

Forum:
The Baghdad Bombing:
Self-defence or Reprisals?

The Raid on Baghdad:
Some Reflections on its Lawfulness and Implications

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From 14 to 16 April 1993, former United States President George Bush, the architect and leader of the international coalition that ended Iraq's aggression against Kuwait, visited Kuwait at the invitation of its grateful government. During the visit, the Kuwaiti government, tipped off by Iraqi informants, uncovered evidence that 175 pounds of explosives had been concealed in the body panels of a Toyota Land Cruiser and smuggled from Iraq into Kuwait. The device had the potential to destroy four city blocks. Its detonation was apparently planned for downtown Kuwait City and was to be timed to follow the high point of the Bush visit: his acceptance of an honorary degree at Kuwait University for his leadership in the Gulf War.

Kuwaiti officials apprehended thirteen Iraqis and three Kuwaitis in connection with the plot. Two of the main suspects, Wali al-Ghazali and Raad al-Assadi, confessed involvement in the plot and claimed that their orders had come directly from Iraqi intelligence. While the trial of the other fourteen suspects was underway in Kuwait, separate FBI and CIA investigations uncovered additional allegedly compelling evidence of Iraqi government complicity in the conspiracy. Most persuasive was the forensic evidence. The bomb incorporated the same remote-control firing device, plastic explosives, blasting cap, integrated circuitry, and wiring as devices linked to Iraqi intelligence in the past. Specifically, the bomb bore a striking resemblance to an Iraqi device recovered during the Gulf War by coalition forces after a foiled attack along the Turkish border.

United States officials spoke of an appropriate response, but President Clinton announced that the United States would not respond until the facts had been

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confirmed in the criminal trials then underway in Kuwait City. That statement notwithstanding, on 26 June 1993, US warships in the Red Sea and the Persian Gulf fired 23 Tomahawk cruise missiles upon Iraqi intelligence headquarters in Baghdad.

Twenty of the 23 US missiles landed within the boundaries of the intelligence service compound. The remaining three missiles struck a surrounding residential neighbourhood in the exclusive Mansour district of Baghdad, killing at least eight, wounding at least twelve civilians, and destroying private property.¹

The United States justified the raid as an act of self-defence permitted under Article 51 of the UN Charter.² President Clinton told the nation on the evening of the raid:

[T]he Iraqi attack against President Bush was an attack against our country and against all Americans. We could not and have not let such action against our nation go unanswered... A firm and commensurate response was essential to protect our sovereignty, to send a message to those who engage in state-sponsored terrorism, to deter further violence against our people, and to affirm the expectation of civilized behaviour among nations.³

General Colin Powell, then Chairman of the Joint Chiefs of Staff, proclaimed that the action was 'appropriate, proportional, and consistent with Article 51 of the Charter'.⁴

As required under Article 51 of the United Nations Charter, the United States promptly reported its action to the Security Council, which convened an emergency session at which the US Permanent Representative presented evidence of Iraqi involvement in the plot against Bush. She offered a series of photographs showing similarities between the device and other devices previously recovered from the Iraqis. She argued,

It is the firm judgment of the United States intelligence community, based on all the sources of evidence available to it, that this assassination plot was directed and pursued by the Iraqi Intelligence Service, an arm of the Government of Saddam Hussein... The attempt against President George Bush's life during his visit to Kuwait last April was an attack on the United States of America. [I]n our judgment, every member here today would regard an assassination attempt against its former head of state as an attack against itself and would react. [We responded] as we are entitled to do under Article 51 of the United Nations Charter, which provides for the exercise of self-defence in such cases.⁵

- 1 Lancaster, Gellman, 'US Calls Baghdad Raid a Qualified Success', *Washington Post* 28 June 1993, at A1.
- 2 Article 51 preserves for member states the 'inherent right of individual or collective self-defence' against armed attack, 'until the Security Council has taken measures necessary to maintain international peace and security'.
- 3 *President Clinton Addresses Nation on Iraq Strike*, Cable News Network 26 June 1993, available in LEXIS, Nexis Library, Transcripts file.
- 4 *Interview with Colin Powell*, Cable News Network, 27 June 1993, available in LEXIS, Nexis Library, Transcripts File.
- 5 Speech of Madeleine Albright, US Permanent Representative to the United Nations, before the UN Security Council, 27 June 1993, excerpted in 'Raid on Baghdad', *New York Times* 28 June 1993, at A7; 'UN Receives Evidence for Bush Attack', *St. Louis Post-Dispatch*, 28 June 1993, at A1.

