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Keywords

Age, Self-Defense, Weapons, Weapons of Mass Destruction, International Law: History, Military Law

PREEMPTIVE SELF-DEFENSE IN AN AGE OF WEAPONS OF MASS DESTRUCTION: OPERATION IRAQI FREEDOM

CHARLES PIERSON*

Facing clear evidence of peril, we cannot wait for the final proof, the smoking gun that could come in the form of a mushroom cloud.

President George W. Bush¹

I. THE FIGHT OVER PREEMPTION

With the promulgation of the Bush Doctrine, President George W. Bush announced a U.S. policy of preemptive action against terrorist states.² President Bush had previously identified Iraq, together with Iran and North Korea, as part of an “axis of evil” bent on the acquisition of weapons of mass destruction (WMD).³ The Bush Administration asserted that the danger of WMD in the hands of Saddam Hussein was so great that it justified a preemptive attack on Iraq before these weapons could be developed and used.⁴

* J.D., Duquesne University School of Law, 1998. The author extends warm thanks to the following who read and offered invaluable comments on drafts of this article: Samuel J. Astorino, Ph.D., J.D., Professor of Law, Duquesne University School of Law; Michla Pomerance, Emilio Von Hofmannstahl Professor of International Law, The Hebrew University of Jerusalem. The author assumes sole responsibility for the contents. This article is dedicated to the memory of my father, Charles Edward Pierson, Sr. (1917-1994).

1. See *Transcript: Confronting Iraq 'Is Crucial to Winning War on Terror,'* N.Y. TIMES, Oct. 8, 2002, at A12 (transcript of President Bush's October 7, 2002 speech in Cincinnati, Ohio) [hereinafter *Cincinnati Speech*].

2. In a commencement address at the U.S. Military Academy at West Point on June 1, 2002, President Bush declared: “We must take the battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.” See *Commencement Address at the United States Military Academy in West Point, New York*, 38 WEEKLY COMP. PRES. DOC. 944 (June 10, 2002), also available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (June 1, 2002) (transcript) (visited Oct. 4, 2004); David E. Sanger, *Bush to Outline Doctrine of Striking Foes First*, N.Y. TIMES, Sept. 20, 2002, at A1. The Bush Doctrine, of which pre-emptive strikes are only one part, has received its fullest exposition in the National Security Strategy released on September 17, 2002. See *National Security Strategy of the United States of America* (September 17, 2002) [hereinafter *National Security Strategy*], available at <http://www.whitehouse.gov/nsc/nss.pdf> (visited Oct. 4, 2004).

3. Address Before a Joint Session of the Congress on the State of the Union, 38 WEEKLY COMP. PRES. DOC. 133 (Feb. 4, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (visited Oct. 4, 2004) [hereinafter “President’s 2002 State of the Union Address”].

4. See David E. Sanger, *Bush Sees 'Urgent Duty' to Pre-empt Attack by Iraq*, N.Y. TIMES, Oct. 8, 2002, at A1; Judy Keen, *Bush: U.S. Can't Await 'Final Proof,'* USA TODAY, Oct. 8, 2002, at 1A;

The Administration made the case against Iraq in speeches by Vice President Dick Cheney on August 26, 2002,⁵ by Secretary of State Colin Powell before the U.N. Security Council on February 5, 2003⁶, and in addresses by President Bush before the General Assembly of the United Nations on September 12, 2002⁷ and on U.S. television on October 7, 2002.⁸ Detailed charges against Iraq also are set out in the joint resolution for the use of military force drafted by the Administration and adopted by Congress.⁹ Preemption supplants the containment strategy the United States had pursued against Iraq in the decade following the 1991 Persian Gulf War.¹⁰

“Preemption,” “preemptive self-defense,” and “anticipatory self-defense” traditionally refer to a state’s right to strike first in self-defense when faced with

Elisabeth Bumiller and James Dao, *Cheney Says Peril of a Nuclear Iraq Justifies Attack*, N.Y. TIMES, Aug. 27, 2002, at A1; Elisabeth Bumiller, *U.S. Must Act First to Battle Terror, Bush Tells Cadets*, N.Y. TIMES (INTERNATIONAL), June 2, 2002, §1, at 1.

Contrary to popular misconception, Bush policy is not a radical break with the past. Regime change in Iraq has been the policy of the United States since the closing days of the Clinton Administration. See Iraq Liberation Act of 1998, 22 U.S.C.S. §2151(3) (1998); The President’s Radio Address, William J. Clinton, 34 WEEKLY COMP. PRES. DOC. 2514, (Dec. 28, 1998); BOB WOODWARD, *PLAN OF ATTACK* 10 (2004); KENNETH M. POLLACK, *THE THREATENING STORM: THE CASE FOR INVADING IRAQ* 91, 94 (2002); DILIP HIRO, *IRAQ: IN THE EYE OF THE STORM* 145 (2002).

5. *In Cheney’s Words: The Administration Case for Removing Saddam Hussein*, N.Y. TIMES, Aug. 27, 2002, at A8 (excerpts from Vice President Cheney’s August 26, 2002 speech before the Nashville convention of the Veterans of Foreign Wars) [hereinafter Nashville Speech].

6. *The Case Against Iraq*, N.Y. TIMES, Feb. 6, 2003, at A38.

7. *In Bush’s Words: On Iraq, U.N. Must Face Up to Its Founding Purpose*, N.Y. TIMES, Sept. 13, 2002, at A10 (transcript of President Bush’s September 12, 2002 address before the United Nations General Assembly) [hereinafter UN Speech].

8. *Cincinnati Speech*, *supra* note 1, at A12.

9. See Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. (2002), 2002 U.S.C.C.A.N. 1498 [hereinafter Iraq Resolution]. The resolution describes Iraq’s breach of Security Council resolutions, including resolutions relating to disarmament and human rights violations against the Iraqi people and the Iraqi Kurds; the 1993 assassination plot against former President Bush; Iraq’s possession, development, and attempts to acquire weapons of mass destruction; Iraq’s support for and harboring of terrorist groups, including Al-Qaeda; and the danger that Iraq would transfer weapons of mass destruction to such terrorist groups. *Id.* The last items link war on Iraq to the war on terror and the September 11, 2001 terrorist attacks on the United States.

Charges against Iraq also appear in Security Council Resolution 1441. See S.C. Res. 1441, U.N. SCOR, 4644th Sess., U.N. Doc. S/RES/1441 (2002). All of the Security Council resolutions cited in this article are available on the web site of the United Nations at <http://www.un.org/documents/scres>.

10. Containment of Saddam rested on the five pillars of U.N. weapons inspections; U.S./U.N. sanctions on Iraq in the form of import/export controls; the imposition of “no-fly” zones over the north and south of Iraq; continuing sporadic limited military action, chiefly in the form of punitive air strikes; and a continued U.S. troop presence in the Persian Gulf region. See POLLACK, *supra* note 4, at x, xv-xxii. Vice President Dick Cheney argued that Saddam is no longer “containable” in a speech before the Veterans of Foreign Wars in Nashville on August 26, 2002. See Nashville Speech, *supra* note 5, at A8. Mr. Cheney said: “[C]ontainment is not possible when dictators obtain weapons of mass destruction and are prepared to share them with terrorists, who intend to inflict catastrophic casualties on the United States.” *Id.* According to Mr. Cheney, U.N. weapons inspections were insufficient to prevent Saddam’s obtaining weapons of mass destruction. *Id.* Accord Robert J. Lieber, *The Folly of Containment*, COMMENT., Apr. 1, 2003, at 15.

imminent attack—to beat an adversary to the punch.¹¹ Preemption remains relevant in the aftermath of Operation Iraqi Freedom as the Bush Administration contemplates preemptive military action to disarm Iran, Syria, North Korea, and Cuba. This article examines whether anticipatory self defense is permitted under international law and, if so, whether the invasion of Iraq was a legitimate exercise of anticipatory self-defense.

