.

#### **4. Saddam Hussein's Actions Against the Town of Al-Dujail Will Probably Not Satisfy the Customary International Law Requirement of Necessity and Proportionality.**

To avoid violation of customary international law, Saddam Hussein's counter-measures against the town of Al-Dujail must be deemed necessary, instant, and overwhelming, leaving no choice of means and no moment for deliberation.<sup>10</sup> Though an "armed attack" creates a strong presumption of necessity, there must exist no other practical alternative to a counter-force. In addition to the customary international law precedent, these principles are also embodied in the U.N. Charter which requires a country to explore peaceful resolutions to a threat before relying on the use of military force. Just as the U.S. would not negotiate with terrorists, it is also unreasonable to require Saddam Hussein to negotiate, reason, or seek other peaceful resolutions with his attackers. However, the annihilation of an entire town, in these circumstances, does not approach the prerequisite of "necessity" under international law. The actions undertaken by the alleged terrorists "necessitated" a response by the Iraqi government appropriate for dealing with criminals, such as arresting those responsible and holding a fair and unbiased trial. The

---

<sup>9</sup> *Nicaragua*, 1986 I.C.J. at 102-105 [Reproduced in the accompanying notebook at Tab 20].

<sup>10</sup> Moore, *supra* note 2, at 409-414 [Reproduced in the accompanying notebook at Tab 29].



argument that the large counter-assault and massacre at Al-Dujail was a necessary response does not muster credibility.

Under customary international law, any defensive measures undertaken by the harmed nation must be proportionate to the seriousness and scope of the initial armed attack.<sup>11</sup> Admittedly, it is difficult to dispute that an assassination attempt against a president of a nation is not serious. A state's use of force, however, must be proportional to the scope of the original armed attack that occurred. The would-be assassins who attacked Saddam Hussein and his convoy only killed a few of Saddam's bodyguards and damaged government property.<sup>12</sup> Whereas those responsible should indeed have been arrested and imprisoned, Saddam went far beyond what is acceptable under international standards. In retaliation for the attempted assassination, Saddam Hussein summarily executed several men, arrested and tortured hundreds of Al-Dujail's citizens, executed 143 young men in show trials,<sup>13</sup> razed 250,000 acres of palm groves,<sup>14</sup> and destroyed the homes of those held responsible. The seriousness of the attempted assassination of Saddam Hussein cannot justify his disproportionate response which resulted in the obliteration of a whole community.

---

<sup>11</sup> 2 RUDIGER WOLFRUM, CHRISTIANE PHILLIP, UNITED NATIONS: LAW, POLICIES AND PRACTICE, 49-50 (1995) [Reproduced in the accompanying notebook at Tab 31].

<sup>12</sup> AP, *Survivors tell story of early attempt on Saddam's life\_\_and the punishment it brought*, at <http://www.sfgate.com/cgi-bin/article.cgi?f=/news/archive/2003/05/27/international0134EDT0414.DTL> [hereinafter *Survivors*]. [Reproduced in the accompanying notebook at Tab 52].

<sup>13</sup> *Id.* Some of the evidence uncovered just days after the fall of Saddam's regime was recovered in the ransacked intelligence headquarters in the capital.

<sup>14</sup> John F. Burns, *The Struggle for IRAQ: THE RECKONING; A Town That Bled Under Hussein Hails His Trial*, N.Y. TIMES, July 3, 2005, at Section: 1. 2005 WLNR 10446389 (2005) [hereinafter *The Reckoning*] [Reproduced in the accompanying notebook at Tab 56].

## **5. Armed Reprisal or Acts of Revenge are Prohibited Against Civilians Under International Law.**

While self-defense is recognized in customary international law as a lawful justification for the use of force, Saddam Hussein's retaliatory acts against the town of Al-Dujail and its citizens will probably be deemed a reprisal or act of revenge. Reprisals against civilians and civilian targets are especially egregious and constitute a grave breach of international humanitarian law.<sup>15</sup> A clearly excessive amount of counterforce can be interpreted as a blatant reprisal disguised as self-defense.<sup>16</sup> Saddam's attack on the village of Al-Dujail was a reprisal or act of vengeance. Rather than simply arrest the perpetrators, Saddam decided to punish the citizens of Al-Dujail by razing the palm groves and destroying many homes and businesses. Many villagers were also transported to Saddam's gulags and beaten or tortured. Saddam's actions were clearly meant to be punishment for the attempted assassination. Simply claiming that a retaliatory act is an act of self-defense may be insufficient to disguise what was really an unlawful reprisal.

## **6. The Inability to Distinguish Terrorists or Insurgents from Innocent Civilians is Not Sufficient to Justify Murder or Crimes Against Humanity as An Act of Self-Defense.**

The inability to distinguish terrorists or insurgents from innocent civilians is not a valid argument justifying murder or crimes against humanity under customary international law. Under Protocol I of the Geneva Conventions, parties to an armed conflict are required to distinguish between the civilian population and combatants and may direct their operations only

---

<sup>15</sup> GA Res. 2625, U.N. GAOR, 6<sup>th</sup> Comm., 25th Sess., Annex, U.N. Doc. A/8082 [Reproduced in the accompanying notebook at Tab 2].

<sup>16</sup> Wolfrum, *supra* note 11, at 1168 [Reproduced in the accompanying notebook at Tab 31].

against military objectives.<sup>17</sup> Whenever it is uncertain whether a person is a civilian or a combatant, that person is considered to be a civilian under international law.<sup>18</sup> Notwithstanding that Saddam was unable to distinguish the Dawa terrorists from civilians, it was unlawful to launch an attack against the citizens of Al-Dujail because of their civilian status. It is also contrary to the laws of war to kill civilians unless they are armed and jeopardizing the safety of troops.<sup>19</sup> No evidence indicates that those who were summarily executed were armed or resisted in any manner which would justify Saddam's acts as a lawful exercise of self-defense. It was unlawful and murderous for Saddam Hussein to kill or harm civilians unless they were armed and jeopardizing the safety of his troops. The inability to distinguish terrorists or insurgents from innocent civilians is not a valid justification under international law for the summary executions and other atrocities that occurred in Al-Dujail.

### **7. Saddam Hussein Will Not Successfully Avoid Liability for His Crimes Under Tu Quoque Defense.**

Saddam Hussein's likely argument that the atrocities that he committed in Al-Dujail are defensible because the United States has committed similar acts while combating terrorists in Iraq and Afghanistan will not be successful. Even if the assumption holds true that the U.S. has committed similar atrocities in its efforts to eliminate terrorists, the international courts have universally rejected the tu quoque defense, which literally means, "you too." In *Hadzihasanovic*,

---

<sup>17</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), art. 49, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 4, 16 I.L.M. 1391 [Reproduced in the accompanying notebook at Tab 3].

<sup>18</sup> *Id.* at art. 50(1).

<sup>19</sup> General William C. Westmoreland testified that "there is no justification for eliminating civilians unless they are armed and jeopardizing the safety of U.S. troops where a matter of self-defense comes into play," *see U.S. v. Calley*, 46 C.M.R. 1131, 1160 (U.S. Army Ct. Mil. Rev. 1973) [Reproduced in the accompanying notebook at Tab 25].

the International Criminal Tribunal for the Former Yugoslavia (hereinafter, the “ICTY”) stated that “the Tribunal's jurisprudence is quite clear that the principles of tu quoque [do] not constitute a defense and has no basis in the law.”<sup>20</sup> In *Kupreskic*, the ICTY again held that the tu quoque defense has no place in contemporary international humanitarian law.<sup>21</sup> An accused does not exculpate himself from a crime by showing that another has committed a similar crime, either before or after the commission of the crime by the accused.<sup>22</sup> The accepted international belief is that every individual has the duty and obligation to adhere to international law regardless of the conduct of enemy combatants. Thus, it is irrelevant whether the United States has engaged in unlawful or criminal acts while fighting terrorists. Saddam’s tu quoque defense will not pass judicial muster and he will be held accountable for any criminal actions that he has committed.

## **II. FACTUAL BACKGROUND**

### **A. Investigation Concluded Regarding Massacre of Al-Dujail.**

On February 26, 2005, the Iraqi Special Tribunal (hereinafter “IST”),<sup>23</sup> also known as the Iraqi High Criminal Court, announced that the Court of Investigations at the IST had concluded

---

<sup>20</sup> *Hadzihasanovic et al.*, Transcript (IT-01-47), (Nov. 28, 2003); 2003 WL 23697684 [Reproduced in the accompanying notebook at Tab 18].

<sup>21</sup> *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judicial Supplement 2, 12043 (ICTY Trial Chamber, February 17, 1999) [Reproduced in the accompanying notebook at Tab 22].

<sup>22</sup> *Id.*

<sup>23</sup> The IST is independent of any Iraqi government bodies and has jurisdiction over specified crimes committed by any Iraqi nationals or residents between July 17, 1968 and May 1, 2003, the period of the Baath party rule, *see* United States Institute of Peace, *Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice*, Special Report 122, (June 2004) [Reproduced in the accompanying notebook at Tab 53].

the investigation pertaining to the crimes committed in the village of Al-Dujail<sup>24</sup> in 1982.<sup>25</sup> The investigation was performed in accordance with Article (12) of the IST Law No. (1)/2003.<sup>26</sup> Saddam Hussein, as well as seven<sup>27</sup> others will be tried for murder, crimes against humanity and various other crimes identified in that investigation. The initial trial is expected to begin sometime in October 2005 and will address only the crimes committed in Al-Dujail. Saddam Hussein will be tried first on the crimes committed in the town of Al-Dujail because it is the easiest case on which to gather evidence and provides the best chance for a speedy conviction. The prosecution also believes that separating the multiplicity of atrocities committed by Saddam Hussein over the course of his presidency into discrete events will help eliminate frivolous nonsubstantive arguments that will likely arise early in the trials.<sup>28</sup>

---

<sup>24</sup> Al-Dujail is a small town in Iraq, of approximately 10,000 inhabitants, 60 kilometers north of Baghdad, at Wikipedia, *Dujail*, at <http://en.wikipedia.org/wiki/Dujail> [Reproduced in the accompanying notebook at Tab 72].

<sup>25</sup> Iraq Special Tribunal, Investigation into Al-Dujail Crimes Concludes, at <http://www.iraqspecialtribunal.org/en/press/releases/0014a.htm> [hereinafter *Investigation*] [Reproduced in the accompanying notebook at Tab 59].

<sup>26</sup> The IST has subject matter jurisdiction over crimes of genocide, crimes against humanity, and war crimes, see Laws of Iraqi Special Tribunal, PART TWO: Crimes Against Humanity, Article 12, at <http://law.case.edu/saddamtrial/content.asp?id=2> [Reproduced in the accompanying notebook at Tab 17].

<sup>27</sup> Other high-value detainees that will also be tried in the Al-Dujail crimes are: Barzan Ebraheem Hassan Al-Tikriti, the half-brother of Saddam Hussein and former chief of the Iraqi Intelligence Service; Taha Yasin Ramadan, former deputy prime minister and Vice President; Awad Hamad Al-Bander, former chief judge of the Revolutionary Court; Abdullah Kadhem Ruaid and his son Mizher Abdulah Rowed Al-Musheikhi, two local Ba'athist officials in Al-Dujail; Ali Daeem Ali; and Mohammed Azawi Ali. See Iraq Special Tribunal Website, *Sharing of Evidence and Notification of Trial Date*, at <http://www.iraqspecialtribunal.org/en/press/releases/0024e.htm> [Reproduced in the accompanying notebook at Tab 60].