Of the fifteen Security Council members, only China questioned the legality of the raid. Representatives of the three Islamic countries on the Security Council – Pakistan, Djibouti and Morocco – remained silent. A spokesman for all of the non-aligned countries on the Security Council – the three Islamic countries plus Venezuela and Cape Verde – stated only that they ‘had taken note of’ the evidence presented by the United States and that the subject was one of ‘utmost concern’.⁶

Egypt and several other Muslim countries questioned the legality of the raid,⁷ but the US action generally met with approval in Western capitals and in Russia. British Foreign Secretary Douglas Hurd expressed what appeared to have been a general view in the West: ‘This operation was a justified and proportionate exercise of the right of self-defence and a necessary warning to Iraq that state terrorism cannot and will not be tolerated.’⁸

I

Even if one believes that the function of the international jurist is to test the lawfulness of particular actions simply by measuring them against certain rules that are widely accepted, or that the jurist believes should be accepted, an appraisal of the Baghdad raid is still far from easy, for many of the norms contain ambiguities and the validity of others is uncertain. These problems rarely inhibit the jurist operating in this jurisprudential mode, for each incident and each judgment about it is essentially picaresque and its longer-term implications are limited; it was either a lawful or an unlawful action. The judgment reached is a kind of *Aktenversendung*, an academic *jus respondendi*, a pure statement of the law.

If one believes, as I do, that law is not to be found exclusively in formal rules but in the shared expectations of politically relevant actors about what is substantively and procedurally right – which may diverge sharply from the written rules – then a prerequisite for appraisal of the lawfulness and implications of an incident such as the Baghdad raid is an identification of the yardstick of lawfulness *actually* being used by relevant actors.

6 ‘US Seeks UN Support for its Strike Against Iraq’, *Star Tribune* 28 June 1993, at A6.

7 Lancaster, Gellman, *supra* note 1, at A1. The Arab League issued a statement expressing ‘extreme regret’ over the US attack and emphasizing that force should only be applied when the UN Security Council approves it. ‘US Seeks Support for its Strike Against Iraq’, *supra* note 6, at A6.

8 Jones, ‘Operation Was “Justified Exercise of Right of Self-Defence”, Says Hurd’, *Daily Telegraph* 29 June 1993, at 1; see also Statement of Chancellor Helmut Kohl of 27 June 1993, quoted in Winslow, ‘Allies, Moscow Lend Support’, *Newsday* 28 June 1993, at 18, ‘The German Government regards the American government’s action as a justified reaction to this detestable terrorist attempt’; see also quoted in Winslow at 18 the following statement of the Russian Foreign Ministry: ‘In the opinion of the Russian leadership, the US actions are justified because they proceed from the right of a state to individual and collective self-defence in accordance with Article 51 of the UN Charter.’ France offered only lukewarm support of the US action, with its UN Representative stating that France ‘understood’ the attack but sought ‘neither the destabilization nor the dismemberment of the Iraqi state’. See Olojede, ‘US Makes Case Before Sceptical UN’, *Newsday* 28 June 1993, at 5.

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The normative expectations that political analysts infer from events are the substance of much of contemporary international law. The fact that the people who are inferring norms from incidents do not refer to the product of their inquiry as 'international law' in no way affects the validity of their enterprise, any more than the obliviousness of Molière's M. Jourdain to the fact that he was speaking prose meant that he was not.⁹

In this approach, incidents, like the Baghdad raid, themselves may contribute to establishing the metric of lawfulness in a particular context. Regardless of whether or not a specific incident has this kind of constitutive impact, all incidents may confirm, adjust, or terminate expectations about lawfulness theretofore held, or indicate that the expectations are in various ways more complex, nuanced or contingent than the 'black letter' rule formulations they may approximate. This approach also demonstrates again and again what I take to be a fundamental jurisprudential postulate: that there may be great differences between the right legal answer *in abstracto* and the right legal decision *in concreto*.