II. DID IRAQ'S MATERIAL BREACH OF THE PERSIAN GULF WAR CEASE-FIRE PROVIDE AUTHORIZATION FOR WAR?

Before discussing the legality of anticipatory self-defense, this section looks briefly at the Administration's argument that Operation Iraqi Freedom was legal due to Iraq's material breach of the 1991 Persian Gulf War cease-fire agreement.¹² Iraq's invasion of Kuwait on August 2, 1990 triggered the right of individual and

11. The three terms are used synonymously in this article. They are distinguished from preventive war which all commentators agree is condemned under international law. See Louis René Beres, *After the Gulf War: Israel, Pre-emption, and Anticipatory Self-Defense*, 13 HOUS. J. INT'L L. 259, 264 n.11 (1991); Louis René Beres, *Striking "First": Israel's Post-Gulf War Options under International Law*, 14 LOY. L.A. L. REV. 1, 1 n.2 (1991). The difference between preemption and preventive war is:

Preemption is a military strategy of striking an enemy first, with the expectation that the only alternative is to be struck first oneself. A preemptive attack differs from a preventive attack, which is launched out of concern for long-term deterioration in the pertinent military balance, rather than fear of imminent hostilities. Thus, in a preemptive attack, the enemy's action is anticipated in a very short time, while in a preventive attack, the interval is considerably longer.

Beres, *Striking "First," supra*, at 1 n.2.

The Department of Defense defines a "preemptive attack" as "[a]n attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent." U.S. DEPT. OF DEFENSE, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 415 (12 Apr. 2001, As Amended Through 17 Dec. 2003), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf (visited Mar. 12, 2004). A "preventive war" is "[a] war initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk." *Id.* at 419.

12. The material breach argument was included in President Bush's address to the nation delivered two days before the beginning of the war. See *Bush's Speech on Iraq: 'Saddam Hussein and His Sons Must Leave,'* N.Y. TIMES, Mar. 18, 2003, at A14 (transcript of President Bush's March 17, 2003 address) [hereinafter *Bush's Speech on Iraq*]; Peter Slevin, *Legality of War Is a Matter of Debate: Many Scholars Doubt Assertion by Bush*, WASH. POST, Mar. 18, 2003, at A16. The implied authorization argument had previously been set forth by William H. Taft IV, the Legal Adviser of the U.S. Department of State. See U.S. DEPT. OF STATE, *Taft: Bush Has Legal Authority to Use Force in Iraq*, available at <http://usinfo.state.gov/topical/rights/law/03032201.htm> (Mar. 21, 2003) (excerpt of remarks before the National Association of Attorneys General, March 20, 2003) (visited Oct. 19, 2003); William H. Taft IV & Todd Buchwald, *Agora: Future Implication of the Iraq Conflict: Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003); Peter Slevin, *U.S. Says War Has Legal Basis: Reliance on Gulf War Resolutions Is Questioned by Others*, WASH. POST, Mar. 21, 2003, at A14. The material breach argument was subsequently presented to the United Nations Security Council. See *Letter Dated 20 March from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, U.N. DOC. S/2003/351 (Mar. 21, 2003), available at http://www.un.int/usa/s2003_351.pdf (visited July 13, 2003). The United States' legal position was joined by the United Kingdom. See Attorney-General's Written Answer on 17 March 2003 Setting out His View of the Legal Basis for Use of Force Against Iraq, available at <http://www.fco.gov.uk/Files/KFile/AG%20Written%20Answer%20of%2017%20March%202003.pdf> (Mar. 18, 2003) (visited May 14, 2003).

collective self-defense under Article 51 of the United Nations Charter.¹³ Shortly thereafter, in Resolution 678, the Security Council invoked Chapter VII of the U.N. Charter and authorized Member States to “use all necessary means to uphold and implement Res. 660” and “*all subsequent relevant resolutions.*”¹⁴ One of those “subsequent relevant resolutions” was Resolution 687, the Gulf War cease-fire, which required Iraq to disarm and submit to weapons inspections.¹⁵ Iraq’s material breach of the cease-fire revived Resolution 678’s authorization to use force.¹⁶ This conclusion proceeds from a number of rationales. One is to treat Security Council Resolution 687 as analogous to a treaty.¹⁷ Under the law of treaties, material breach of a treaty allows a “specially affected” party to suspend operation of the treaty.¹⁸ Another rationale is that the cease-fire was expressly

13. See Andru E. Wall, *The Legal Case for Invading Iraq and Toppling Hussein*, 32 ISRAEL Y.B. HUM. RTS. 165, 165, 172 (2002).

14. S.C. Res. 678, Para. 2, U.N. SCOR, 2963rd Sess. (1990), (emphasis added). “All necessary means” is standard Security Council shorthand for military force. See MOHAMED AWAD OSMAN, *THE UNITED STATES AND PEACE ENFORCEMENT: WARS, TERRORISM AND DEMOCRACY* 52-54 (2002). While commentators routinely refer to Security Council Resolution 678 as the “authorization” for the Persian Gulf War the Council’s consent was not needed. As already stated, Desert Storm was a legal exercise of the right of individual and collective self-defense set out in U.N. Charter Article 51. See *supra* note 13 and accompanying text; U.N. CHARTER art. 51; Taft & Buchwald, *supra* note 12, at 558 n.4 and accompanying text; Wall, *supra* note 13, at 172, 175, 177-78. The United States went to the Security Council in 1991, as it did in 2003, for political reasons: to help build a coalition to act against Iraq. See Wall, *supra*, at 172, 177-78.

15. S.C. Res. 687, U.N. SCOR, 2983rd Sess. (1991)). See John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563 (2003); Michael J. Matheson, REMARKS, in *Legal Authority for the Possible Use of Force against Iraq*, 92 AM. SOC’Y INT’L L. PROC. 136, 138 (1998); Frederic L. Kirgis, *Security Council Resolution 1441 on Iraq’s Final Opportunity to Comply with Disarmament Obligations*, AM. SOC’Y INT’L L. INSIGHTS (Nov. 2002), available at <http://www.asil.org/insights/insigh92.htm> (visited Oct. 7, 2004). Unlike a peace treaty, a cease-fire agreement only temporarily suspends, rather than terminates, hostilities. See Wall, *supra* note 13, at 180, 183. The state of war continues. *Id.* at 180, 182. For background on the Gulf War cease-fire, see *id.* at 178-183.

16. See Taft & Buchwald, *supra* note 12, at 557, 558; Yoo, *supra* note 15, at 567; Kirgis, *supra* note 15; Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq’s Weapons of Mass Destruction*, 92 AM. J. INT’L L. 724, 725-26 (1998). In his address on the eve of war President Bush said: “Under [Security Council] Resolutions 678 and 687, both still in effect, the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction.” See *Bush’s Speech on Iraq*, *supra* note 12 (emphasis added).