<sup>28</sup> Khalil al-Duleimi, Saddam's defense counsel, has already made it clear that he intends to discredit the tribunal and argue against its validity, see IRIN News.ORG, *IRAQ: Focus on forthcoming trial of Saddam Hussein*, at [http://www.irinnews.org/report.asp?ReportID=47858&SelectRegion=Middle\\_East&SelectCountry=IRAQ](http://www.irinnews.org/report.asp?ReportID=47858&SelectRegion=Middle_East&SelectCountry=IRAQ) [hereinafter *Forthcoming Trial*] [Reproduced in the accompanying notebook at Tab 61].

## **B. Historical Accounting of Assassination Attempt and Destruction of Al-Dujail.**

In 1982, Iraq was at war with its Shiite neighbor, Iran.<sup>29</sup> Many citizens of Al-Dujail were also Shiites and despised Saddam for starting the war two years prior.<sup>30</sup> Though Saddam Hussein distrusted the predominantly Shiite town, he planned a trip to Al-Dujail to build support for the war.<sup>31</sup> Dawa,<sup>32</sup> a conservative Shiite religious party with strong support in Al-Dujail, had an armed wing that had previously mounted terrorist attacks against Saddam Hussein's government.<sup>33</sup> Dawa saw Saddam's visit as a chance to avenge the government's killings of hundreds of Dawa leaders and sympathizers.<sup>34</sup>

On July 8, 1982, at approximately 2:30 p.m., Saddam Hussein's convoy drove into the town of Al-Dujail. As he passed the palm groves that aligned each side of the highway, seventeen gunmen with Kalashnikov rifles fired on Saddam Hussein and his procession.<sup>35</sup> Though several of Saddam's body guards were claimed to have been killed in the attack,<sup>36</sup>

---

<sup>29</sup> *The Reckoning*, *supra* note 14 [Reproduced in the accompanying notebook at Tab 56].

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Also called the Islamic Dawa Party or Al-Dawa. The Dawa party was formed in the late 1950s by a group of Shiite leaders and created to combat atheistic communism and Baathist Arab socialism which were then ascendant in Iraq. Dawa rose to prominence in the 1970's when it waged an armed campaign against the Iraqi government. It supported the Islamic Revolution in Iran and received support from Iran during the Iran-Iraq War. In 1979 Dawa created a military wing. Dawa committed several assassination attempts against Iraqi leaders, including Saddam Hussein, Tariq Aziz and Saddam's son, Uday. Wikipedia, *Islamic Dawa Party*, at [http://en.wikipedia.org/wiki/Islamic\\_Dawa\\_Party](http://en.wikipedia.org/wiki/Islamic_Dawa_Party) [Reproduced in the accompanying notebook at Tab 74].

<sup>33</sup> *The Reckoning*, *supra* note 14 [Reproduced in the accompanying notebook at Tab 56].

<sup>34</sup> *Id.*

<sup>35</sup> *Survivors*, *supra* note 12 [Reproduced in the accompanying notebook at Tab 52].

<sup>36</sup> *Id.*

Saddam's car was bullet proof and he escaped by helicopter unharmed.<sup>37</sup> Eyewitnesses reported that several of the townspeople who came to see the ensuing events were killed when Saddam's forces fired upon the crowd. Within days, several state security forces of Saddam's regime composed of units from the Iraqi army, agents of the Iraqi Intelligence Service and other police agencies descended on Al-Dujail.<sup>38</sup>

Saddam accused the people of Al-Dujail of being conspirators in an attempt to kidnap and kill him<sup>39</sup> and retaliated directly against the people of Al-Dujail. As many as fifteen individuals were summarily executed shortly after the assassination attempt.<sup>40</sup> Approximately 1,500 men, women and children were wrongly arrested.<sup>41</sup> Those arrested were sent to Saddam Hussein's gulags, first to a detention center in Tikrit, later to a secret police detention center in Baghdad, and finally, to the Nugra as-Salman prison, an old British-built fort in the desert along the Saudi Arabian border.<sup>42</sup> Many of these individuals were never charged or brought to trial.<sup>43</sup> A total of 375 women, children, teenagers and old men were incarcerated for four years.<sup>44</sup> Many of these individuals were tortured, including several of the younger women whose torture was

---

<sup>37</sup> John F. Burns, *Iraqi Tribunal Details Plan to Prosecute Saddam Hussein*, N.Y. TIMES, June 5, 2005 [Reproduced in the accompanying notebook at Tab 55].

<sup>38</sup> *Investigation*, *supra* note 25 [Reproduced in the accompanying notebook at Tab 59].

<sup>39</sup> IRIN News.ORG, *IRAQ: Focus on forthcoming trial of Saddam Hussein*, at [http://www.irinnews.org/report.asp?ReportID=47858&SelectRegion=Middle\\_East&SelectCountry=IRAQ](http://www.irinnews.org/report.asp?ReportID=47858&SelectRegion=Middle_East&SelectCountry=IRAQ) [hereinafter *Trial*] [Reproduced in the accompanying notebook at Tab 61].

<sup>40</sup> Edward Wong, *Charges Presented Against 5 Former Allies of Saddam Hussein*, N.Y. TIMES, March 1, 2005, at Section: A, 2005 WLNR 3081387 (2005) [Reproduced in the accompanying notebook at Tab 75].

<sup>41</sup> *The Reckoning*, *supra* note 14 [Reproduced in the accompanying notebook at Tab 56].

<sup>42</sup> *Id.*

<sup>43</sup> Wong, *supra* note 40 [Reproduced in the accompanying notebook at Tab 75].

<sup>44</sup> *Survivors*, *supra* note 12 [Reproduced in the accompanying notebook at Tab 52].

aimed at forcing them to confess that brothers or fathers were members of Dawa.<sup>45</sup> Mr. Sadoon, the chief of the revolutionary court, ordered approximately 143 men, some as young as 13, to be executed during show trials at the Abu Ghraib prison outside Baghdad. Some of the evidence recovered indicates that Saddam Hussein not only knew of and approved of these death sentences, but issued a presidential decree ordering the execution by hanging of these Dujail men.<sup>46</sup>

Saddam Hussein also destroyed the economic livelihood of the town of Al-Dujail. Within weeks of the attempted assassination, Saddam had more than 250,000 acres of Al-Dujail's palm groves and orchards bulldozed.<sup>47</sup> These orchards represented the town's primary source of income.<sup>48</sup> Saddam also salted the groves to assure that the townspeople would never harvest fruit or crops from the land again.<sup>49</sup> Scores of homes and buildings were also demolished.<sup>50</sup>

---

<sup>45</sup> *Id.*

<sup>46</sup> *Survivors*, *supra* note 12 (Some of the evidence uncovered just days after the fall of Saddam's regime was recovered in the ransacked intelligence headquarters in the capital) [Reproduced in the accompanying notebook at Tab 52].

<sup>47</sup> *The Reckoning*, *supra* note 14 [Reproduced in the accompanying notebook at Tab 56].

<sup>48</sup> *Survivors*, *supra* note 12 [Reproduced in the accompanying notebook at Tab 52].

<sup>49</sup> Michael P. Scharf, Fox News special: *Big Story Weekend, Saddam Hussein On Trial*, Oct. 1, 2005 [Reproduced in the accompanying notebook at Tab 66].

<sup>50</sup> John F. Burns, *The Struggle for IRAQ: Tribunal; First Case Against Hussein, Involving Killings in 1982, Is Sent to a Trial Court*, N.Y. TIMES, July 22, 2005, at Section: A, 2005 WLNR 11486440 (2005) [Reproduced in the accompanying notebook at Tab 57].



### **C. Saddam Hussein will Likely Argue that Crimes Committed in Al-Dujail Were Justified as Acts of Self-Defense.**

Saddam is likely to claim that any atrocities committed against the town of Al-Dujail and its citizens were lawfully justified as acts of self-defense. This justification is based on two primary theories. First, Saddam Hussein is expected to argue that his actions against the citizens of Al-Dujail are no different from those taken by the United States in Afghanistan after 9/11 in response to the bombing of the World Trade Center towers. Similarly, Saddam Hussein would argue that he was the victim of a terrorist attack and was therefore justified in his actions. Al-Dulaimi, Saddam's head lawyer, has stated that "punishing those who carried out the assassination attempt is justifiable all over the world and any president in the position of Saddam would do the same thing."<sup>51</sup> Second, Saddam Hussein is likely to argue that the armed attacks against the citizens of Al-Dujail are no different from the bombings and raids the American military is currently undertaking against insurgents in Afghanistan and Iraq. Saddam Hussein believes that the people of Al-Dujail were terrorists and insurgents<sup>52</sup> and any assaults on the citizens of Al-Dujail were preemptive measures necessary to protect the country from an insurgency. In this view, his actions were nothing more than self-defense and necessary to prevent destabilization of the Iraqi government.<sup>53</sup>

---

<sup>51</sup> Mona Mahmoud, Steven Komarow, USA Today, Oct. 13, 2005, 2005 WLNR 16584572 (2005) [Reproduced in the accompanying notebook at Tab 63].

<sup>52</sup> *Forthcoming Trial*, *supra* note 28 [Reproduced in the accompanying notebook at Tab 61].

<sup>53</sup> *Id.*

### **III. HISTORICAL USE OF SELF-DEFENSE AS JUSTIFICATION FOR USING ARMED FORCE AGAINST TERRORISTS OR STATES THAT SUPPORT AND HARBOR TERRORISTS.**

#### **A. U.S. Justified Bombing of Libya in 1986 as Lawful Exercise of Self-Defense Because Libya Sponsored Terrorist Attacks on the United States.**

On April 15, 1986, the United States conducted a series of air strikes against Libya in response to the terrorist bombing of a discotheque in West Germany where one American was killed and several others were injured. The United States conducted these attacks against what the White House called “terrorist centers” and military bases in Libya.<sup>54</sup> According to a Senior Libyan official, thirty-seven people were killed and another ninety-three were injured by the American attack.<sup>55</sup>

Following the air strikes against Libya, the United States asserted that the aerial assault was justified on grounds of self-defense and was necessary given the terrorist actions committed by the Libyan government against the United States. President Reagan stated that the attack was retaliation for Libya’s direct role in the bombing of the West Berlin discotheque and for its “reign of terror”<sup>56</sup> against the United States and its citizens. The United States viewed its actions as necessary and proportionate<sup>57</sup> to the sustained, clear and widespread use of terror against Americans by the Libyan government. The preemptive actions against Libya’s terrorist installations were intended to diminish Colonel Qaddafi’s capacity to export terror and deter him

---

<sup>54</sup> Bernard Weinraub, *U.S. Jets Hit “Terrorist Centers” in Libya*, N.Y. TIMES, Apr. 15, 1986, at Section: A, 1986 WLNR 827539 (1986) [Reproduced in the accompanying notebook at Tab 71].

<sup>55</sup> Edward Schumacher, *Tension Over Libya: A Day of Bitterness*, N.Y. TIMES, Apr. 19, 1986, at Section: 1, 1986, WLNR 809624 (1986) [Reproduced in the accompanying notebook at Tab 68].

<sup>56</sup> Weinraub, *supra* note 54 [Reproduced in the accompanying notebook at Tab 71].