II

The Baghdad raid signifies the continuing claim of the major international political actor, the United States, to initiate unilateral coercive action in circumstances in which it alone decides that such action is lawful and appropriate. This claim has been remarkably consistent over time and has not varied significantly on party lines. To cite only two examples, in a speech on 5 January 1993, former President Bush, speaking at West Point, said

... Military force is never a tool to be used lightly, or universally. In some circumstances it may be essential. In others, counterproductive. I know that many people would like to find some formula, some easy formula to apply, to tell us with precision when and where to intervene with force.

...

But to warn against a futile quest for a set of hard and fast rules to govern the use of military force is not to say there cannot be some principles to inform our decisions. Such guidelines can prove useful in sizing and indeed shaping our forces, and in helping us to think our way through this key question.

Using military force makes sense as a policy where the stakes warrant, where and when force can be effective, where no other policies are likely to prove effective, where its application can be limited in scope and time, and where the potential benefits justify the potential costs and sacrifice.

Once we are satisfied that force makes sense, we must act with the maximum possible support. The United States can and should lead, but we will want to act in concert, where possible, involving the United Nations or other multinational grouping.

...

9 Reisman, 'International Incidents: Introduction to a New Genre in the Study of International Law', in W.M. Reisman, A.R. Willard (eds), *International Incidents: The Law that Counts in World Politics* (1988) 5.

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But in every case involving the use of force, it will be essential to have a clear and achievable mission, a realistic plan for accomplishing the mission, and criteria no less realistic for withdrawing US forces once the mission is complete.¹⁰

In his Inaugural Address shortly thereafter, Bush's successor, President Clinton, said

... When our vital interests are challenged, or the will and conscience of the international community defied, we will act – with peaceful diplomacy when possible, with force when necessary. The brave Americans serving our nation in the Persian Gulf, in Somalia, and wherever else they stand are testament to our resolve.¹¹

One month later, in an address to the European Institute in Washington, a member of President Clinton's National Security Council said, 'I think you will see us willing to use force again on a case-by-case basis, but in a variety of combinations.'¹² Spokesmen for the Clinton Administration have made clear that the proclaimed preference for multilateral diplomacy does not preclude a resort to unilateral action when the United States deems it appropriate. As Secretary of State Warren Christopher told reporters shortly after the Baghdad raid:

In the United Nations we will act with other countries, we'll press them to do ... [their] part, but I emphasize that when our vital interests are threatened, as they were by the attempted assassination of former President Bush, we will act alone.¹³

In its insistence on this broad right, the United States does not view itself as a Nietzschean law-breaker. Quite the contrary. It sees its unilateral uses of force in circumstances it deems appropriate as consistent with and an implementation of international law. This self-perception continues to be controversial in general, but not always in particular.

Because all unilateral coercive action in international law is not *per se* unlawful, the lawfulness *vel non* of a particular coercive unilateral action must be appraised in terms of the general criteria about the lawful use of force. The international community seems to have accommodated itself to the Baghdad raid. But unilateral action always poses special burdens for the jurist called upon to appraise lawfulness. Over and above the question of whether a particular action is lawful is the larger constitutive question of the implications for the international system of continued reliance on unilateral action. On the one hand, the potential lawfulness of unilateral coercion acknowledges that the Hobbesian problem of international politics has not been solved by the creation of some sort of centralized enforcement agency. Since such centralized arrangements have been demonstrated, in many contexts, to be the

10 'Bush's Talk to Cadets: When "Force Makes Sense"', *New York Times* 6 January 1993, A6.

11 Advance Text of President Bill Clinton's Inaugural Address, Prepared for Delivery at 12:05 pm, US Capital, Washington, D.C., Wednesday, 20 January 1993.

12 Speech of Jenonne Walker of 25 February 1993, quoted in Martin, 'US Message in Bosnia Airdrop Plan', *Financial Times* 26 February 1993, at 3.

13 *World News Summary*, ABC News 27 June 1993, available in LEXIS, Nexis Library, Transcripts File.

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more economical and less destructive mode of vouchsafing minimum order, efforts at securing an efficient system of centralized response must continue.

Paradoxically, however, when an effective centralized enforcer does not exist, the availability and prospect of a potentially lawful unilateral action may sometimes pressure an unfocused or somnolent Security Council – the only approximation of a centralized enforcer we have – to exercise its powers, lest it be completely bypassed by an individual actor. Unilateral action in support of international public order may be better than nothing, but it is no substitute for an effective international institution. The selection of instances for unilateral action by particular states will always be heavily influenced by perceptions of what serves their national interests. Incidents that engage major international interests and that require an effective international response may not be perceived by any state as of sufficient national interest to warrant paying the international and domestic political costs of unilateral action.