17. See Kirgis, *supra* note 15. Professor Mary Ellen O’Connell objects that Security Council resolutions are not analogous to treaties because Council resolutions are binding even without the consent of states subject to them. See Mary Ellen O’Connell, *UN Resolution 1441: Compelling Saddam, Restraining Bush*, JURIST, available at <http://jurist.law.pitt.edu/forum/forumnew73.php> (visited Nov. 27, 2002) (text accompanying note 11) While this is true of most Security Council resolutions it is not true of S.C. Res. 687 which provided that it would come into effect only upon its acceptance by Iraq. See S.C. Res. 687 Op. Para. 33. The requirement of Iraqi consent makes S.C. Res. 687 resemble a treaty more than a typical Security Council resolution. See Robert F. Turner, *Was Operation Iraqi Freedom Legal?*, in LAURIE MYLROIE, *BUSH VS. THE BELTWAY: HOW THE CIA AND THE STATE DEPARTMENT TRIED TO STOP THE WAR ON TERROR* 164, 177-78 (2003). This is not surprising given the resolution’s origin as a cease-fire agreement negotiated in the field between the Iraqi and Coalition military commanders. See Wall, *supra* note 13, at 178-79. Iraq notified the Security Council of its acceptance on April 6, 1991. Wall, *supra* note 13, at 180.

18. See Kirgis, *supra* note 15; Yoo, *supra* note 15, at 568; Vienna Convention on the Law of

conditioned on Iraq's disarmament and compliance with inspections.¹⁹ The Security Council found Iraq in material breach of the cease-fire on numerous occasions.²⁰

The first President Bush relied upon the material breach argument to establish "no-fly" zones over northern and southern Iraq.²¹ When the United States, Britain, and France bombed Iraq in January 1993 in order to enforce Iraqi compliance with weapons inspections they did not seek specific authorization from the Security Council.²² Nevertheless, U.N. Secretary General Boutros Boutros-Ghali declared that the strikes were pursuant to Resolution 678.²³ President Clinton used the material breach argument to justify the December 1998 Operation Desert Fox bombing campaign against Iraq.²⁴

Security Council Resolution 1441 reinforces the conclusion that the United States had authorization for the war on Iraq. Security Council Resolution 1441, passed unanimously on November 8, 2002, gave Iraq a "final opportunity" to disarm.²⁵ To that end Resolution 1441 provided for a resumption of weapon

Treaties, U.N. Doc. A/Conf. 39/27, 1155 U.N.T.S. 331, *reprinted in* 63 AM. J. INT'L L. 875 (1969), 8 I.L.M. 679 (1969), art. 60(2)(b) (concluded at Vienna, May 23, 1969, entered into force Jan. 27, 1980) [hereinafter "Vienna Convention"]. The Vienna Convention postdates the Charter and is nonretroactive in application. Vienna Convention art. 4. It is cited solely as evidence of the customary law of treaty interpretation. *See infra* note 48 and accompanying text. The United States is a "specially affected" state because it is the world's leading target of terrorism and presumably of any Iraqi WMD. *See Kirgis supra* note 15.

19. *See* Wedgwood, *supra* note 16, at 725-26.

20. Iraq was first found in material breach less than six months after the Gulf War ended. *See* S.C. Res. 707 Op. Para. 1 (Aug. 15, 1991); Wall, *supra* note 13, at 166 n.5. The Security Council would find Iraq in material breach repeatedly thereafter. *See* S.C. Res. 1060 Op. Para. 1 (June 12, 1996) ("clear violation"); S.C. Res. 1115 Op. Para. 1 (June 21, 1997) ("clear and flagrant violation"); S.C. Res. 1134 Op. Para. 2 (Oct. 23, 1997) ("flagrant violation"); S.C. Res. 1137 Op. Para. 1 (Nov. 12, 1997) ("continued violations"); S.C. Res. 1194 Op. Para. 1 (Sept. 9, 1998) ("totally unacceptable contravention of its obligations"); S.C. Res. 1205 Op. Para. 1 (Nov. 5, 1998) ("flagrant violation"); S.C. Res. 1441 Op. Para. 1 (Nov. 8, 2002). On six occasions between 1991 and 1992 the President of the Security Council declared that Iraq was in material breach of Resolution 687. *See* Yoo, *supra* note 15, at 569, 569 n.35 (2003). For brief histories of Iraq's breaches of the ceasefire, *see* Turner, *supra* note 17, at 173-77; Paul Schott Stevens, Andru E. Wall, and Ata Dinlene, *The Just Demands of Peace and Security: International Law and the Case against Iraq*, available at <http://www.fed-soc.org/War%20on%20Terror/iraqfinal—web.pdf>, at 8-12 (visited Feb. 17, 2004).

21. *See* O'Connell, *supra* note 17. Security Council Resolutions 678 and 687 were read together with Security Council Resolution 888, which condemned Iraq's repression of the Iraqi Kurds and Shiites. *Id.* Professor Mary Ellen O'Connell reluctantly concedes that owing to Security Council acquiescence the no-fly zones were "arguably permissible." *Id.*

22. *See* Wedgwood, *supra* note 16.

23. *See* Taft & Buchwald, *supra* note 12, at 559; Yoo, *supra* note 15, at 570; George Bush, Letter to Congressional Leaders Reporting on Iraq's Compliance With United Nations Security Council Resolutions, Jan. 19, 1993, 29 WEEKLY COMP. PRES. DOC. 67, 67 (Jan. 25, 1993) (quoting UN Secretary General Boutros Boutros-Ghali).

24. *See* William J. Clinton, Letter to Congressional Leaders on the Military Strikes Against Iraq, Dec. 18, 1998, in PUB. PAPERS OF WILLIAM J. CLINTON 2195, 2195-96 (1998); Matheson, *supra* note 15 at 137-38, 141-42. Mr. Matheson was Principal Deputy Legal Adviser of the U.S. Department of State during Operation Desert Fox.

25. S.C. Res. 1441 Op. Para. 2 (Nov. 8, 2002). The same language appeared in Security Council

inspections in Iraq interrupted since UNMOVIC inspectors left Iraq in 1998.²⁶ The resolution warned that Iraq's failure to submit to renewed inspections would lead to "serious consequences," understood to mean war.²⁷ Following adoption of Resolution 1441 U.S. Ambassador to the United Nations John Negroponte indicated that the United States did not consider Resolution 1441 to be a bar to unilateral U.S. action should the Security Council fail to act.²⁸

III. SELF DEFENSE PRIOR TO THE UNITED NATIONS CHARTER

The right of self-defense is set out in customary international law in the so-called *Caroline* doctrine. In 1837 a portion of Canada was in rebellion against the British Crown. The vessel *Caroline* was owned by a group of Americans who in 1837 were using her to ferry men and supplies to rebels on an island on the Canadian side of the Niagara River.²⁹ To cut off assistance to the rebels, British troops crossed into U.S. territory on December 29, 1837, loosed the *Caroline* from her moorings on the New York side of the river, set fire to the ship, and sent her over the Falls.³⁰ The resulting legal issue was whether the British had acted legitimately in self-defense. In an exchange of diplomatic correspondence with Lord Ashburton of Great Britain, Secretary of State Daniel Webster set forth the conditions of necessity and proportionality which came to be accepted as the customary law requirements for the exercise of self defense (the "*Caroline*

Resolution 678 which authorized the 1991 Persian Gulf War. S.C. Res. 678 Op. Para. 1 ("one final opportunity"); Taft & Buchwald, *supra* note 12, at 558, 560.