<sup>57</sup> U.N. SCOR, 41st Sess., 2674th mtg. at 14-15, U.N. Doc. S/PV.2674 (1986), (The U.S. had convincing evidence that Libya was not only responsible for the East Berlin bombing but was also engaged in the planning of a multitude of future attacks against the United States) [Reproduced in the accompanying notebook at Tab 10].

from further attacks against the United States. Reports demonstrated that Libya supported over one dozen camps where about 1,000 persons were trained in guerilla warfare, explosives, and arms for use in sabotage operations.<sup>58</sup> Libya was known as a safe haven for terrorists and provided substantial financial resources to various terrorist organizations.

Though the United States believed its attack on Libya was justified as a valid exercise of self-defense under international law, the international community did not share its views. Many U.N. delegates argued that the U.S. raid was not justified as an act of self-defense because there was no antecedent aggression by Libya within the meaning of Article 51 of the U.N. Charter.<sup>59</sup> Many states also claimed that U.S. charges of Libyan involvement in terrorism were unsubstantiated.<sup>60</sup> For these states the claim of terrorist involvement was too attenuated and more conclusive proof was needed to justify the attack on Libya.

A few nations<sup>61</sup> publicly stated their disapproval of the United States' actions and the Congo, Ghana, Madagascar, Trinidad, and the United Arab Emirates even sponsored a resolution before the United Nations Security Council to condemn the bombings by the United States as

---

<sup>58</sup> Gregory Francis Intocchia, *American Bombing of Libya: An International Legal Analysis*, 19 CASE W. RES. J. INT'L L. 177 (Spring 1987), citing *The Libyan Problem*, U.S. Dept of State Bureau of Pub. Affairs, Spec. Rep. No. 111, at 1, (Oct. 1983) [Reproduced in the accompanying notebook at Tab 36].

<sup>59</sup> Algeria denied any validation of self-defense under Charter unless there has been an act of aggression and in this case Algeria did not believe that such an act had been undertaken by Libya, see U.N. SCOR, 41st Sess., 2676th mtg., U.N. Doc. S/PV .2676 (1986). Ghana even described the U.S. bombing as a reprisal and argued that it was doubtful that an armed attack within the meaning of the U.N. Charter had occurred, as such attacks are more typical of an armed invasion perpetrated against the territorial integrity or sovereign independence of the United States, see U.N. SCOR, 41st Sess., 2675th mtg., U.N. Doc. S/PV.2675 (1986) [Reproduced in the accompanying notebook at Tabs 12 and 11].

<sup>60</sup> U.N. Doc. S/PV .2675 (remarks by Ambassador Al-Ansi (Oman)); see also U.N. SCOR, 41st Sess., 2680th mtg., U.N. Doc. S/PV .2680 (1986) [Reproduced in the accompanying notebook at Tab 13].

<sup>61</sup> Gorbachev stated in an address to the East German Communist Party that the "invocation of terrorism in no way gives the American Administration the right impudently to set itself up as an international judge, to high-handedly punish other countries and to replace the principles of international coexistence with the law of the jungle," see James M. Markham, *Gorbachev Says Libya raid May hurt U.S.-Soviet Ties*, N.Y. TIMES, Apr. 19, 1986, 1986 WLNR 809540 [Reproduced in the accompanying notebook at Tab 62].

being in violation of the U.N. Charter.<sup>62</sup> Bulgaria, China, the Soviet Union, and Thailand also voted in favor of that proposed resolution. Though the resolution before the U.N. Security Council was ultimately vetoed by the United States, Great Britain and France, the U.N. General Assembly subsequently adopted a resolution condemning the United States for the attack against Libya as a violation of the Charter of the United Nations and of international law.<sup>63</sup>

### **B. U.S. Argued Self-Defense as Justification for Launching Cruise Missiles into Iraq in 1993 After Assassination Attempt on Former President Bush.**

On June 26, 1993, the United States launched twenty-three Tomahawk cruise missiles at the Iraqi Intelligence Service in Baghdad causing a number of civilian deaths<sup>64</sup> and destroying much of the complex. The United States justified the attack on Iraq as a valid use of self-defense for the foiled assassination attempt against former President Bush two months prior. On April 14, 1993, while President Bush was beginning a three-day visit to Kuwait city, Kuwaiti authorities thwarted a terrorist plot, seizing a powerful car bomb and other explosives and arresting 16 suspects.<sup>65</sup> The ringleaders were two Iraqi nationals. After careful investigation, the United States provided conclusive proof that the attempted assassination was the work of the

---

<sup>62</sup> Intoccia, *supra* note 58, at 189 [Reproduced in the accompanying notebook at Tab 36].

<sup>63</sup> U.N. A/RES/41/38 (1986). [Reproduced in the accompanying notebook at Tab 6].

<sup>64</sup> *Raid on Baghdad: Iraq Reports Many Killed*, N.Y. TIMES, June 27, 1993, at Sect. 1, 1993 WLNR 3397390 (1993). [hereinafter *Raid*]. [Reproduced in the accompanying notebook at Tab 65].

<sup>65</sup> U.N. SCOR, 48th Sess., 3245th mtg. at 6, U.N. Doc. S/PV.3245 (1993). [Reproduced in the accompanying notebook at Tab 14].

Iraqi Intelligence Service acting under the direction of the Iraqi government and not a small group of people acting independently.<sup>66</sup>

The United States declared that its actions were justified as an act of self-defense and were carefully implemented to be proportional to the attempted assassination on President Bush. On June 27, 1993, U.S. Ambassador to the United Nations Madeleine Albright appeared before the Security Council and stated that it was America's view that an assassination attempt against its former Head of State is an attack against itself. The United States was therefore entitled to directly respond to such a threat under Article 51 of the United Nations Charter, which provides for the exercise of self-defense in such cases.<sup>67</sup> Recognizing that the element of proportionality is required for a valid self-defense claim under international law, the United States carefully provided justifications for the target chosen (the Iraqi Intelligence Service). Secretary of State Les Aspin in a Pentagon briefing stated that "the Iraqi Intelligence Service headquarters was selected because it is the closest thing related to the provocation. They were the ones responsible for planning the attempt on President Bush's life, and so we wanted to make sure we had a target that was the nexus to the provocation."<sup>68</sup> The United States also sought to debilitate Iraq from engaging in future acts of terrorism. The attack was designed to damage the terrorist infrastructure of the Iraqi regime, reduce its ability to promote terrorism and deter further acts of aggression against the United States.<sup>69</sup>

---

<sup>66</sup> *Raid on Baghdad; Pentagon Statements on the Missile Attack*, N.Y. TIMES, June 27, 1993, at Sect. 1, 1993 WLNR 3397382 (1993) [hereinafter *Pentagon Statements*] [Reproduced in the accompanying notebook at Tab 64].

<sup>67</sup> U.N. Doc. S/PV.3245 [Reproduced in the accompanying notebook at Tab 14].

<sup>68</sup> *Pentagon Statements*, *supra* note 66 [Reproduced in the accompanying notebook at Tab 65].

<sup>69</sup> U.N. Doc. S/PV.3245 [Reproduced in the accompanying notebook at Tab 14].

Unlike the predominately negative reaction by the international community in response to the American bombing of Libya in 1986, most states either supported or did not object to the cruise missile attack on the Iraqi Intelligence Service. Following Madeleine Albright's presentation before the Security Council, representatives of other member states either manifested their support for the U.S. action or refrained from voicing any criticism. Several nations stated that the U.S. was justified in its actions and made reference to the missile attack as being proportional to the Iraqi Intelligence's actions.<sup>70</sup> China was the only nation that made any statements that can be construed negatively by indicating that it "would not endorse any action that might intensify the tension in the region."<sup>71</sup> No action was subsequently taken by the U.N. Security Council as a result of the U.S. missile attack.

### **C. U.S. Justified Invasion of Afghanistan as Act of Self-Defense in Response to Terrorist Attacks of 9/11.**

On September 11, 2001, the United States was the victim of a brutal terrorist attack that rocked the international community. Terrorists hijacked two airplanes and flew them into the World Trade Center towers in New York City, another airplane slammed into the Pentagon, and a final terrorist plot was thwarted by the passengers of United Airlines flight 93 which later crashed into the countryside of Pennsylvania. The terrorist attacks resulted in the deaths of almost 3,000 persons, including nationals of 81 countries, as well as the destruction of four

---

<sup>70</sup> *Id.* (France placed a great deal of importance on the response being proportionate to the action of the Iraqi secret service and the reasons the missile attack was carried out; Japan considered the situation to be unavoidable; Hungary stated that U.S. action was justified; the United Kingdom believed the action was justified, proper and proportionate; the Russian Federation viewed the actions by the United States as justified and arising from states right of self-defense under U.N. Charter; and Spain viewed an assassination attempt by a nation's secret service to be very serious).

<sup>71</sup> *Id.*

civilian aircraft, the World Trade Center towers and a section of the Pentagon.<sup>72</sup> An attack on American soil of this magnitude had not been seen since the Japanese bombed Pearl Harbor on December 7, 1942. Congress subsequently granted authority to President Bush to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.<sup>73</sup>

On October 7, 2001, the United States notified the U.N. Security Council that it was exercising its inherent right of individual and collective self-defense permitted by Article 51 of the U.N. Charter and that its armed forces had initiated actions designed to prevent and deter further attacks on the U.S.<sup>74</sup> The United States declared that the attack and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization were made possible by the decision of the Taliban regime to allow parts of Afghanistan to be used as a terrorist base of operation.<sup>75</sup> On October 8, 2001, the United States, Great Britain and other U.S. allies launched a powerful barrage of cruise missiles and long-range bombers against Afghanistan in a campaign to destroy the terrorist training camps of Osama bin Laden's Al-Qaeda network and overthrow the Taliban government.<sup>76</sup> President Bush announced that the carefully targeted actions were

---

<sup>72</sup> U.N. Doc. S/2001/946 (2001) [Reproduced in the accompanying notebook at Tab 8].

<sup>73</sup> PL 107-40, September 18, 2001, 115 Stat 224 [Reproduced in the accompanying notebook at Tab 1].

<sup>74</sup> U.N. Doc. S/2001/946 [Reproduced in the accompanying notebook at Tab 8].

<sup>75</sup> *Id.*

<sup>76</sup> Patrick E. Tyler, *A Nation Challenged: The Attack; U.S. and Britain Strike Afghanistan*, N.Y. TIMES, Oct. 8, 2001, 2001 WLNR 3365194 [Reproduced in the accompanying notebook at Tab 70].

designed to disrupt the use of Afghanistan as a terrorist base of operations and to attack the military capability of bin Laden's organization.<sup>77</sup>

The United States' use of force against Al-Qaeda and the Taliban received unprecedented international support and approval. The U.N. Security Council unequivocally condemned the terrorist attacks of 9/11 and declared the acts a threat to international peace and security. The Security Council further recognized the United States' inherent right of individual or collective self-defense in accordance with the Charter.<sup>78</sup> The United Kingdom, Canada, Australia, Germany and France all pledged forces for the operation and more than 40 countries in the Middle East, Africa, Europe and across Asia granted air transit and landing rights.<sup>79</sup>

#### **IV. LEGAL ANALYSIS**

##### **A. Introduction and Roadmap for Legal Analysis Section.**

Self-defense is universally recognized and accepted by the international community as an "inherent right" and valid justification for an armed response against an aggressor. The right of self-defense is found in the *Caroline* Doctrine, Article 51 of the U.N. Charter, and the Rome Statute of the International Criminal Court. Self-defense is a valid and recognized defense under customary international law, and subsection B will show that Saddam Hussein should be allowed to argue the defense in response to the charges that have been brought against him. Subsection C will make clear why self-defense is applicable to attacks by terrorists or non-state actors.