So, like Churchill's quip about democracy, unilateral action in contemporary world politics is probably the worst practical option (and often the only one) ... except for all the others. The Baghdad raid and the absence, in its aftermath, of significant disapproval by politically relevant actors reinforces its potential lawfulness.

III

If unilateral actions are potentially lawful, how they are characterized legally acquires importance. It is not unusual for governments, like many other actors, to invoke a variety of justifications for their actions, some of which are inconsistent and some of which are, at best, peripherally linked to the governments' real objectives. In justifying the Baghdad raid, some US officials noted that Iraq had failed to comply with a series of Security Council resolutions on disarmament.¹⁴ Still, the United States sought to preserve the distinction between unilateral retaliation for the plot against Bush and the possibility of multilateral action to enforce the disarmament decrees.

Despite the fact that the United States sought to characterize the Baghdad raid as an act of self-defence, the raid fits at least as comfortably, if not more so, under the classic rubric of reprisal. In fact, there is quite a history to the contention that acts of reprisal are really acts of self-defence under the Charter. The United States has steadfastly resisted acknowledging that what it or some of its friends sometimes do

14 See, e.g., Statement of Madeleine Albright of 27 June 1993, US Permanent Representative to the United Nations, excerpted in 'Raid on Baghdad', *supra* note 5, at 7: 'Since its invasion of Kuwait, on August 2d, 1990, Iraq had repeatedly and consistently refused to comply with the resolutions of this Council. My Government's policy remains constant. We insist on full Iraqi compliance with all the United Nations resolutions.' Statement of General Colin Powell, Joint Chiefs of Staff Chairman of 27 June 1993, quoted in 'Iraq Attack was Success', *Houston Chronicle* 28 June 1993, at 1; 'The Iraqi regime would do well to comply with the obligations they entered into at the end of Operation Desert Storm.'

are essentially reprisals. In 1979, the Office of the Legal Adviser of the Department of State released a statement which, in relevant part, set out the American position:

Initially, the United States joined in the adoption of Security Council resolutions which isolated and condemned as illegal Israeli armed reprisals regardless of the provocations involved. [1953-1964] [in original] ... While the United States has modified its initial position of willingness to isolate armed reprisals and condemn them as illegal by insisting on a balanced condemnation of both the provocative acts, especially acts of terrorism, and the armed reprisals, the United States has not changed its position that reprisals involving the use of force are illegal...

In conclusion, it is clear that the United States has taken the categorical position that reprisals involving the use of force are illegal under international law; that it is generally not willing to condemn reprisals without also condemning provocative terrorist acts; and that it recognizes the difficulty of distinguishing between proportionate self-defence and reprisals but maintains the distinction. Where the United States has itself possibly engaged in reprisal action involving the use of force, characterization of the action has been confused by equating it also with self-defence. These so-called reprisal incidents took place in the context of a war justified by the United States Government as collective self-defence, and on this basis, could be distinguished from the reprisal raids conducted by Israel. It is also clear that the United States has determined that patterns of attacks can constitute a level of 'armed attack' justifying the use of force in self-defence.¹⁵

On a number of occasions in the last decade, the United States and the United Kingdom have exercised what could be characterized as reprisals against the presumed headquarters from which international terrorist actions emanate. In October, 1987, Iran fired Chinese-built Silkworm missiles upon the *Sea Isle City*, one of eleven Kuwaiti vessels that had been 'born again' with US flags, wounding the ship's US captain and injuring 16 other crewmen. The United States responded by destroying two Iranian offshore oil platforms.¹⁶ While this action, too, was described as self-defence,¹⁷ the much more plausible view is that it was an act of reprisal. Israel claimed a right of reprisal for more than 20 years; the United Nations General Assembly never accepted it. South Africa also claimed it with regard to paramilitary operations by the African National Congress (ANC) from bases outside of South Africa.¹⁸ The United States invoked it in actions against the Sandinista

15 M.L. Nash, *Digest of United States Practice in International Law* (1983) 1979, 1749-1752.

16 See Tyler, 'Silkworm Hits Kuwaiti Oil Terminal; Iran Reports Attack, but Makes No Claim of Responsibility', *Washington Post* 23 October 1987, at A1; Cannon, Ottoway, 'Officials Say Attack Shows US Intends to Defend Interests', *Washington Post* 20 October 1987, at A26.