26. S.C. Res. 1441. UNMOVIC stands for United Nations Monitoring, Verification and Inspection Commission established in 1999. S.C. Res. 1284 Op. Para. 1 (Dec. 17, 1999). UNMOVIC is the successor to the United Nations Special Commission on Iraq (UNSCOM). S.C. Res. 687 Op. Para. 9(b)(i) (Apr. 3, 1991).

27. S.C. Res. 1441 Op Para. 13. See Julia Preston, *Security Council Votes, 15-0, For Tough Iraq Resolution; Bush Calls It a 'Final Test.'* N.Y. TIMES, Nov. 9, 2002, at A1; Kirgis, *supra* note 15.

28. Ambassador Negroponte stated that "[O]ne way or another . . . Iraq will be disarmed." *The Rationale for the U.N. Resolution on Iraq, in the Diplomats' Own Words*, N.Y. TIMES, Nov. 9, 2002, at A8. Unidentified government sources asserted that in the event Iraq materially breached Resolution 1441 and the Security Council took no action the United States would be legally justified in proceeding to invade Iraq. See Preston, *supra* note 27, at A8 ("United States officials said that [Resolution 1441] gives Washington the legal basis to go to war unilaterally if the Council cannot agree how to respond to new violations by Baghdad."). Also significant is President Bush's statement after adoption of Resolution 1441 that: "The United States has agreed to discuss any material breach with the Security Council, but *without jeopardizing our freedom of action* to defend our country. If Iraq fails to fully comply, the United States and other nations will disarm Saddam Hussein." *Transcript of Bush's Remarks on the Security Council's Iraq Resolution*, N.Y. TIMES, Nov. 9, 2002, at A10 (emphasis added). Compare similar remarks made by President John F. Kennedy during the Cuban Missile Crisis: "This Nation is prepared to present its case against the Soviet threat to peace, and our own proposals for a peaceful world, at any time and in any forum—in the OAS, in the United Nations, or in any other meeting that could be useful—*without limiting our freedom of action.*" President John F. Kennedy, *Radio and Television Report to the American People on the Soviet Arms Buildup in Cuba* (Oct. 22, 1962), in PUB. PAPERS OF JOHN F. KENNEDY 806, 808 (1962); 47 DEP'T STATE BULL. 715, 718 (1962) [hereinafter Radio and Television Report] (emphasis added).

29. See Michael Byers, *Jumping the Gun*, LONDON REV. BKS 3 (July 25, 2002).

30. *Id.*; see also Frederic L. Kirgis, *Cruise Missile Strikes in Afghanistan and Sudan*, ASIL INSIGHT, Aug. 1998, available at <http://www.asil.org/insights/insigh24.htm> (last visited Sept. 24, 2004).

doctrine”).³¹ Necessity requires imminent “overwhelming” danger and exhaustion, unavailability, or futility of peaceful means to avert attack. The force employed must be proportional to the danger sought to be averted.³² The British accepted Webster’s criteria and agreed that the British attack had failed to meet them. Under *Caroline*, an actual armed attack was not required as the precondition for the use of force in self-defense.³³ Thus, the *Caroline* criteria permit both reactive and anticipatory self-defense so long as necessity and proportionality are observed.³⁴

IV. DID ARTICLE 51’S DRAFTERS INTEND TO ELIMINATE THE CUSTOMARY RIGHT OF ANTICIPATORY SELF-DEFENSE? LESSONS OF THE *TRAVAUX PRÉPARATOIRES*

Article 51, the United Nations Charter’s provision on self-defense, does not include the phrase “anticipatory self-defense.” Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.³⁵

The question of whether the customary law doctrine of anticipatory self-defense survives under the United Nations Charter is addressed by two schools.³⁶ “Restrictionists” argue that Article 51 eliminates the customary right of

31. See MOORE, 2 DIGEST OF INTERNATIONAL LAW 412 (1906). Secretary Webster wrote that a nation may employ force in self defense when there exists “[a] necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberation.” See THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS 669 (K. Shewmaker, ed. 1983).

32. See Mary Ellen O’Connell, *The Myth of Preemptive Self-Defense*, ASIL TASK FORCE ON TERRORISM, at 25-36, Aug. 2002, available at <http://www.asil.org/taskforce/oconnell.pdf> (last visited Sept. 24, 2004); See I OPPENHEIM, INTERNATIONAL LAW 420 (R.Y. Jennings & Sir Arthur Watts, eds., 9th ed. 1990). According to Webster, proportionality requires “nothing unreasonable or excessive; since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.” *Id.*

33. See Yoram Dinstein, WAR, AGGRESSION AND SELF-DEFENSE 172 (1988); Louis René Beres, *After the Scud Attacks: Israel, “Palestine,” and Anticipatory Self-Defense*, 6 EMORY INT’L L. REV. 71, 75- 76 (1992); Beres, *After the Gulf War*, *supra* note 11, at 266; Beres, *Striking First*, *supra* note 11, at 6; Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT’L L. 597, 598 (1963).

34. Webster’s criteria trace to Grotius, Vattel, and Pufendorf. See Beres, *Striking First*, *supra* note 11, at 6, citing HUGO GROTIUS, THE LAW OF WAR AND PEACE, bk. II, ch. I (1625); EMMERICH DE VATEL, THE LAW OF NATIONS, bk. II, ch. IV (1758); Louis René Beres, *Preserving the Third Temple: Israel’s Right of Anticipatory Self-Defense under International Law*, 26 VAND. J. TRANSNAT’L L. 111, 125 (1993), citing SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 32 (Frank Gardner Moore trans., 1927) (1682).

35. U.N. CHARTER art. 51.

36. See ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 73 (1993).

anticipatory self defense set out in the *Caroline* doctrine and limits self-defense to the case of an actual armed attack. Restrictionists maintain that the intent of Article 51's drafters was to raise the standard of necessity required up until 1945.³⁷ Henceforth, the necessity to use force in self-defense would exist only "if an armed attack occurs." "Counter-restrictionists" believe that the customary right of anticipatory self-defense survives under the Charter.³⁸ The customary right allowed force to be used in advance of an armed attack so long as an attack was imminent.³⁹ The United States follows the counter-restrictionist position.⁴⁰

Each school focuses on a different phrase in Article 51. Restrictionists emphasize the phrase "if an armed attack occurs." Counter-restrictionists focus on Article 51's opening sentence: "Nothing in the present Charter shall *impair the inherent right of individual or collective self defense . . .*"⁴¹ Counter-restrictionists take "inherent right" to refer to the right of self-defense as it existed under customary law, including the right of anticipatory self-defense.⁴² Counter-restrictionists insist that the language "if an armed attack occurs" must not be misread as "if and *only* if."⁴³ The phrase merely emphasizes what, in 1945, was considered to be the paramount, but not the sole, form of aggression without limiting self-defense to an "armed attack."⁴⁴ Significantly, the French text of

37. See *cf.* MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 233, 235 (1961) (rejecting this position). Some restrictionists maintain that by 1945 customary international law already included a requirement that self-defense could be exercised only in the event of an armed attack. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 150 (1991); Oscar Schachter, *The Scope of Legitimate Self-Defense*, in *INTERNATIONAL LAW AND INTERNATIONAL SECURITY: MILITARY AND POLITICAL DIMENSIONS* 21, 22 (Paul B. Stephan III & Boris M. Klimenko, eds., 1991); IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 274 (1963) (restrictions imposed by Article 51 may, by 1945, have become part of customary international law). Under this view Article 51 was intended to be merely declarative of then-existing customary law prohibiting anticipatory self-defense. This view cannot be accepted. As Professor Schachter remarks, if customary law by 1945 did require an armed attack as the precondition for self-defense then the words "armed attack" in Article 51 would be redundant. See Schachter, *supra*, at 21.