---

<sup>77</sup> *Id.*

<sup>78</sup> U.N. 4370th mtg., S/RES/1368 (2001) [Reproduced in the accompanying notebook at Tab 15] *See also* U.N. 4385th mtg., S/RES/1373 (2001), where U.N. Sec. Council confirms resolution 1368 [Reproduced in the accompanying notebook at Tab 16].

<sup>79</sup> Tyler, *supra* note 76 [Reproduced in the accompanying notebook at Tab 70].



For Saddam Hussein to successfully argue that any actions undertaken against the town of Al-Dujail and its citizens in response to the assassination attempt are no different than those taken by the United States in Afghanistan after 9/11, he must satisfy the customary international law requirements for the doctrine of self-defense. The defense counsel must prove that the assassination attempt against Saddam Hussein rises to the level of an “armed attack” as required under Article 51 of the U.N. Charter.<sup>80</sup> Failing to prove that the assault on Saddam Hussein and his motorcade is an “armed attack” as interpreted by international standards, will nullify any further arguments by defense counsel that Saddam’s actions are justified as a lawful exercise of self-defense. Subsection D of the Legal Analysis section will address why Saddam Hussein will probably not satisfy Article 51’s requirement of “armed attack.”

Even if Saddam Hussein can prove that an “armed attack” did in fact occur, self-defense only validates measures that “are proportional to the armed attack and necessary to respond to it.”<sup>81</sup> To satisfy the requirement of necessity, defense counsel must prove that the need for actions in response to the assassination attempt by Saddam Hussein or his subordinates must have been “instant, overwhelming, and leaving no choice of means and no moment for deliberation.”<sup>82</sup> Saddam must also show that there was no peaceful alternative and the subsequent arrests, summary executions, razing of the palm groves, tortures and other actions taken were necessary given the nature and severity of the “armed attack.” Even if Saddam can successfully show that his response was necessary, he must also prove that the defensive measures were proportionate to the seriousness and scope of the attack. Subsection E of the

---

<sup>80</sup> U.N. Charter, art. 51 (1945) [Reproduced in the accompanying notebook at Tab 7].

<sup>81</sup> *Nicaragua v. U.S.*, 1986 I.C.J. 14, 94 (I.C.J. 1986) [Reproduced in the accompanying notebook at Tab 20]

<sup>82</sup> Moore, *supra* note 2, at 409-414 [Reproduced in the accompanying notebook at Tab 29].

Legal Analysis section will address why Saddam Hussein will probably not satisfy the necessity and proportionality requirements under customary international law.

The final three subsections, F, G, & H, address other legal issues of importance that are not directly related to the defense of self-defense. Subsection F of the Legal Analysis Section will demonstrate why Saddam's retaliatory acts against the citizens of Al-Dujail will be deemed a reprisal or act of revenge and prohibited under international law. Saddam Hussein is also likely to argue that the any actions taken against the citizens of Al-Dujail were acceptable because he was unable to distinguish terrorists or insurgents from innocent civilians. Subsection G of the Legal Analysis section will address why this argument is flawed and will ultimately prove unsuccessful. Finally, Subsection H of the Legal Analysis Section will show that Saddam Hussein will not be successful if he attempts to avoid liability under the tu quoque defense.

## **B. Self-Defense is an Inherent Right and Valid Defense to “Armed Attacks” Under Codified and Customary International Law.**

### **1. Foundation for Self-Defense in Customary International Law—*Caroline* Doctrine.<sup>83</sup>**

The right of self-defense as recognized by modern customary international law has its foundation in the *Caroline* doctrine which establishes the essential prerequisites to exercising this valuable right. In 1837, an insurrection arose in Canada against the British crown. Many Americans were sympathetic to the Canadian insurgents and provided them with assistance. In late December, approximately 70 or 80 armed British soldiers boarded the *Caroline*, an American steamship docked in Schlosser, New York, and attacked the crew. After the attack,

---

<sup>83</sup> *Id.*

the British set the *Caroline* on fire, cut the ship loose from its moorings, and sent it over the Niagara Falls.

Upon learning of the incident, Secretary of State Forsyth addressed a letter to Mr. Fox, the British minister at Washington, and demanded that redress and reparation be made for the destruction of property and the assassination of United States citizens on American soil. Mr. Fox claimed that the destruction of the *Caroline* was an act of necessary self-defense because the *Caroline* was engaged in carrying supplies and military stores from the American side of the river to the rebels in Navy Island (part of British territory). Since the American authorities had difficulty enforcing the laws of the United States along the frontier border, the British felt they had a clear right to seize and destroy the *Caroline*.

The case was finally resolved five years later through a series of letters between Secretary of State Daniel Webster and Lord Ashburton of Great Britain. Though neither country ultimately agreed on whether the attack on the *Caroline* was necessary under the circumstances, both agreed that there are situations where self-defense may be necessary. In a letter to Lord Ashburton, Secretary of State Webster stated that the permissibility of self-defense “should be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>84</sup> In this letter, Secretary Webster set forth the conditions of necessity and proportionality which came to be accepted as the customary legal requirements for the exercise of self-defense (the “*Caroline* doctrine”).<sup>85</sup>

---

<sup>84</sup> *Id.* at 412.

<sup>85</sup> Charles Pierson, *Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DENV. J. INT’L L. & POL’Y 150, 156 (Winter 2004) [Reproduced in the accompanying notebook at Tab 44].

## 2. United Nations Supports Self-Defense in Article 51 of U.N. Charter.

At the end of World War II, the United Nations was established to create an international peace and security order that would restrain the exercise of force and save succeeding generations from the scourge of war.<sup>86</sup> The United Nations Charter (the “U.N. Charter”) includes two key articles embodying the international community’s resolution to prohibit the use of force by member nations. First, Article 2(3) requires that all members settle their disputes by peaceful means so that international peace and security are not endangered.<sup>87</sup> The second key charter provision, Article 2(4), is considered the core international legal rule relating to a state’s right to resort to armed force. Article 2(4) requires all members to “refrain in their international relations from the use of force that would threaten the territorial integrity, or political independence of any state or in any other manner inconsistent with the purposes of the United Nations.”<sup>88</sup> By including the phrase, “purposes of the United Nations,” Article 2(4) could also be interpreted to preclude the use of armed force that would interfere with peace, security, equal rights and self-determination of peoples, human rights and fundamental freedoms.<sup>89</sup> Collectively these provisions prohibit any state from using force against another nation that would endanger international peace and security.<sup>90</sup>

Though the primary goal of the United Nations is to promote international peace and security, Article 51 of the U.N. Charter (“Article 51”) provides a self-defense exception to the

---

<sup>86</sup> U.N. Charter, Preamble (1945) [Reproduced in the accompanying notebook at Tab 7].

<sup>87</sup> *Id.* at art. 2(3).

<sup>88</sup> *Id.* at art. 2(4).

<sup>89</sup> *Id.* at Preamble.

<sup>90</sup> The ICJ stated that, “this obligation to refrain from the threat or use of force is not just a U.N. Charter provision but is now also regarded as a rule of customary international law,” *Nicaragua v. U.S.*, 1986 I.C.J. 14, 100 (I.C.J. 1986 [Reproduced in the accompanying notebook at Tab 20].

prohibition of the use of force by one nation against another. Article 51 states that “nothing in the Charter may impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>91</sup> This “inherent right” of individual or collective self-defense is a right existing independent of the Charter and not subject to an express grant.<sup>92</sup> Self-defense is a full justification for actions taken by an aggressor and not just an excuse.<sup>93</sup> The U.N. Charter therefore codifies the long-established “inherent right” under customary international law of any nation to defend itself against armed attack.

### **3. The Statute of the International Criminal Court Provides Grounds for Excluding Criminal Responsibility.**

The International Criminal Court (“ICC”) was established in 2002 as a permanent tribunal to assure that the most serious crimes of concern to the international community as a whole do not go unpunished.<sup>94</sup> To that end, the ICC is vested with jurisdiction to decide cases involving the crime of genocide, crimes against humanity, war crimes, and the crime of aggression,<sup>95</sup> which are generally considered to be the most heinous of all international crimes.

---

<sup>91</sup> U.N. Charter, art. 51 [Reproduced in the accompanying notebook at Tab 7].

<sup>92</sup> Wolfrum, *supra* note 11, at 1166 [Reproduced in the accompanying notebook at Tab 31].

<sup>93</sup> Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, THE AM. J. INT. L., Vol. 41, No. 4, 872-879, 877 (Oct., 1947) [Reproduced in the accompanying notebook at Tab 38].

<sup>94</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF, 183/9, Preamble (1998) [Reproduced in the accompanying notebook at Tab 5].

<sup>95</sup> *Id.* at art. 5.

The ICC was created as a permanent tribunal so that an ad hoc tribunal would not have to be created every time these crimes occurred.<sup>96</sup>

Notwithstanding the ICC's authority to adjudicate these kinds of cases, the ICC recognizes that self-defense may be grounds for excluding criminal responsibility for certain criminal acts. Article 31 of the Rome Statute of the ICC provides that a defendant will not be held criminally responsible if, at the time of that person's conduct: the person acts reasonably to defend himself or another person, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or other person protected.<sup>97</sup> This defense has been taken from national criminal law and has some limitations to its application.<sup>98</sup> In the case of genocide or crimes against humanity, for example, the practical application of the customary international law requirements of necessity and proportionality, will rarely justify self-defense as a lawful response.<sup>99</sup> Some have even argued that self-defense under Article 31 is primarily limited to war crimes when the defense is invoked as a defensive reaction against unjust attacks.<sup>100</sup> Though self-defense is recognized by the ICC as a valid defense under its statute, it will probably not be successful as a defense against genocide or crimes against humanity.

---

<sup>96</sup> Wikipedia, *International Criminal Court*, at [http://en.wikipedia.org/wiki/International\\_Criminal\\_Court](http://en.wikipedia.org/wiki/International_Criminal_Court) [Reproduced in the accompanying notebook at Tab 73].

<sup>97</sup> U.N. Doc. A/CONF, 183/9 at art. 31(1)(c) [Reproduced in the accompanying notebook at Tab 5].

<sup>98</sup> Ferrando Mantovani, *The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer*, 1 J. INT'L CRIM. JUST. 26 (April 2003) [Reproduced in the accompanying notebook at Tab 39].

<sup>99</sup> The ICJ in *Nicaragua* held that it is a well established rule of customary international law that even when a state is lawfully engaged in the exercise of its inherent right of self-defense, its use of force must be limited to that force necessary to defend against the attack and must be proportionate, *Nicaragua v. U.S.*, 1986 I.C.J. 14, 101, para. 191, (I.C.J. 1986). It is difficult to argue that serious crimes such as the massacring, torturing, or killing of civilians is a necessary response to any initial armed attack. It is also difficult to argue that a response involving crimes against humanity or war crimes is proportional [Reproduced in the accompanying notebook at Tab 20].

<sup>100</sup> Mantovani, *supra* note 98 [Reproduced in the accompanying notebook at Tab 39].