17 See, e.g., Statement of President Ronald Reagan of 19 October 1987, quoted in Kurkjian, 'US Destroys 2 Iranian Platforms in Response to Attack on Tanker', *Boston Globe* 20 October 1987, at 1 (characterizing US action as 'lawful exercise of the right of self-defence enshrined in Article 51 of the United Nations Charter'); see also 'Britain, Israel Applaud; Soviets Call Action Aggression', *Los Angeles Times* 20 October 1987, Section 1 page 9.

18 As the South African representative told the UN Security Council '... South Africa will not tolerate activities endangering our security ... we will not hesitate to take whatever action may be appropriate for defence and security of our own people and for the elimination of terrorist elements who are intent on sowing death and destruction in our country and in our region. We will not allow ourselves to be attacked with impunity. We shall take whatever steps are appropriate to defend ourselves.'

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Government in Nicaragua. The International Court condemned the US action.¹⁹ The United States ignored the Court.

Whatever the US position, it appears that the notion of reprisal is generally reviving, under the guise of 'counter-measures,' as developed by the US-France tribunal in the *Air Services Agreement* arbitration²⁰ and elaborated by the UN International Law Commission.²¹

Statement of Ambassador von Schirnding, 41 UN SCOR (2684th mtg.) at 27-28, UN Doc. S/PV.2684 (prov. ed. 1986); see also W.M. Reisman, J.E. Baker, *Regulating Covert Action* (1992), at 82-83.

- 19 *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports (1986) 14, at paras. 248-49. After rejecting self-defence as a justification for US support for the *contras*, the Court addressed the legality of counter-measures: 'While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot ... produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused ... could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.' *Ibid.*, at para. 249.
- 20 *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France (US v. France)*, 18 Reports of International Arbitral Awards (1987) 417 (hereafter referred to as *US v. France*); for a very thoughtful examination of its implications, see E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Counter-measures* (1984). The case involved a dispute over the proper interpretation of the 1946 Agreement between the United States and France. Pan Am, the designated US carrier under the agreement for flights between the West Coast and Paris via London, used a different capacity plane for the London to Paris leg of the trip than it had used for the West Coast to London leg. France charged that the switch violated the agreement, which did not grant the United States traffic rights between London and Paris. The US Civil Aeronautics Board (CAB) responded by requiring French airlines to file all of their flight schedules to and from the US with the CAB for approval. The *US v. France* Tribunal addressed the legality of reprisals in general as follows: 'If a situation arises which, in one State's view, results in a violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of force, to affirm its rights through "counter-measures".' See *US v. France*, 18 Reports of International Arbitral Awards 417 at 443. In the dispute before it, the tribunal found that the United States had the right to act as it did. *Ibid.*, at 441, 447; see also W.M. Reisman, J.E. Baker, *supra* note 18, at 93-97.
- 21 The International Law Commission addressed the legality of counter-measures in its draft text on State responsibility, offering a fairly permissive view of their use. Under the draft text, counter-measures are lawful if taken in response to an internationally wrongful act of another State, Report of the International Law Commission on the Work of its Thirty-First Session: State Responsibility, Draft Articles (pt. 1), Art. 3, 2 ILC Yearbook (1980) and if taken after that State refuses to comply with interim measures of protection, Sixth Report on the Content, Forms and Degrees of International Responsibility, Draft Articles (pt. 2), Art. 10, 2 ILC Yearbook (1985) 12. See also the Symposium on counter-measures in this issue at 20.

Reprisals have followed a curious path in international politics. Article 50 of the 1907 Hague Convention on Land Warfare provided that

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.²²

This provision limits permissible targets of reprisals but does not prohibit reprisals as such. Sir Hersch Lauterpacht wrote in this regard:

Probably Article 50 of the Hague Regulations, enacting that no general penalty, pecuniary or otherwise may be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible, does not prevent the burning, by way of reprisals, of villages or even towns, for a treacherous attack committed there on enemy soldiers by unknown individuals, and this being so, a brutal belligerent has his opportunity.²³