38. The two schools are also called the "restrictivists" and "expansivists," respectively. Richard G. Maxon, *Nature's Eldest Law: A Survey of a Nation's Right to Act in Self-Defense*, 25 *PARAMETERS* 55 (1995).

39. See Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 *WASH. Q.* 89, 91 (2003); McDougal, *supra* note 33, at 598.

40. See George K. Walker, *Anticipatory Self-Defense in the Charter Era: What the Treaties Have Said*, 31 *CORNELL INT'L L.J.* 321, 322 (1998).

41. UN CHARTER art. 51 (emphasis added); O'Connell, *supra* note 32, at 12.

42. See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 86 (2000); Eugene v. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 *AM. J. INT'L L.* 506, 510 (1991) (Inasmuch as self-defense is an incident of sovereignty it cannot be limited or taken away—even by treaty) [hereinafter Rostow]; Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 *HARV. J.L. & PUB. POL'Y.* 539, 558 (2002) (This view was shared by U.S. Secretary of State Frank Kellogg during the negotiations over the Kellogg-Briand Pact outlawing war).

43. MCDUGAL & FELICIANO, *supra* note 37, at 237; Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ 14 at 347-48 (June 27) (Jennings, dissenting); S.M. Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 *RECUI DES COURS* 411, 480 (1972, Vol. 2).

44. See AREND & BECK, *supra* note 36, at 73; Yoram Dinstein, *The Legal Issues of "Para-War"*

Article 51 refers not to the narrow concept of *attaque armée* ("armed attack") but to the broad concept of *aggression armée* ("armed aggression").⁴⁵ Inasmuch as international law scholars have not been able to agree on a definition of aggression in fifty years, it would be odd if Article 51 identified aggression with only one narrow contingency, an "armed attack," and restricted self-defense to that circumstance alone.⁴⁶ The International Court of Justice has not spoken to the legality of anticipatory self-defense. In the *Nicaragua* case the Court reserved judgment on whether an imminent threat of armed attack would pass Article 51 muster.⁴⁷

Since the text, by itself, will not reveal whether the Charter permits anticipatory self-defense, reference must be had to Article 51's drafting history.⁴⁸ Counter-restrictionists contend that the Article 51 *travaux préparatoires* do not support a conclusion that anticipatory self-defense is illegal under the Charter.⁴⁹ Professor Timothy L. H. McCormack demonstrates that restrictionists offer only perfunctory analyses of the Article 51 *travaux préparatoires*.⁵⁰ Taking one example, Professor McCormack comments that Professor Louis Henkin provides no review of the *travaux préparatoires* to support his bald assertion that "Nothing in the history of its [Article 51's] drafting (the *travaux préparatoires*) suggests that the framers of the Charter intended something broader than the language implied."⁵¹

Counter-restrictionists assert that the purpose of Article 51 was not to eliminate anticipatory self-defense but to make plain—particularly to the Latin American delegations attending the San Francisco conference—that the Charter permits regional security organizations to act in self-defense without prior authorization from the U.N. Security Council ("individual or *collective* self-

and Peace in the Middle East, in 2 THE ARAB-ISRAELI CONFLICT: READINGS 158, 160 (John Norton Moore, ed. 1977) (rejecting this view); Sir Humphrey Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUIL DES COURS 451, 497 (1952, Vol. 2).

45. Timothy L. H. McCormack, *Anticipatory Self-Defense in the Legislative History of the United Nations Charter*, 25 ISRAEL L. REV. 1, 36 (1991); *Nicar. v. U.S.*, *supra* note 43, at 543 (Jennings, dissenting).

46. For a contrasting view that the Article 51 drafters did intend a narrow concept of "armed attack" see *infra* notes 59 – 62 and accompanying text.

47. *Nicar. v. U.S.*, *supra* note 43, at 103.

48. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. §325(1) (1987). Terms of international agreements are to be interpreted according to their "ordinary meaning." Where a treaty's meaning can not be determined from its words alone recourse may be had to the treaty's *travaux préparatoires*: the treaty's drafting history. *Id.* at §325 comment e; Vienna Convention, *supra* note 18, art. 32(a). The Vienna Convention is cited solely as evidence of the customary law of treaty interpretation. See McCormack, *supra* note 45, at 4-7.

49. See McCormack, *supra* note 45, *passim*; MCDUGAL & FELICIANO, *supra* note 37, at 235-36.

50. See McCormack, *supra* note 45, at 3.

51. *Id.*, quoting LOUIS HENKIN, HOW NATIONS BEHAVE 141 (2d ed. 1979) (brackets in original). Professor McCormack might also have quoted Professor Brownlie's similarly perfunctory assertion that the drafting history of Article 51 reflects "a presumption against self-help and even action in self-defense within Article 51 was made subject to control by the Security Council." See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275 (1963).

defense”).⁵² The wording of Article 51 follows closely the wording of Part I of the Act of Chapultepec which required an armed attack in order for signatories to respond in self-defense.⁵³ Professor McCormack suggests that the Article 51 drafters imported the words “armed attack” unreflectingly from the Act of Chapultepec.⁵⁴ Had Article 51’s purpose been to change existing customary law, this would have been a change so momentous that it would have been extensively debated in the drafting sessions.⁵⁵ But the *travaux préparatoires* show that this issue was not discussed.⁵⁶

V. DOES ARTICLE 51 REQUIRE A STATE TO “ABSORB” THE FIRST BLOW?

We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation’s security to constitute maximum peril. Nuclear weapons are so destructive and ballistic weapons are so swift, that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.⁵⁷

President John F. Kennedy

Section IV argued that the drafters of Article 51 did not intend to cut down the customary right of self-defense by limiting its exercise to the occurrence of an “armed attack.” Other writers maintain that the drafters intended just that; Professor Michael J. Glennon observes that in 1945, so great was the fear that states would use self-defense as a pretext for aggression that the Article 51 drafters decided to impose a “bright line” test: self-defense would be allowed only in the

52. U.N. CHARTER art. 51 (emphasis added); see SCHACHTER, *supra* note 37, at 150; LELAND M. GODDRICH, EDVARD HAMBRO, & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 342-44 (3d rev. ed. 1969); MCDUGAL & FELICIANO, *supra* note 37, at 235; McCormack, *supra* note 47, at 8, 25-27; Schwebel, *supra* note 43, at 480; Waldock, *supra* note 44, at 497.