### C. International Law Supports the Use of Self-Defense Against Non-State Actors.

Customary international law does not restrict the application of self-defense only to conflicts that arise between two separate nations or states. A state or government may also defend itself against an “armed attack” by insurgents or terrorists who are non-state actors. The first example in recent history where this was witnessed was during the Caroline incident. There the British attacked an American ship and its crew which were assisting Canadian insurgents that opposed the crown.<sup>101</sup> The United States and Great Britain agreed that such an attack was permissible so long as it was “necessary.”<sup>102</sup> Since that time, it has generally been seen as acceptable under customary international law for a nation to defend itself against a non-state actor so long as the appropriate steps have been taken.

Exercising the right of self-defense under Article 51 of the U.N. Charter is not restricted to situations where the initial hostile attack was committed by a foreign state or nation. When the inherent right of self-defense was codified in Article 51, the drafters had the opportunity to limit its lawful use to armed conflicts between state actors. Article 51, however, is silent on the issue and does not contain any language limiting self-defense to situations where the “armed attack” is committed by a foreign nation.<sup>103</sup> Furthermore, the language found in Article 2(4) of the U.N. Charter which prohibits the use of force by one “Member” against “any state” is not repeated in Article 51.<sup>104</sup> Although there is widespread agreement that an “armed attack” must

---

<sup>101</sup> Moore, *supra* note 2, at 409-414. (Discussed *supra* notes 79-81 and accompanying text) [Reproduced in the accompanying notebook at Tab 29].

<sup>102</sup> *Id.* at 412.

<sup>103</sup> Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41 (Winter 2002) [Reproduced in the accompanying notebook at Tab 40].

<sup>104</sup> U.N. Charter (1945), (compare U.N. Charter, art. 2(4) and art. 51) [Reproduced in the accompanying notebook at Tab 7].

occur, nothing in the language of Article 51 requires that such an armed attack be carried out by another state, nation, or belligerent, as opposed to armed attacks by various other non-state actors.<sup>105</sup> There should be no distinction in whether a state can defend itself against attacks from across territorial boundaries but not against armed attacks or conflicts that originate from within.<sup>106</sup> Since Article 51 is silent as to the required source of the armed attack, a nation can arguably invoke its right to defend itself against a state or non-state perpetrator, an insurgent or even against a terrorist.

#### **D. Requirements For the Lawful Exercise of Self-Defense Under Article 51 of the U.N. Charter.**

The United Nations has encapsulated two essential requirements under Article 51 of the U.N. Charter that are requisite for a valid use of self-defense. The harmed state must: (1) be the victim of an “armed attack” that has occurred; and (2) notify the Security Council of any exercise of self-defense. Article 51 states that “nothing in the Charter may impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations,” and that any “[m]easures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council.”<sup>107</sup>

---

<sup>105</sup> Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533 (Winter 2002) [Reproduced in the accompanying notebook at Tab 43].

<sup>106</sup> Ruth Wedgwood. *NATO’s Kosovo Intervention: NATO’s Campaign in Yugoslavia*, 93 A.J.I.L. 828, 833 [Reproduced in the accompanying notebook at Tab 51].

<sup>107</sup> U.N. Charter at art. 51 [Reproduced in the accompanying notebook at Tab 7].



## **1. Armed Attack on State.**

For Saddam Hussein to properly defend his actions in Al-Dujail as a lawful exercise of self-defense, he must first prove that the assassination attempt rises to the level of an “armed attack” under customary international law. The phrase “armed attack” is a legal term that does not include all attacks, border disputes, or assaults against a nation or government. Whether an attack is deemed an “armed attack” under international law is determined by holdings from the international courts, Security Council resolutions, and the international community’s reaction when a state exercises its inherent right of self-defense. For Saddam Hussein to be successful under the doctrine of self-defense, he must show that the assassination attempt is deemed an “armed attack” as defined in customary international law.

### **a. The Assassination Attempt May Not Meet the Threshold Level of Intensity to be Considered an “Armed Attack.”**

For the attack on Saddam Hussein and his motorcade to be considered an “armed attack” that justifies defensive action, the force used by the attackers must reach a certain threshold of intensity.<sup>108</sup> Under international law, not all attacks on a government or nation will validate the lawful exercise of self-defense. The ICJ in *Nicaragua v. U.S.* stated that it is necessary to distinguish “the gravest forms of the use of force (those constituting an armed attack) from other less grave forms.”<sup>109</sup> The determination of “intensity” is evaluated on a “case by case basis of whether an armed attack has occurred, whether it has reached the necessary threshold of intensity, and thus whether the counterforce is a legal use of self-defense.”<sup>110</sup>

---

<sup>108</sup> Wolfrum, *supra* note 11, at 1166 [Reproduced in the accompanying notebook at Tab 31].

<sup>109</sup> *Nicaragua v. U.S.*, 1986 I.C.J. 14, 101, para. 191, (I.C.J. 1986) [Reproduced in the accompanying notebook at Tab 20].

<sup>110</sup> Wolfrum, *supra* note 11, at 1166 [Reproduced in the accompanying notebook at Tab 31].

**i. The Terrorist Attacks of 9/11 Meet the Requisite Threshold Level of Intensity Needed for Classification as an “Armed Attack,” but the Attack on Saddam Hussein Might not Qualify as such Under International Law.**

For defense counsel to successfully argue that Saddam Hussein’s actions in Al-Dujail are no different from those taken by the United States after 9/11, it must first prove that like the terrorist attacks on 9/11, the assassination attempt rises to the level of an “armed attack” justifying the lawful exercise of self-defense. The terrorist attacks of 9/11 and the assassination attempt on Saddam Hussein are not analogous. The catalyst that triggered the United States’ valid exercise of its inherent right of self-defense against Al-Qaeda terrorists was categorically dissimilar to the assassination attempt on Saddam Hussein. The scale of the 9/11 attack was akin to that of a military assault. An attack on American soil of this magnitude had not occurred since the Japanese bombed Pearl Harbor on December 7, 1942 and the 9/11 attack was even more dramatic with death tolls eventually reaching almost 3,000 persons from 81 different countries.<sup>111</sup> To find U.S. deaths on the same scale in a single day requires going back to the U.S. Civil War.<sup>112</sup> The attacks also destroyed four civilian aircraft, the World Trade Center towers and a section of the Pentagon.<sup>113</sup> Furthermore, the complete destruction of the famous twin towers in the heart of the United States’ largest city was a severe blow to the American financial center and economy. These and other factors led to the Security Council unanimously recognizing the United States’ inherent right to exercise its individual or collective self-defense in accordance with the U.N. Charter.<sup>114</sup>

---

<sup>111</sup> U.N. Doc. S/2001/946 (2001) [Reproduced in the accompanying notebook at Tab 8].

<sup>112</sup> Murphy, *supra* note 103, at 47 [Reproduced in the accompanying notebook at Tab 40].

<sup>113</sup> U.N. Doc. S/2001/946 [Reproduced in the accompanying notebook at Tab 8].

<sup>114</sup> U.N. 4370th mtg., S/RES/1368 (2001) [Reproduced in the accompanying notebook at Tab 15].

Although the terrorist attacks of 9/11 were deemed by the Security Council and international community to be an “armed attack” under customary international law, the assassination attempt against Saddam Hussein is not of the same magnitude and may not meet the required threshold level of intensity. Admittedly, any assassination attempt or attack on the President of a nation is serious. However, in the assassination attempt on Saddam Hussein, thousands of people did not lose their lives and the Iraqi economy did not suffer severe damage as a result. Though several governmental vehicles were riddled with bullets and some of Saddam Hussein’s bodyguards lost their lives while protecting the Iraqi President,<sup>115</sup> it is questionable whether these actions alone would be considered an “armed attack” under international standards. The 9/11 attack was one of the few examples in modern history where the United Nations and the international community approved the use of armed force in the exercise of self-defense.<sup>116</sup> The assassination attempt against Saddam Hussein simply does not equate to the severity and massive scale of the 9/11 attack and therefore may not be considered an “armed attack” under customary international law.

**ii. Saddam Will Probably not be Able to Aggregate Past Terrorist Attacks Against the Iraqi Government to Reach the Threshold Level of Intensity Required Under International Law for a Finding of an Armed Attack.**

In the alternative, Saddam Hussein could argue that if all of Al-Dawa’s previous terrorist attacks on the Iraqi government are accumulated (including the assassination attempt in Al-Dujail), the combined attacks would meet the threshold level of intensity. The “accumulation of events theory” was first proposed in 1985 after Israel bombed a Palestinian Liberation

---

<sup>115</sup> Survivors, *supra* note 12 [Reproduced in the accompanying notebook at Tab 52].

<sup>116</sup> U.N. S/RES/1368 [Reproduced in the accompanying notebook at Tab 15].

Organization camp in Tunisia. Israel justified its action as legitimate self-defense against prior acts of terrorism, allegedly committed by the PLO, which had caused seventy-five Israeli civilian deaths during the preceding months.<sup>117</sup> Israel's argument was that repeated and unpredictable terrorist attacks were sufficient to establish a self-defense claim under Article 51.<sup>118</sup> The United Nations Security Council rejected this theory and voted 14 to 0 (with the United States abstaining) to condemn Israel for its attack on Tunisia.<sup>119</sup> The Security Council refused to look beyond the immediate situation or consider Israel's "accumulation of events" theory for justification. The Israeli position on self-defense was simply too open-ended and subjective for the international community to tolerate.<sup>120</sup> Similarly, any previous attacks on the Iraqi government by Al-Dawa occurred several years before the assassination attempt and would be too speculative to aggregate. It is therefore not likely that Saddam Hussein will be successful in arguing the "accumulation of events" theory.

**b. An Attack May be Deemed an Armed Attack if Performed by a "Regular Armed Force."**

**i. The Assassination Attempt on Saddam Hussein May not be Deemed an "Armed Attack" under International Law Because the Attackers Are Probably Not Considered a "Regular Armed Force."**

The assassination attempt on Saddam Hussein may not rise to the level of "armed attack" required under international law if the attackers are not considered a "regular armed force." The

---

<sup>117</sup> Frank A. Biggio, *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*, 34 CASE W. RES. J. INT'L L. 1, 33 (Fall 2002) [Reproduced in the accompanying notebook at Tab 33].

<sup>118</sup> *Id.*

<sup>119</sup> U.N. SCOR (2615th mtg.) at 108, U.N. Doc. S/PV.2615 (prov. ed. 1985) [Reproduced in the accompanying notebook at Tab 9].

<sup>120</sup> Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 69 (Winter 1988) [Reproduced in the accompanying notebook at Tab 49].

ICJ in *Nicaragua v. U.S.*, relying on the U.N.’s definition of aggression, held that an “armed attack” occurs when regular armed forces cross an international border, or when a state sends “armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State.”<sup>121</sup> In *Nicaragua*, the United States argued that the mining of Nicaraguan ports, attacks on oil installations, and various other attacks it carried out against Nicaragua were justified because Nicaragua provided arms and other assistance to opposition forces in El Salvador, which assistance amounted to an “armed attack” under international law. The International Court of Justice disagreed, holding that any action taken by the aggressor must amount to an actual attack by regular forces.<sup>122</sup> The attack on Saddam Hussein and his motorcade may not be considered an “armed attack” under international law because the seventeen disgruntled citizens responsible for the assassination attempt could hardly be classified as a regular force in the traditional sense. The facts do not indicate that the attack was performed by an army, soldiers, or fighters trained in the art of war. Rather than use rocket propelled grenades or bombs to carry out the attack, the assailants only fired upon Saddam Hussein with Kalashnikov rifles and were quickly overpowered by Saddam’s bodyguards and soldiers.<sup>123</sup> The attack is better viewed as a conventional crime or use of force and not as an armed attack under international law.