Protocol I Additional to the Geneva Conventions of 1977, which is not in force for the United States, provides that 'civilian objects shall not be the object of attack or of reprisals', and that 'attacks shall be limited strictly to military objectives'.²⁴ (In this regard, one may note that the target of the Baghdad raid probably met the target tests of Protocol I.) These provisions do not preclude resort to reprisals as such but address issues of target and scope. The International Law Commission's draft on State responsibility states in Article 30:

The wrongfulness of an act of a state not in conformity with an obligation of that state towards another state is precluded if the act constitutes a measure legitimate under international law against that other state, in consequence of an internationally wrongful act of that other state.²⁵

The drafting committee of the Commission has prepared additional articles that establish conditions and limitations or counter-measures. Certain members of the Commission would plainly like to reduce their ambit substantially. What will ultimately emerge from the Commission and whether the international community will accept it remain to be seen.²⁶

The American Law Institute, in its *Restatement (Third) of Foreign Relations Law*, follows the ILC. Its black letter provides:

22 Convention on Laws and Customs of War on Land (Hague IV), 18 October 1907, C.I. Bevans, *Treaties and Other International Agreements of the United States of America 1776-1949*, Vol. 1 (1968) 631, at 652.

23 L. Oppenheim, *International Law*, Vol. II, *Disputes, War and Neutrality* (H. Lauterpacht ed., 7th ed. 1952) 565.

24 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), 16 ILM 1391 (1977).

25 Report of the International Law Commission on the Work of its Thirty-First Session, *supra* note 21, at 33.

26 See generally the discussion in the Symposium in this edition.

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[A] state victim of a violation of an international obligation by another state may resort to counter-measures that might otherwise be unlawful, if such measures (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered.²⁷

But the American Law Institute qualifies this privilege of resort to force:

The threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter...²⁸

That, of course, neatly begs the question. A strict interpretation of the Charter would, according to many scholars, preclude *any* unilateral use of force other than acts in self-defence within the meaning of Article 51 of the United Nations Charter. Even to explore the contingencies, conditions and restrictions on such unilateral uses of force is to acknowledge that they may sometimes be lawful.

The United States has it both ways by insisting that activities that it has undertaken that might be characterized as reprisals come under Charter Article 51. That makes them lawful and legitimately unilateral. It is sometimes good lawyering to fudge matters for a client. The critical question, of course, is what longer-term implications this approach carries for world order. That inquiry would be best served by clarity.

IV

The Baghdad raid confirms a practice of the United States over the last decade of using military force as a highly demonstrative elective tool for securing limited political objectives. Democracies like the United States make these decisions in a unique way. When a high profile use of force appears to be the preferred instrument for securing specific political objectives, the selection by political leaders of the particular ensemble of weapons and the method of their delivery is governed (i) decreasingly by the external political objectives sought and strict military considerations about the optimum method for their achievement and (ii) increasingly by political factors within the initiating state. This may be contrasted with professional military decision-making which would reverse the priorities.

The elites of the large popular democracies of the advanced industrial countries apparently believe that political support among the rank-and-file for military action abroad will not be long-term.²⁹ It is now taken for granted that in cases of indecisive military operations, popular support for a particular military action will be inversely proportional to casualties suffered. If the casualties mount and success is not immediate, the military action will be terminated. To avoid this outcome, the elite of

²⁷ Restatement (Third) of Foreign Relations Law of the United States sec. 905 (1987).

²⁸ *Ibid.*

²⁹ Reisman, 'War Powers: The Operational Code of Competence', 83 *AJIL* (1989) 777.

the initiating state will be inclined to select a weapons ensemble that minimizes the exposure of its personnel or will use massive amounts of force even when smaller, more precise applications would be likely to achieve the objective, with less peripheral damage in the target state but at greater risk to the initiator. This phenomenon may prove not to be unique to the United States. The great industrial democracies of Western Europe, Japan and the rest of North America will likely find that they too are subject to similar internal political forces.

The American practice can be traced to the Reagan Administration's attack on Syrian and Lebanese irregular positions near Beirut in December 1983. In October 1983, a suicide bombing of the US marine base in Beirut had left 241 marines dead. Although the United States did not respond immediately, it used Syrian anti-aircraft fire against US Navy F-14s on reconnaissance missions in December as a justification for striking back.³⁰ The United States bombarded suspected sites in the Shuf Mountains from ships in the Mediterranean. It cranked up the ships' great guns, virtually using them as mortars. To preclude United States casualties, even spotter planes, which would have been vulnerable to ground fire, were not used. The shelling was, for all intents and purposes, blind. After a predetermined amount of ordinance was fired, the mission was declared successful and the ships sailed off.