The Latin American nations feared Communist penetration. See STEPHEN C. SCHLESINGER, ACT OF CREATION: THE FOUNDING OF THE UNITED NATIONS 66, 175, 180 (2003). Would the Security Council protect them or would the Council be blocked by a Soviet veto? *Id.* at 175. As insurance against possible Security Council ineffectiveness the Latin American states insisted that regional defense organizations be included in the Charter. The episode is significant for showing that even from the beginning doubts existed as to whether the Security Council would be able to perform its assigned function of protecting international peace and security. See *infra*, § VII.

53. See McCormack, *supra* note 45, at 33; Inter-American Reciprocal Assistance And Solidarity (Act of Chapultepec), reprinted in U.S. DEPT. OF STATE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, VOL. III: MULTILATERAL 1931-1945 1024 (1968). The Act of Chapultepec was a mutual defense pact concluded among Latin American states and the United States towards the end of World War Two. The Act of Chapultepec was the forerunner of the Inter-American Treaty of Reciprocal Assistance of 1947 (“Rio Treaty”) which established the Organization of American States.

54. McCormack, *supra* note 45, at 35, 36.

55. *Id.* at 7-8.

56. *Id.* at 8, 35.

57. See Radio and Television Report, *supra* note 28, at 807.

event of an "armed attack."⁵⁸

Neither Article 51 nor the rest of the U.N. Charter defines "armed attack."⁵⁹ In the view under examination the drafters of Article 51 intended a narrow conception of "armed attack" which included only trans-border attacks by army, navy, or air forces.⁶⁰ Prime examples would be the Nazi invasion of Poland in 1939 or the Japanese attack on Pearl Harbor. This mode of aggression was vivid in the experience of the Charter drafters. Confronted with the threat of invasion, Article 51 would allow a target state to mass its forces at the border prepared to meet the invaders. But not until the invaders crossed the frontier would an armed attack have occurred and the target state be allowed to respond with force.⁶¹

In contrast, counter-restrictionists refuse to impose a purely technical requirement that an enemy army first set foot across the border.⁶² Counter-

58. Professor Glennon writes:

The new requirement narrowed significantly the circumstances in which force could be used. And it set out a readily identifiable and, it was thought, objectively verifiable event to trigger defensive rights. Phony defensive justifications would be less plausible and war be less frequent, thereby vindicating the first great purpose of the Charter—"to maintain international peace and security."

Michael J. Glennon, *Preempting Terrorism: The Case for Anticipatory Self-Defense*, WKLY. STANDARD 24 (Jan. 28, 2002). The final phrase quotes the Charter. U.N. CHARTER Preamble and art. 1(1). As Professor Glennon's title indicates, he believes the Charter design is no longer adequate. See also Glennon, *supra* note 42, at 546. Accord HENKIN, *supra* note 51, at 142 (The "armed attack" requirement was imposed because an "actual armed attack" is "clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication."); J. E. S. Fawcett, *Intervention in International Law: A Study of Some Recent Cases*, 103 RECUEIL DES COURS 347, 361 (1961-II).

59. See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 668, 669 (Bruno Simma ed., Oxford University Press 1994); Andru E. Wall, *Lawfully Defending the Peace: The Bush Doctrine and the Global War on Terrorism*, 4:2 ENGAGE 95, 97, 98 (2003), available at www.fed-soc.org/Publications/Engage/oct%2003.pdf (visited Apr. 27, 2004); Krzysztof Skubiszewski, *The Postwar Alliances of Poland and the United Nations Charter*, 53 AM. J. INT'L L. 613, 620 (1959). State practice since 1945 has defined "armed attack" broadly. See Wall *supra*, at 96. Thus, the Administration of the first President Bush argued that attacks on American military and civilian personnel in and around the Panama Canal Zone constituted an "armed attack" allowing U.S. intervention. See Ruth Wedgwood, *The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion*, 29 COLUMBIA J. TRANSNAT'L L. 609, 609, 619-21 (1991). The Clinton Administration justified its 1993 air strikes on Baghdad with the claim that a failed Iraqi assassination attempt against former President Bush constituted an "armed attack" on the United States. See John Quigley, *Missiles with a Message: The Legality of the United States Raid on Iraq's Intelligence Headquarters*, 17 HASTINGS INT'L L. & COMP. L. REV. 241, 252, 271 (1994). These are examples of reactive, rather than anticipatory, self-defense; in both cases the United States' position was that an "armed attack" had already occurred. *Id.* at 252, 258, 260; Wedgwood, *supra*, at 609, 619-21.

60. Cf. *National Security Strategy*, *supra* note 2, at 13; AREND & BECK, *supra* note 36, at 97.

61. Harold Stassen, one of the U.S. negotiators on the Charter, and later a perennial Presidential candidate, gave the example of an enemy fleet approaching the United States. The United States may send an opposing fleet to meet the enemy fleet. But until the enemy fleet has entered U.S. territorial waters the U.S. may not respond with force. See Thomas M. Franck, *When, If Ever, May States Deploy Military Force without Prior Security Council Authorization?*, 5 WASH. U. J. L. & POL'Y 51, 58-59 (2001). Counter-restrictionists reject this approach as unworkable in an age of weapons of mass destruction. By contrast, Professor Dinstein has argued that the U.S. could legally have interdicted the Japanese fleet as it was on its way to Pearl Harbor. See *infra*, text accompanying note 72.

62. See JULIUS STONE, *THE MIDDLE EAST UNDER CEASE-FIRE 4* (1967), cited in Amos Shapira,

restrictionists insist that the critical factor is an enemy's *intent* to imminently attack: the Charter drafters imposed the "armed attack" requirement only as the best index then available for determining imminent hostile intent.⁶³

Still, when the discussion is limited to a conventional attack there is something to be said for the "armed attack" criterion. Faced with a conventional attack waiting may be advisable: postponing the use of force gives diplomacy a chance to defuse tensions and possibly avert conflict.⁶⁴ There is less chance that force will be used by mistake. But in the case of a non-conventional attack, a literal adherence to Article 51 may spell national suicide. Whatever the intent of Article 51's drafters, in an age of weapons of mass destruction, a state which waits for an "armed attack" before defending itself may be ensuring its own annihilation.⁶⁵ In the case of nuclear missiles or other WMD it is absurd—indeed, lethal—to require a state to first absorb an attack before responding.⁶⁶ WMD radically foreshorten response time and can occasion massive destruction in a single stroke. In order to avoid this outcome states need the right to pre-empt the aggressor—to defend themselves *before* the first blow is struck.⁶⁷ A state which does not anticipate the first blow is, in Professor Myres McDougal's memorable

The Six-Day War and the Right of Self-Defense, in THE ARAB-ISRAELI CONFLICT, VOLUME II: READINGS 205, 215 n.24 (John Norton Moore, ed. 1975); Waldock, *supra* note 44, at 498 ("Where there is convincing evidence not merely of threats and potential danger but of an attack being actually mounted, then an armed attack may be said to have begun to occur, though it was not passed the frontier."). Thus, counter-restrictionists conclude, Israel acted legally by striking preemptively against Egyptian and Syrian armies gathering on its frontier in June 1967. *See infra* § VI.

63. *See* Glennon, *supra* note 58, at 26. Whether "armed attack" is still the best gauge of hostile intent is open to question. *See infra* note 190 and accompanying text.