As a counter-defense, Saddam Hussein could possibly argue that even though his attackers were not a regular force in the conventional sense, they used weapons traditionally used by regular military personnel and therefore should be likened to a regular force. The assailants

---

<sup>121</sup> *Nicaragua v. U.S.*, 1986 I.C.J. 14, 103 (I.C.J. 1986), quoting from U.N. definition of aggression [Reproduced in the accompanying notebook at Tab 20].

<sup>122</sup> *Id.*

<sup>123</sup> *Survivors*, *supra* note 12 [Reproduced in the accompanying notebook at Tab 52].

were heavily armed with military assault weapons (AK-47s), which are used by many militaries around the world. Saddam could also argue that those who engaged in the attack were members of Dawa, the military wing of an Islamic terrorist organization, and had successfully committed several previous acts of terrorism against the Iraqi government. In rebuttal, the prosecution could argue that the possession of assault weapons does not automatically justify the finding of a regular force. For example, gang members in Los Angeles or New York City who possess semi-automatic weapons would probably not be considered a regular force as required by the ICJ, but only dangerous criminals. Research did not uncover any authority under customary international law for Saddam's potential arguments and the IST will probably find that these facts do not warrant a finding that the attackers are considered a regular force.

**ii. Though the Assassination Attempt Against George Bush Sr. Was Deemed by the International Community to be an “Armed Attack,” the Attack Against Saddam Hussein is Distinguishable Because it was Probably Not Committed by an “Armed Regular Force.”**

It is likely that defense counsel will equate the attack on Saddam Hussein with the assassination attempt against former President Bush in 1993, which was generally accepted by the international community as an armed attack justifying the United States' lawful use of self-defense. On April 14, 1993, while President Bush Sr. was beginning a three-day visit to Kuwait city, Kuwaiti authorities thwarted a terrorist plot, seizing a powerful car bomb and other explosives and arresting 16 suspects.<sup>124</sup> After careful investigation, the United States obtained conclusive proof that the attempted assassination was the work of the Iraqi Intelligence Service

---

<sup>124</sup> U.N. SCOR, 48th Sess., 3245th mtg., U.N. Doc. S/PV.3245 [Reproduced in the accompanying notebook at Tab 14].

acting under the direction of the Iraqi government.<sup>125</sup> The United States justified the launching of twenty-three Tomahawk cruise missiles at the Iraqi Intelligence Service in Baghdad as an act of self-defense because America viewed an assassination attempt against its former Head of State as an attack against itself.<sup>126</sup> Although there was never a judicial determination, most states either approved of or did not object to the United States' decision to bomb Iraqi targets and no action was ever taken by the U.N. Security Council as a result of the U.S. missile attack.

Although the assassination attempt against former President Bush is analogous to the attack on Saddam, the prosecution could argue that the two attacks are distinguishable. The assassination attempt against President Bush was performed by the Iraqi Intelligence Service, a governmental agency under the control of Iraq, whereas the attack on Saddam Hussein was committed by Iraqi civilians with no formal ties to any government. Relying on the ICJ's holding in *Nicaragua*, the prosecution would argue that an "armed attack" against the U.S. occurred in 1993 because Iraq sent "armed bands, groups, irregulars or mercenaries [to] carry out acts of armed force against [the United States]."<sup>127</sup> The attempt on former President Bush's life was executed by the Iraqi Intelligence Service, an Iraqi government agency generally known to be equivalent to the CIA in the United States, which could be considered a regular force. In order to carry out the attack, highly specialized military training was needed to position and detonate the powerful car bomb and other explosives which would have taken many lives and caused much bloodshed. Those responsible for the attack on Saddam Hussein, however, cannot be included in the same category of "regular forces." Saddam's attackers were Iraqi civilians

---

<sup>125</sup> *Pentagon Statements*, *supra* note 66 [Reproduced in the accompanying notebook at Tab 65].

<sup>126</sup> U.N. Doc. S/PV.3245 [Reproduced in the accompanying notebook at Tab 14].

<sup>127</sup> *Nicaragua v. U.S.*, 1986 I.C.J. 14, 103 (I.C.J. 1986) [Reproduced in the accompanying notebook at Tab 20].

with seemingly no specialized technical training and were more akin to common thugs or gang members with assault rifles. They were not members of any state intelligence unit or other governmental agency and were not sent by any hostile foreign government. They also would not have killed hundreds of people had they been successful. In rebuttal to these arguments, defense counsel could use the United State's position before the Security Council in 1993<sup>128</sup> and argue that any attack on a President is the same as an attack on the nation and serious enough to warrant defensive action. This argument, however, does not negate the fact that the attackers in each assassination attempt are different. It is not likely that defense counsel will be successful under this argument because Saddam Hussein's attackers will probably not be deemed an armed regular force as required by the ICJ.

**c. Saddam Hussein has not Provided Conclusive Evidence Linking the Citizens of Al-Dujail to the Attack.**

Even if the attack on Saddam Hussein by the seventeen assailants constitutes an "armed attack" under international law, Saddam Hussein has not provided conclusive evidence demonstrating that the citizens of Al-Dujail were directly responsible for the "armed attack," and therefore he was not legally justified in exercising the right of self-defense. It is an accepted rule in customary international law that any state exercising the right of armed force in self-defense must prove that the party against whom the counter-attack is launched is to blame for the "armed attack." In *Iran v. United States*, the ICJ held that the United States had the burden of proving that "attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in

---

<sup>128</sup> U.N. Doc. S/PV.3245 [Reproduced in the accompanying notebook at Tab 14].



Article 51 of the United Nations Charter.”<sup>129</sup> After bombing four Iranian offshore oil production platforms, the U.S. claimed that it had acted in self-defense because Iran had launched a missile that struck a United States flag vessel near Kuwait harbor and Iran had also placed mines in international waters, one of which the warship *USS Samuel B. Roberts* struck. Since the United States could not provide conclusive evidence that Iran had launched the missile, or direct evidence that Iran was responsible for placing the mines in international waters, the ICJ held that the evidence was too attenuated and inconclusive to justify the United States’ claim of self-defense.<sup>130</sup> Similarly, Saddam must provide conclusive evidence demonstrating that the citizens of Al-Dujail were responsible in some way for the assassination attempt on Saddam Hussein. The facts only demonstrate that seventeen unidentified gunmen committed the armed attack against Saddam Hussein and not the thousands of Al-Dujail citizens that Saddam Hussein retaliated against. Unless Saddam Hussein can provide conclusive evidence that the individuals he summarily executed, arrested, tortured and hung were also responsible for the attack, his actions against the town of Al-Dujail will be considered a violation of international law.

**d. Providing Logistical Support, Shelter, Weapons, or other Support is Insufficient for Finding of “Armed Attack” under International Law.**

Assuming arguendo that the citizens of Al-Dujail are considered conspirators or accomplices in the attack on Saddam,<sup>131</sup> because they provided some form of logistical support, shelter, food, or weapons to the attackers, these actions would still not constitute an “armed

---

<sup>129</sup> *Iran v. U.S.*, 2003 WL 23335678, p. 21, para. 51, (I.C.J. 2003) [Reproduced in the accompanying notebook at Tab 19].

<sup>130</sup> *Id.* at 28, para. 72. (The Court did not rule out the possibility that the mining of a single military vessel might be sufficient to bring into play the “inherent right of self-defense.” The Court simply held that the evidence was insufficient to prove that Iran had placed the mine that the *USS Samuel B. Roberts* struck in international waters.)

<sup>131</sup> *Trial*, *supra* note 39 [Reproduced in the accompanying notebook at Tab 61].

attack” justifying the counter-defensive measures undertaken by Saddam Hussein. The ICJ in *Nicaragua* held that the concept of “armed attack” does not include providing assistance to rebels in the form of weapons, logistical or other support.<sup>132</sup> This is because providing support to rebels does not amount to an attack by regular forces. Such assistance may be regarded as a threat or use of force,<sup>133</sup> but does not rise to the threshold level of intensity required for an “armed attack” under international law. Any logistical support, shelter, food, or even weapons that the citizens of Al-Dujail may have provided to the attackers are equivalent to criminal acts at most and do not rise to the level of “armed attack” that justifies defensive actions under international law.

## **2. Nations Exercising Lawful Right of Self-Defense Must Notify the U.N. Security Council.**

After a Member nation or state exercises its inherent right of self-defense, Article 51 of the U.N. Charter requires that state to report its actions to the Security Council. It is generally known that the purpose of requiring the reporting of any armed force used against a previous aggressor is to give the Security Council the opportunity to assess the situation and prevent the conflict from escalating beyond the practical achievement of peaceful means. “This requirement, though explicit and unambiguous, has rarely been observed by States using force.”<sup>134</sup> Though the Security Council has passed judgment on states that failed to notify it of their employment of self-defense,<sup>135</sup> research did not uncover any circumstances where the Security Council

---

<sup>132</sup> *Nicaragua*, 1986 I.C.J. at 102-105 [Reproduced in the accompanying notebook at Tab 20].

<sup>133</sup> *Id.*

<sup>134</sup> OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE*, 138 (1995) [Reproduced in the accompanying notebook at Tab 30].

<sup>135</sup> *Id.*

sanctioned any Member for failing to report the exercise of the State's inherent right of self-defense. Thus, although Article 51 requires Member states to report to the Security Council any actions of armed force used against other nations, no Member nation has faced sanctions for failing to do so.

**E. Customary International Law Requirements of “Necessity” and “Proportionality” are Probably Not Met.**

Even if defense counsel is able to prove that the assassination attempt is deemed an illegal “armed attack” under international law, it must also prove that Saddam Hussein's response against the town of Al-Dujail was necessary under the circumstances and proportionate to the original attack. The ICJ in *Nicaragua* held that it is a well established rule of customary international law that even when a state is lawfully engaged in the exercise of its inherent right of self-defense, its use of force must be limited to that force necessary to defend against the attack and must be proportionate.<sup>136</sup> It is not likely that Saddam Hussein will be successful in establishing either of these prerequisites to the lawful use of armed force against aggressors.

---

<sup>136</sup> Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 583 (Spring 2002) [Reproduced in the accompanying notebook at Tab 32].

## **1. The Lawful Exercise of Self-Defense Must be Deemed “Necessary” under the Circumstances.**

Defense counsel must prove that Saddam Hussein’s armed retaliation<sup>137</sup> was a necessary exercise of self-defense, because there was no other meaningful alternative. Necessity as a requirement of self-defense in international law has its roots in the *Caroline* doctrine, where American Secretary of State Daniel Webster stated that self-defense “should be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>138</sup> The principle of necessity requires a harmed nation to explore potential peaceful resolutions to a threat before relying on the use of military force<sup>139</sup> and asks the question of whether peaceful means would be sufficient to forestall the danger of future attacks and provide adequate redress.<sup>140</sup> If peaceful alternatives were available to Saddam Hussein to redress the harms Iraq incurred from the attack, his response will be considered unnecessary and a violation of customary international law.