In the Baghdad raid, the weapon elected was a late model of a 'Cruise' missile. The Cruise missile is a weapon that may be fired at a 'safe' remove from the responsive capacity of the adversary and that is supposed to be guided by a pre-set computer programme to its target. Considering the nature of its delivery mechanism, the cruise missile is remarkably accurate. But it is not as accurate as other weapons available in the arsenal, some of which incorporate technology no less sophisticated but also allow for real-time visual verification and, if necessary, correction. Those other weapons, however, cannot be operated from over the horizon. By their nature, they require a more proximate presence of the operator and, thus, increase the likelihood of casualties to or capture of US forces.³¹

'Collateral damage' is the official euphemism for a weapon's use which, whether or not it achieves its target, injures or kills non-combatants and destroys property which was not targeted. Collateral damage is not *per se* a violation of the law of war. Until now, however, the international legal criteria of proportionality and necessity have implied the selection, by the attacker, of the most discriminating weapon in its arsenal for the military task at hand.

In this perspective, the Baghdad raid represents, implicitly, one more claim to revise this part of the law of armed conflict by inserting a new corollary: the

30 See, e.g., Cowell, 'US Warships Hit Syrian Positions in Lebanon Hills', *New York Times* 19 December 1983, at A1; see also Hiatt, 'Shultz Says Talk of Retaliation to End', *Washington Post* 15 November 1983, at A17; Gwertzman, 'US Denies Plan to Attack Syria; Urges Restraint', *New York Times* 8 November 1983, at A1.

31 In this regard, Baghdad may be contrasted with Mogadishu, a programme largely designed by professionals with quite a different configuration of risk as between the belligerents and non-combatants.

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initiating state should use the most discriminating weapon *that exposes its forces to the lowest probability of casualty*. Note that in this claim, the relationship between attacker and collateral damage to civilians in the target state is perforce zero-sum. The greater margin of safety for the initiating forces translates into greater peripheral damage to civilians in the target.

There is nothing iniquitous about a claim to change a part of the legal regime. Life changes and all of the institutions of society must adjust. Claims to revise legal arrangements are commonplace. Customary law, by its nature, is revised by a general acquiescence in a state's purposive current behaviour that violates some prior norm. That acquiescence should, ideally, be based on an *opinio juris* that the proposed changes promise to better serve the common interest in a new context than would the norms they are supplanting.

How should the claim to change this aspect of the law of war be evaluated? Is it true that an ineluctable condition for operation of the industrial democracies in this sector of international law is the reduction of their own casualties? If it is true, does it warrant changing the law and shifting the losses to non-combatants in the target state? Will the international law of armed conflict accommodate itself to this claim?

V

Although the Baghdad raid may be seen in a context of continuing military, economic and diplomatic pressures against the Saddam Hussein government in Iraq, the specific precipitating event for this raid was the attempt by the Government of Iraq to assassinate former President George Bush.

It is a sad feature of modern life, underlined by the murder of Olaf Palme, that even democratically elected leaders in comparatively tranquil states now require elaborate personal security systems. It is generally accepted that in the absence of security someone will try to harm a Head of State. But those are individual acts. Until now the initiation of an assassination attempt by one government against the Head of State of another has been deemed to be unlawful. For example, the May 1981 attempt to assassinate Pope John Paul II, probably by one or more intelligence agencies in the then Soviet Bloc, was unanimously condemned.³²

This norm has, however, suffered some discernible erosion and it would be inaccurate and unfair not to put the Iraqi *attentat* into context. Although the United States prohibits United States agencies from engaging in assassination,³³ the United States Government did not conceal, in the course of the Tripoli raid in April, 1986, that Muammar el-Qadaffi was a target. Indeed, one of the targets in the raid was the

32 See, e.g., 'From New Delhi to Iowa: Indignation and Prayers', *New York Times* 15 May 1981, at A10; Prial, 'Leaders Around the World Voice Shock and Anger', *New York Times* 14 May 1981, at A5.

33 Reisman, 'The Tormented Conscience: Applying and Appraising Unauthorized Coercion', 32 *Emory Law Journal* (1983) 499.