64. Recall that as part of necessity *Caroline* required that alternatives to force would have to be either unavailable or exhausted ("no choice of means"). *See supra* note 31 and accompanying text.

65. Under the principle of *rebus sic stantibus*, materially changed circumstances allow operation of a treaty such as the United Nations Charter to be suspended in whole or in part. The materially changed circumstances must have been unforeseen at the time the treaty was entered into; must strike at the basis upon which the parties gave consent; and must fundamentally alter the parties' future obligations under the treaty. *See* Frederic L. Kirgis, *Pre-emptive Action to Forestall Terrorism*, ASIL INSIGHTS (June 2002), available at <http://www.asil.org/insights> (visited July 28, 2002); Vienna Convention, *supra* note 18, Art. 62; RESTATEMENT (THIRD), *supra* note 48, §336. The advent of WMD constitutes materially changed circumstances suspending Article 51's "armed attack" requirement.

66. *See* Schwebel, *supra* note 43, at 481. As Israel argued before the Security Council after its attack on Iraq's Osiraq nuclear reactor: "[T]he concept of [self-defense] took on new and far wider application with the advent of the nuclear era." *See* U.N. SCOR 36th Sess., 2288th mtg. at 9, U.N. Doc. S/PV.2288 (June 19, 1981) (Israel).

67. *See* Louis René Beres, *Israel and Anticipatory Self Defense*, 8 ARIZ. J. INT'L & COMP. L. 89, 93 (1991). Professor Beres argues that the "customary right of anticipatory self defense articulated by the *Caroline*" survives into the Charter system in order to avoid the absurd result of requiring a state to absorb the first blow. *Id.* Beres forcefully concludes: "International law is not a suicide pact." *Id.* at 90. President Bush has echoed Professor Beres' words. President Bush has said of terrorists and terrorist states such as Iraq: "[R]esponding to such enemies only after they have struck first is not self-defense, it is suicide." *See Bush's Speech on Iraq, supra* note 12, at A10, col. 4. The International Court of Justice has left open the question whether a state may launch a preemptive nuclear attack if its very existence were at risk. *See* Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 266 (July 8, 1996).

phrase, a "sitting duck."⁶⁸ Former Secretary of State John Foster Dulles' judgment that the Charter was a "pre-atomic age" document reflects how Article 51's "armed attack" requirement fails to cope with the new technology of mass destruction.⁶⁹

Some restrictionists attempt to sidestep the need for anticipatory force by declaring that an attack occurs at the moment it is launched.⁷⁰ Professor Dinstein takes the view that had the United States attacked the Japanese fleet as it was heading towards Pearl Harbor this use of force would not have been anticipatory.⁷¹ By the same token, if missiles are fired towards the United States, the United States may respond before the missiles hit; this is not anticipatory action.⁷²

It is difficult not to think that in adopting such logic, restrictionists have taken a long step toward becoming counter-restrictionists. The incoherence of the restrictionist position is apparent when we ask: At what point has an armed attack begun? Under the restrictionist reading of Article 51, the right of self-defense is not activated until the exact instant an armed attack has begun.⁷³ Some commentators have sought to distinguish "armed attack" from "preparations for armed attack."⁷⁴ Response to armed attack is self-defense (allowed under Article 51), while force initiated against preparations for armed attack is anticipatory self-defense (prohibited by Article 51). But the line between actual attack and preparations for attack is an artificial one and cannot be drawn in practice.⁷⁵ How do we isolate the instant at which preparations end and an armed attack begins?⁷⁶

68. MCDUGAL & FELICIANO, *supra* note 37, at 236; McDougal, *supra* note 33, at 601. Even Professor Louis Henkin, a restrictionist, recognizes that it may be necessary to allow a "small and special exception [to the "armed attack" requirement] for the special case of the surprise nuclear attack." See HENKIN, *supra* note 51, at 144.

69. See John Foster Dulles, *The Challenge of Our Time: Peace with Justice*, 39 A.B.A. J. 1063, 1066 (1953).

70. See DINSTEIN, *supra* note 33, at 178.

71. Professor Dinstein calls this a response to "incipient attack." See Dinstein, *supra* note 44, at 161; O'Connell, *supra* note 32, at 8-9, 12, quoting YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENSE* 172 (3d ed. 2001). Professor Mary Ellen O'Connell accepts Dinstein's conclusion so long as the hostile intent of the Japanese fleet was clear. *Id.* at 9.

72. See HENKIN, *supra* note 51, at 142 ("In all probability, then, only an actual take-off by Soviet planes or missiles would cause the United States to strike, and in that case the United States is not 'anticipating' an armed attack, for the attack would have begun."). Accord Dinstein, *supra* note 44, at 160-61.

73. See DINSTEIN, *supra* note 33, at 176.

74. MCDUGAL & FELICIANO, *supra* note 37, at 240.

75. *Id.*

76. MCDUGAL & FELICIANO, *supra* note 37, at 240; SCHACHTER, *supra* note 37, at 151 ("Just when an armed attack may be said to begin cannot be determined by an a priori rule."). Some writers have suggested irrevocability or irreversibility as the line of demarcation. When an attack can no longer be recalled, then it has "occurred" within the meaning of Article 51 and response in self-defense is permitted. See MCDUGAL & FELICIANO, *supra*, at 239-40, citing Nagendra Singh, *The Right of Self-Defense in Relation to the Use of Nuclear Weapons*, 5 INDIAN Y.B. INT'L AFF. 3 (1956). Accord DINSTEIN, *supra*, at 179 ("[A]n armed attack may precede the firing of the first shot. The crucial question is who embarks upon an irreversible course of action . . ."). But, as Professors McDougal and Feliciano point out, irrevocability is an unworkable criterion for determining when an armed attack begins because a state which launches an intercontinental missile may abort the missile until almost up to the point of impact. See MCDUGAL AND FELICIANO, *supra*, at 240. Thus the proposed

And why should we? If an armed attack “occurs” the instant a missile is launched why not the instant before the firing button is pushed? Or the day before? Or a week? Isn’t this a formalistic requirement?⁷⁷ And could a state time its action with this degree of exactitude? “Don’t shoot until you see the whites of their eyes” is ill-adapted to the nuclear age.

VI. STATE PRACTICE AND ANTICIPATORY SELF-DEFENSE

When states acquiesce to conduct new customary international law is formed.⁷⁸ Counter-restrictionists argue that state practice has been to acquiesce to anticipatory self defense.⁷⁹ The leading examples are the 1962 U.S. blockade of Cuba, Israel’s pre-emptive attack on Egypt, Syria, and Jordan in 1967, the Israeli bombing run on Iraq’s Osiraq nuclear reactor in 1981, and the 1986 U.S. air strikes against terrorist camps in Libya.⁸⁰

The Cuban Missile Crisis

The Kennedy Administration avoided justifying the Cuban “quarantine” either in terms of the customary principle of anticipatory self defense or as an application of Article 51 of the U.N. Charter.⁸¹ The Administration’s public

irrevocability/irreversibility test translates into a requirement that the defender must absorb the first blow. (Professor Dinstein undercuts his own irreversibility argument two paragraphs earlier by asserting that it does not matter if the missile can be aborted before impact. See DINSTEIN, *supra* note 33, at 179). Finally, irreversibility/irrevocability fails as a criterion because the target state may be in no position to tell whether an attack can be aborted.