### **a. The Assault on Al-Dujail was Not Necessary Since Saddam Hussein Had Alternative Means at his Disposal to Handle the Attackers.**

Saddam Hussein’s reprisal against the town of Al-Dujail will probably not satisfy the requirement of necessity because he had alternative means at his disposal to bring those responsible for the attack to justice. In *Prosecutor v. Stakic*, the ICTY held that coordinated and

---

<sup>137</sup> Saddam Hussein’s retaliation includes the summary execution of 15 men, the arrest and imprisonment of over 1,500 men, women, and children, the torture of innocent civilians, the hanging of hundreds men and young boys in show trials and the razing of the town’s palm groves. Wong, *supra* note 40. [Reproduced in the accompanying notebook at Tab 75]. See also *The Reckoning*, *supra* note 14. [Reproduced in the accompanying notebook at Tab 56]. See also *Survivors*, *supra* note 12 [Reproduced in the accompanying notebook at Tab 52].

<sup>138</sup> Moore, *supra* note 2, at 412 [Reproduced in the accompanying notebook at Tab 29].

<sup>139</sup> Donald Nungesser, *United States’ Use of the Doctrine of Anticipatory Self-Defense in Iraqi Conflicts*, 16 PACE INT’L L. REV. 193 (Spring 2004) [Reproduced in the accompanying notebook at Tab 41].

<sup>140</sup> Schachter, *supra* note 134, at 168 [Reproduced in the accompanying notebook at Tab 30].

sustained armed attacks on civilian settlements in retaliation for an attack on Serbian soldiers by Muslim extremists was not lawful under international law, since alternative measures were available.<sup>141</sup> In that case, Serbian forces responded to an attack by Muslim extremists on a Serbian military patrol by launching a full-fledged military maneuver against the citizens of Jakupovici.<sup>142</sup> The ICTY agreed that the Serbs had a lawful right to self-defense but reasoned that other courses of action were at the Serbian forces' disposal to find the attackers, such as dispatching units to search for the alleged perpetrators.<sup>143</sup> Similarly, Saddam had the lawful right to bring the perpetrators to justice for the attack. The attackers in Al-Dujail were Iraqi citizens and could have easily been arrested and tried as common criminals. But rather than simply arrest those responsible and grant them the due process of the law, Saddam's secret police abducted approximately 1,500 men, women and children and subjected them to torture, beatings and other atrocities over the course of four years. He also chose to punish the attackers' community by destroying 240,000 acres of fruit groves and orchards. Saddam's need to take such actions can hardly be considered instant, overwhelming, and leaving no choice of other means.

**b. Unlike the United States' Response after 9/11, Saddam Hussein's Actions Against Al-Dujail Will Probably Not be Deemed Necessary Under International Law.**

For defense counsel to successfully argue that Saddam Hussein's actions in Al-Dujail were no different from those taken by the United States after 9/11, it must show that his actions were necessary because he had no other reasonable alternative in response to the attack. After

---

<sup>141</sup> *Prosecutor v. Stakic*, Case No. IT-97-24-T, at para. 153, Judgment (ICTY Trial Chamber, July 31, 2003); 2003 WL 23924205 [Reproduced in the accompanying notebook at Tab 24].

<sup>142</sup> *Id.* at para. 149.

<sup>143</sup> *Id.* at para. 153.

9/11, the United States argued that it had no alternative but to launch an attack on Afghanistan because the Taliban harbored Al-Qaeda terrorists and refused to hand them over to the proper authorities. The United States had previously attempted to negotiate with Afghanistan leaders but the Taliban refused to cooperate.<sup>144</sup> The United States subsequently launched a powerful barrage of cruise missiles and long-range bombers against terrorist training camps of Osama bin Laden's Al-Qaeda network.<sup>145</sup> President Bush announced that the targets chosen were necessary and designed to disrupt use of Afghanistan as a terrorist base of operations and to attack the military capability of bin Laden's organization.<sup>146</sup> Even assuming that the citizens of Al-Dujail are considered terrorists, Saddam Hussein did not find himself in the same position as the United States. Iraq was the harboring state and could deal with Iraqi terrorists as it would any other criminal. Since the attackers were Iraqi citizens, the only necessary action was for Saddam to arrest the assailants and try them as common criminals. Absent further provocation, any additional actions by Saddam Hussein were simply not necessary.

## **2. Any Defensive Actions taken Must be “Proportionate” to the Initial “Armed Attack.”**

Assuming *arguendo* that the assassination attempt on Saddam Hussein rises to the level of an “armed attack” and Saddam Hussein's retaliation against Al-Dujail and its citizens is deemed necessary by international standards, the hostile actions taken by Saddam Hussein will probably not satisfy the additional requirement of proportionality. Under customary international law, any defensive measures undertaken by an attacked nation or state must be

---

<sup>144</sup> Tyler, *supra* note 76 [Reproduced in the accompanying notebook at Tab 70].

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

“proportionate” to the seriousness and scope of the attack.<sup>147</sup> Even though Article 51 does not specifically require that an armed response be proportional or necessary, “it does not subsume [nor] supervene customary international law.”<sup>148</sup> The ICJ in *Nicaragua* held that it is a well established rule of customary international law that even when a state is lawfully engaged in the exercise of its inherent right of self-defense, its use of force must be proportionate.<sup>149</sup> When defensive action is greatly excessive to the provocation, as measured by relative casualties or scale of weaponry, the international courts and international opinion will more readily condemn such defense as illegally disproportionate.<sup>150</sup> Proportionality is paramount in judging the lawfulness of forcible acts. For example, some have argued that the destruction of a village because of a single terrorist incident would be grossly disproportionate and creates revulsion and horror.<sup>151</sup> Proportionality is especially relevant to actions that injure noncombatants or destroy civilian property to an excessive degree. Actions of self-defense by armed forces against terrorists are not exempt from basic humanitarian rules applicable to armed conflict.<sup>152</sup> Many have also argued that self-defense can never justify genocide or crimes against humanity because of the lack of proportionality or the imbalance between the interests protected,<sup>153</sup> and because less radical means are almost always available.

---

<sup>147</sup> Wolfrum, *supra* note 11, at 1168 [Reproduced in the accompanying notebook at Tab 31].

<sup>148</sup> 1 RAINER HOFMANN, JULIANE KOKOTT, & KARIN OELLERS-FRAHM, *WORLD COURT DIGEST, 1986-1990* (1993) [Reproduced in the accompanying notebook at Tab 27].

<sup>149</sup> *Nicaragua v. U.S.*, 1986 I.C.J. 14, 176 (I.C.J. 1986) [Reproduced in the accompanying notebook at Tab 20].

<sup>150</sup> Schachter, *supra* note 134, at 153 [Reproduced in the accompanying notebook at Tab 30].

<sup>151</sup> *Id.* at 168-169.

<sup>152</sup> *Id.* at 154.

<sup>153</sup> Mantovani, *supra* note 98, at 36 [Reproduced in the accompanying notebook at Tab 39].

**a. Saddam Hussein's Retaliation Against the People of Al-Dujail will Probably Not Satisfy the Requirement of Proportionality.**

Saddam Hussein's retaliation against the people of Al-Dujail will probably not satisfy the requirement of proportionality because his response was not proportional to the scope of the assassination attempt. In *Prosecutor v. Stakic*, the ICTY held that coordinated and sustained armed attacks on civilian settlements by Serbian forces in retaliation for a prior attack by Muslim extremists on a Serbian convoy was not considered a proportional response under international law.<sup>154</sup> The ICTY recognized the Serbs' right of self-defense but reasoned that such a justification was absurd in light of the eyewitness testimony that the attack was a planned and coordinated military operation of extreme intensity with infantry and armored vehicles opening fire not only on the houses in the village but also on the unarmed civilians fleeing into the nearby forests.<sup>155</sup> Admittedly, Saddam's armies did not launch a full blown military assault on Al-Dujail. In the aftermath of the attack, however, multiple rounds of heavy artillery were fired at crowds of civilians that had come to greet Saddam. Saddam's armies also committed many atrocities against the citizens of Al-Dujail. Iraqi special police murdered approximately fifteen unarmed men subsequent to the attack on Saddam without granting them any opportunity for a fair trial. There is no evidence that these unarmed men resisted arrest but they were summarily executed nonetheless. Rather than simply arrest those responsible and bring them to justice, Saddam's henchmen kidnapped approximately 1,500 men women and children and subjected them to torture, beatings and other atrocities for several years. Of those arrested, 143 were tried in show trials and publicly executed by hanging. Saddam also chose to punish the citizens of Al-

---

<sup>154</sup> *Prosecutor v. Stakic*, Case No. IT-97-24-T, at para. 153, Judgment (ICTY Trial Chamber, July 31, 2003); 2003 WL 23924205 [Reproduced in the accompanying notebook at Tab 24].

<sup>155</sup> *Id.* at para. 612.



Dujail by destroying 240,000 acres of fruit groves and orchards. His actions can hardly be considered proportional to the assassination attempt which only resulted in the death of a few of his body guards; his response must therefore be considered unlawful.

**b. Even if Citizens are Classified as Terrorists, Saddam Hussein's Actions were Still Not Proportional to the Original Attack.**

Saddam Hussein will probably argue that due to the unconventional means used by terrorists and insurgents to commit their attacks, he was unable to respond to the terrorists' actions using traditional methods of law enforcement and therefore proportionality is an inappropriate standard to evaluate his actions. In conventional warfare, proportionality is defined along the lines of fighting an adversary with similar weapons systems.<sup>156</sup> For example, fighting tanks with tanks and supporting artillery would be proportionally adequate whereas fighting tanks with nuclear warheads would clearly be disproportionate.<sup>157</sup> Some have argued that proportionality does not work when engaging in defensive actions against terrorists because states will not fight terrorists with explosive-filled trucks or suicide bombers.<sup>158</sup> Nonetheless, if some restraint is not exercised in responding to terrorist attacks, the doctrine of proportionality could become a nullity. An aggressor would only have to argue that the attackers were terrorists and therefore excessive use of force is acceptable under international law. Customary international law has never distinguished between different sources of the attack and it is irrelevant whether the attack is performed by terrorists or a regular army. For an armed attack to be considered lawful by international standards it must be proportionate to the original attack.

---

<sup>156</sup> Biggio, *supra* note 117, at 28 [Reproduced in the accompanying notebook at Tab 33].

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

## **F. Reprisal and Acts of Revenge Against Civilians Are Prohibited under International Law.**

State acts of reprisal or revenge that are directed against civilians are abhorred by the international community and considered unlawful under customary international law. In keeping with the purposes of the U.N. Charter, the U.N. General Assembly has resolved that reprisals are unlawful and nations have a duty to refrain from them.<sup>159</sup> Reprisals against civilians and civilian targets are especially egregious and constitute a grave breach of international humanitarian law. Protocol I of the Geneva Conventions states that, “attacks against the civilian population or civilians by way of reprisals are prohibited.”<sup>160</sup> If the response undertaken by Saddam Hussein against the people of Al-Dujail is considered a reprisal or act of revenge, it will be declared unlawful under international law.

While self-defense is recognized as a lawful justification for the use of force in customary international law, Saddam Hussein’s retaliatory acts against the town of Al-Dujail and its citizens will probably be deemed a reprisal or act of revenge. Self-defense is justified in some circumstances because it is implemented to protect the security and essential rights of a state and its citizens. When self-defense is used as an act of punishment or revenge, however, it is considered an armed reprisal and unlawful under international law.<sup>161</sup> Reprisals are generally

---

<sup>159</sup> In the General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 1970, “States have a duty to refrain from acts of reprisal involving the use of force.” GA Res. 2625, U.N. GAOR, 6<sup>th</sup> Comm., 25<sup>th</sup> Sess., Annex, at 122, U.N. Doc. A/8082 (1970) [Reproduced in the accompanying notebook at Tab 2].