El Azziziya barracks, which served as Qaddafi's home and military headquarters; during the strike, Qaddafi's wife and two of his sons were injured and his adoptive daughter killed.³⁴ There was considerable criticism within the United States Congress of the failure in October, 1989, of the United States to provide decisive support for an abortive military initiative by Panamanian officers, led by Major Moises Giroldi, to oust Colonel Manuel Noriega, then dictator of Panama.³⁵ And the previous United States Administration and the United Kingdom had made clear that their political objective with regard to Iraq during the Gulf crisis was the removal of Saddam Hussein from power, which did not, apparently, exclude steps that could have led to Saddam's death by allied weapons or indigenous assassination. In Somalia, it was difficult not to interpret many of the operations of the United Nations forces throughout 1993 as designed to secure the death of Mohamed Farah Aidid.

For more than one thousand years, there has been a deep tension in Western civilization between the legitimacy of tyrannicide and the notion of the inviolability of the Head of a state or government.³⁶ To its credit, the Baghdad raid affirmed the grave international unlawfulness of trying to assassinate a Head of State. The raid itself targeted the intelligence headquarters in which the assassination plot had presumably been hatched and from which it was directed. The raid did not target Saddam himself. But the United States has conveyed inconsistent messages about the law in relation to Saddam and others. Plainly, officials have not thought through the public order implications of the cumulative erosion of a norm about Head of State inviolability, which occurs each time a Head of State is targeted.³⁷ They should.

VI

The United States had initially indicated that it would not react to the allegations of an Iraqi plot against former President Bush until the results of the Kuwaiti investigation and the trial and conviction of the operatives – who had been apprehended – had been concluded. In the event, however, the United States did not wait for the end of the trial, but conducted the raid much earlier. Some observers

34 Keesing's Contemporary Archives (1986) 34457.

35 See, e.g., 135 *Congressional Record* 513, 020-21 (daily ed. 11 October 1989) Statement of Senator Mitchell; 135 *Congressional Record* H6987 (daily ed. 12 October 1989) (Statement of Representative Durbin); 135 *Congressional Record* H6986 (daily ed. 12 October 1989) Statement of Representative Wise; 135 *Congressional Record* H6981 (daily ed. 11 October 1989) Statement of Representative Smith (Fla.); see also 'Baker Tells US Options on Panama', *Los Angeles Times* 4 October 1989, at A2.

36 See Schmitt, 'State-Sponsored Assassination in International and Domestic Law', 17 *Yale J. Int'l L.* (1992) 609.

37 For further discussion, see the comments on the thesis of Major Schmitt with regard to a right of assassination; Reisman, 'Some Reflections on International Law and Assassination Under the Schmitt Formula', 17 *Yale J. Int'l L.* (1992) 687.

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speculated that the selection of the time of attack was not accidental, but was designed to send an ancillary message to North Korea, then resisting UN efforts to have it withdraw its denunciation of its membership in and commitments to the International Atomic Energy Agency.

Assuming that the conjunction of events was not fortuitous, the question for the international legal scholar is whether, in assessing the lawfulness of uses of force, such extra-arena implications may be taken into account to justify or reinforce the action.³⁸ Plainly, the selection of a target and the conduct of the unilateral action only for its demonstration effect *vis-à-vis* another target outside the arena is unlawful. It would be equivalent, to paraphrase Holmes, to contending that if capital punishment is an effective deterrent, it is not too important whether a guilty or an innocent person is hung.

The inquiry becomes more complex, however, when there is some justification for the primary action but the principal objective of the initiators is the unrelated behaviour of another actor outside of the particular arena in which the unilateral action takes place. Will appraisals of the international lawfulness of coercive acts take account of the extra-arena effect of factors such as selection of timing, selection of weapons and, perhaps, selection of targets? Protocol I to the Geneva Conventions would seem to rule out such factors. It is, however, not one particular instrument but the complex process of decision of international politics that makes and changes international law. Incidents like the Baghdad raid play no small part in this process. It is precisely for this reason that they should be scrutinized, as are formal legislative proposals, for their comparative contribution to the fulfilment of the common interests of the world community.

38 At the time of the United States' invasion of Grenada, there was considerable discussion of the US interest in sending a general message that, despite its difficulties in Lebanon, it continued to be a credible global actor prepared to use force when it served its interests.