<sup>160</sup> Protocol Additional to Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), art. 51(6), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 4, 16 I.L.M. 1391 [Reproduced in the accompanying notebook at Tab 3].

<sup>161</sup> Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889, 893 (Summer 2002) [Reproduced in the accompanying notebook at Tab 42].

punitive and differentiated from self-defense by time, necessity and motivation.<sup>162</sup> A clearly excessive amount of counterforce can be interpreted as a blatant reprisal disguised as self-defense. The prosecution could successfully argue that Saddam's attack on the village of Al-Dujail was a reprisal or act of vengeance. Rather than simply arrest the perpetrators, Saddam decided to punish the citizens of Al-Dujail by razing the palm groves and destroying many homes and businesses. Many villagers were also transported to Saddam's gulags and beaten or tortured. These actions were undertaken to drive fear into the hearts of the citizens of Al-Dujail and to compel strict obedience to the former dictator. Saddam's actions were clearly meant to be punishment for the attempted assassination. Simply claiming that a retaliatory act is an act of self-defense should be insufficient to disguise what was really an unlawful reprisal.

**G. Inability to Distinguish Terrorists or Insurgents from Innocent Civilians Is Not Sufficient to Justify Retaliatory Acts as Self-Defense.**

Saddam will likely argue that it was impossible to differentiate the terrorists and insurgents from innocent civilians and any civilians killed or harmed while trying to quell an insurrection were just "collateral damage." This argument, which is partially based on current U.S. operations in Iraq and Afghanistan to "uproot" terrorists and suppress the insurgency, will probably not be successful. Under Protocol I of the Geneva Conventions, parties to an armed conflict are required to distinguish between the civilian population and combatants and may direct their operations only against military objectives.<sup>163</sup> Whenever it is uncertain whether a person is a civilian or a combatant, that person is considered to be a civilian under international

---

<sup>162</sup> Wolfrum, *supra* note 11, at 1167 [Reproduced in the accompanying notebook at Tab 31].

<sup>163</sup> Protocol I, Geneva Conventions at art. 49 [Reproduced in the accompanying notebook at Tab 3].

law.<sup>164</sup> Since Saddam was uncertain of whether the citizens of Al-Dujail were armed terrorists or law abiding citizens, he was required under international law to operate under the assumption that they were civilians. The ICTY has held that “any deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law.”<sup>165</sup> Notwithstanding that Saddam was unable to distinguish the Dawa terrorists from civilians, it was unlawful to launch an attack against the citizens of Al-Dujail because of their civilian status. The rationale for such strict adherence to these principles is to protect the civilian population from unlawful armed attacks and the atrocities of war. Courts have recognized the difficulty during unconventional warfare to distinguish combatants from non-combatants, but have refused to mitigate criminal responsibility for actions against innocent civilians.<sup>166</sup>

Though it may be difficult to differentiate between belligerents and innocent civilians, it is contrary to the laws of war to kill civilians unless they are armed and jeopardizing the safety of troops.<sup>167</sup> The United States Army Court of Military Review in *U.S. v. Calley* held that reprisal by summary execution of innocent civilians is forbidden in the laws of land warfare notwithstanding the difficulty in distinguishing enemy belligerents from innocent civilians.<sup>168</sup> In *Calley*, the defendant and his troops stormed a village that was allegedly controlled by Viet Cong

---

<sup>164</sup> *Id.* at art. 50(1).

<sup>165</sup> *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judicial Supplement 2, at 257, para.78 (ICTY Trial Chamber, Feb. 17, 1999) [Reproduced in the accompanying notebook at Tab 22].

<sup>166</sup> *U.S. v. Calley*, 46 C.M.R. 1131, 1160 (U.S. Army Ct. Mil. Rev. 1973). (The U.S. Army Court of Military Review recognized that the Vietnam War was not a conventional war. “The enemy is often not in uniform. A farmer or a housewife or a child by day may well be the enemy by night.” The Court, however, held that a soldier must still keep his emotions in check and the inability to distinguish between innocent civilians and belligerents was not grounds to excuse criminal actions taken against civilians) [Reproduced in the accompanying notebook at Tab 25].

<sup>167</sup> *Id.* (General William C. Westmoreland testified that “there is no justification for eliminating civilians unless they are armed and jeopardizing the safety of U.S. troops where a matter of self-defense comes into play”).

<sup>168</sup> *Id.* at 1174.

but encountered only unarmed, unresisting, frightened old men, women, and children.<sup>169</sup> The defendant and some of his men summarily executed over one hundred unarmed villagers.<sup>170</sup> The defendant justified his actions on the grounds that his superiors had ordered the attack and it was impossible to distinguish Viet Cong insurgents from innocent civilians.<sup>171</sup> The Military Court did not agree, holding that reprisal by summary execution of the helpless is forbidden in the laws of land warfare.<sup>172</sup> Similarly, the Iraqi secret police and other military units summarily executed fifteen Al-Dujail citizens in the aftermath of the assassination attempt. No evidence indicates that these individuals were armed or resisted in any manner justifying the lawful exercise of self-defense. It was unlawful and murderous for Saddam Hussein to kill civilians unless they were armed and jeopardizing the safety of his troops.

Even if Saddam Hussein is correct in contending that the citizens of Al-Dujail were insurgents and terrorists and not innocent civilians, the summary execution of terrorists, insurgents, soldiers or other hostile forces is unlawful under international law. Defense counsel in *Calley* argued that since villager sympathy and support for the Viet Cong was so extensive and enduring, the villagers should not be considered innocent civilians but belligerents<sup>173</sup> themselves. Though the court did not address the issue of whether the villagers were in fact classified as belligerents or civilians, it held that summary execution of belligerents is unlawful and against

---

<sup>169</sup> *Id.* at 1165.

<sup>170</sup> *Id.* at 1169-1173.

<sup>171</sup> Michael P. Scharf, *Grotian Moment: The Saddam Hussein Trial Blog; Issue #13: Does Saddam Hussein Have a Viable Defense Based on the Necessity to Combat Insurgents and Terrorists?*, at <http://law.case.edu/grotian-moment-blog/> [Reproduced in the accompanying notebook at Tab 68].

<sup>172</sup> *Calley*, 46 C.M.R. at 1174 [Reproduced in the accompanying notebook at Tab 25].

<sup>173</sup> *Id.* at 1177, (Lt. Calley's contention was that since the villagers were deemed belligerents by superiors prior to entering the village, they were not entitled to the protections of peaceful civilian status under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *citing* 6 UST 3516, TIAS No. 3365 (1956)).

the Geneva conventions regardless of whether the armed conflict is a local uprising or an international war.<sup>174</sup> A classification of whether the citizens of Al-Dujail were in fact terrorists or insurgents is thus unnecessary and irrelevant. Saddam Hussein can not be justified in the summary executions that occurred simply by the possibility that those killed were terrorists or insurgents.

#### **H. Saddam Hussein Will Not Successfully Avoid Liability for His Crimes under Tu Quoque Defense.**

It is likely that Saddam Hussein will argue that the atrocities that he committed in Al-Dujail are defensible because the United States has committed similar acts while combating terrorists in Iraq and Afghanistan. This justification is known as the “tu quoque defense,” which literally means “you too.” Even if the assumption holds true that the U.S. has committed similar atrocities in its efforts to eliminate terrorists, the international courts have universally rejected the tu quoque defense. In *Hadzihasanovic*, the ICTY stated that “the Tribunal's jurisprudence is quite clear that the principles of tu quoque [do] not constitute a defense and has no basis in the law.”<sup>175</sup> In *Simic*, the defense attempted to justify the commission of crimes against humanity and war crimes because opposition forces had committed similar crimes. The ICTY emphatically rejected this argument stating that simply because “there may have been war crimes or crimes against humanity perpetrated against the Serbs by Croats and Muslims does not justify the commission of similar crimes by Serbs.”<sup>176</sup> In *Kupreskic*, the ICTY held that the tu quoque

---

<sup>174</sup> *Id.*

<sup>175</sup> *Hadzihasanovic et al.*, Transcript (IT-01-47), 269 (Nov. 28, 2003); 2003 WL 23697684 [Reproduced in the accompanying notebook at Tab 18].

<sup>176</sup> *Simic et al.*, The Prosecutor of the Tribunal, Transcript, (IT-95-9), (ICTY Nov. 7, 2002); 2002 WL 32598495 [Reproduced in the accompanying notebook at Tab 23].

defense has no place in contemporary international humanitarian law.<sup>177</sup> An accused does not exculpate himself from a crime by showing that another has committed a similar crime, either before or after the commission of the crime by the accused.<sup>178</sup> These holdings are based on the universal belief that every individual has the duty and obligation to adhere to international law regardless of the conduct of enemy combatants. Thus, it is irrelevant to Saddam's case whether the United States has engaged in unlawful or criminal acts while fighting terrorists. Saddam's tu quoque defense will not pass judicial muster and he will be held accountable for any criminal actions that he has committed.

Even if the tu quoque defense were considered valid under international law, it would still not exculpate Saddam Hussein from liability because the citizens of Al-Dujail did not commit similar crimes against Saddam Hussein or the Iraqi government. Tu quoque is generally argued to justify unlawful acts against an enemy that has committed similar acts against the individual accused.<sup>179</sup> The citizens of Al-Dujail are not guilty of or even accused of committing crimes against humanity against Saddam Hussein or the Iraqi government. Defense counsel has also not attempted to make this contention. Saddam will instead attempt to justify his actions because he alleges that the United States has undertaken similar actions in Afghanistan and Iraq. However, this is not a valid comparison under the tu quoque defense because any unlawful actions committed by the United States while fighting the insurgency or terrorists are unrelated to the parties involved in this case and therefore irrelevant. Even if the tu quoque defense were valid, Saddam would probably not be successful under this argument.

---

<sup>177</sup> *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judicial Supplement 2, at 12043, (ICTY Trial Chamber, February 17, 1999) [Reproduced in the accompanying notebook at Tab 22].

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at para. 516.

## **V. CONCLUSION.**

Though self-defense is a valid defense under customary international law that justifies a state's use of armed force against terrorist or insurgents, it will probably provide little protection to Saddam Hussein for the atrocities he committed in Al-Dujail. The attack by the Dawa terrorists may not rise to the level of an "armed attack" required by Article 51 of the U.N. Charter because it lacks the required intensity, and the assassination attempt was not committed by a regular armed force. Even if Saddam can show that the attack on his convoy rises to the level of an "armed attack," he has not provided conclusive proof that the citizens of Al-Dujail were responsible for the attack. Providing assistance, logistical support, or even arms to the attackers would also not be sufficient for finding that an armed attack occurred.

Assuming *arguendo* that the assassination attempt is deemed an armed attack by international legal standards, Saddam will probably not be able to meet the customary international law requirements of "necessity" or "proportionality." It is not likely that the IST will find that the massacre in Al-Dujail was necessary, instant or overwhelming as required by international law. Furthermore, his response will probably not be deemed proportional to the seriousness and scope of the initial armed attack. Even if Saddam is able to prove any one of the three requirements of self-defense under codified and customary international law, it is highly unlikely that he will be able to satisfy all three of them.