77. See Terrence Taylor, *Iraq and the “Bush Doctrine” of Pre-Emptive Self-Defense*, at <http://www.crimesofwar.org/expert/bush-taylor.html> (August 20, 2002) (last visited Sept. 9, 2002).

78. See Turner, *supra* note 17, at 165-66; Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT’L L. & COMP. L. Q. 401, 409-10, 410 n.46 (2002). See also RESTATEMENT (THIRD), *supra* note 48, at §102 Comment b (“Inaction may constitute state practice, as when a state acquiesces in acts of another state that affect its legal rights.”). This is because international law rests on state consent. What states consent to may change over time. State practice provides evidence of what states consent to.

State practice may also be looked to for interpretation of a treaty; for instance, to determine what meaning parties attach to terms such as “armed attack.” See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 31(3)(b), reprinted in 25 ILM 543 (1986). Accord RESTATEMENT (THIRD), *supra* note 48, §325(2).

79. See David B. Rivkin, Jr., Lee A. Casey, & Darin R. Bartram, *Remember the Caroline*, NAT’L REV. 17, 18 (July 1, 2002).

80. *Id.*; Thomas Franck, *Iraq and the “Bush Doctrine” of Pre-emptive Self-Defense*, available at <http://www.crimesofwar.org/expert/bush-franck.html> (August 20, 2002) (visited September 8, 2002). Consider also Tanzania’s invasion of Uganda, the use of force by the Economic Community of West African States (ECOWAS) in the Liberia and Sierra Leone civil wars, and Israel’s raid on Entebbe, Uganda. While not instances of anticipatory self-defense these actions are relevant to determining the legitimacy of anticipatory self-defense. Tanzania, ECOWAS, and Israel did not seek prior approval from the Security Council for the use of force. Yet none of these applications of force was censured by the Security Council. See Rivkin, et al, *supra* note 79, at 18; Franck *supra*. This demonstrates that the use of force without prior Security Council approval is not absolutely prohibited. Professor Thomas Franck argues that the Security Council, in a “creative adaption” of the Charter, has come to perform a “jurying function” whereby the Council evaluates the justice of pre-emptive attack on a case by case basis. See Franck *supra*. I suggest that this practice may represent a partial return *sub rosa* of just war theory.

81. See HENKIN, *supra* note 51, at 294; Abram Chayes, *The Legal Case for U.S. Action on Cuba*,

statements, for example the President's national address of October 22, 1962, spoke merely of "defense."⁸² The Kennedy Administration's official legal basis for the quarantine was regional peacekeeping under the OAS Charter.⁸³ The regional peacekeeping argument, however, fails because a regional organization cannot do what none of its members would be allowed to do individually.⁸⁴ The deficiencies of the regional peacekeeping argument have led scholars to justify the Cuban "quarantine" on the basis of anticipatory self defense.⁸⁵

Restrictionists maintain that the quarantine did not meet the strictures of Article 51. There was no imminent threat of, much less an actual, armed attack on the United States.⁸⁶ The United States was confronted with no more than a potential threat.

However, there are good reasons for not applying Article 51's "armed attack" requirement literally. First is the advent of nuclear weapons.⁸⁷ Second is the failure of collective security and of the Security Council to maintain the peace. The Charter strictures on the use of force must be relaxed because the Security Council

47 DEP'T STATE BULL. 763, 764 (Nov. 19, 1962). Chayes was Department of State Legal Adviser during the crisis so this may be taken as an official statement.

82. See Radio and Television Report, *supra* note 28, at 807 ("in the defense of our own security and of the entire Western Hemisphere"); Proclamation 3504: Interdiction of the Delivery of Offensive Weapons to Cuba (Oct. 23, 1962), in PUBLIC PAPERS OF JOHN F. KENNEDY 809, 810 (1962) ("to defend the security of the United States").

83. See Minutes of the 507th Meeting of the National Security Council (Oct. 22, 1962), reprinted in THE CUBAN MISSILE CRISIS, 1962: SELECTED FOREIGN POLICY DOCUMENTS FROM THE ADMINISTRATION OF JOHN F. KENNEDY, JANUARY 1961-NOVEMBER 1962 209, 209 (2001) ("Secretary Rusk stated that the best legal basis for our blockade action was the Rio Treaty. The use of force would be justified on the ground of support for the principles of the United Nations Charter, not on the basis of Article 51, which might give the Russians a basis for attacking Turkey."); HENKIN, *supra* note 51, at 290; ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 51, 121 (1969); Abram Chayes, *Law and the Quarantine of Cuba*, 41 FOR'N AFF. 550, 554 (1963); Chayes, *supra* note 81, at 764; Inter-American Treaty of Reciprocal Assistance of 1947 Articles 6, 8, reprinted in 17 DEP'T STATE BULL. 565 (Sept. 21, 1947) [hereinafter Rio Treaty]. The OAS resolution authorizing the quarantine is reprinted at 47 DEP'T STATE BULL. 722 (Nov. 12, 1962) and in KENNEDY, *supra* at 143. The United Nations Charter allows regional security arrangements under Chapter VIII.

84. See Rostow, *supra* note 42, at 515. Collective self-defense is subject to the same Article 51 strictures as individual self-defense. *Id.* Moreover, Article 3 of the Rio Treaty, like Article 51 of the UN Charter, requires an armed attack as the precondition for the unilateral use of force in self-defense. Rio Treaty, *supra* note 83, at art. 3. Where a threat falls short of an armed attack, the OAS Organ of Consultation may authorize the use of force. *Id.* at art. 5, 8. This raises a difficulty: whether the force employed constitutes an "enforcement action" under U.N. Charter Article 53. See Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 558-59 (1963). Enforcement actions cannot be undertaken absent Security Council approval. U.N. CHARTER art. 53; see Richard N. Gardner, *Neither Bush Nor the "Jurisprudes,"* 97 AM. J. INT'L L. 585 (July 2003), reprinted in FUTURE IMPLICATIONS OF THE IRAQ CONFLICT 33, 35-36 (2003). The Organ of Consultation is the inter-American system's equivalent of the United Nations Security Council.

85. See HENKIN, *supra* note 47, at 294.

86. See Rex J. Zedalis, *Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense*, 19 CASE W. RES. J. INT'L L. 129, 131 (1987) (no imminent threat of attack); Rostow, *supra* note 42, at 515.

87. See *supra*, § V.

is no longer effective, if it ever was, in safeguarding the peace.⁸⁸ Faced with a Security Council deadlocked by the veto, regional organizations like the OAS are a good substitute for the Charter system of collective security.⁸⁹ The collective decision-making engaged in by regional organizations, the forum they provide for deliberation, and their built-in checks and balances are safeguards against the use of force for aggression.⁹⁰

Furthermore, in a larger sense the imminence requirement was preserved, although, in an expansion of the law, the meaning of imminence expanded to include not just an imminent attack but an imminent shift in the balance of power occasioned by a rogue state's imminent acquisition of the capacity to attack.⁹¹ Soviet missiles ninety miles from Florida would have radically reduced U.S. response time to a nuclear attack, heightening U.S. vulnerability.⁹² The world acquiesced in this change in the law.⁹³

The Six Day War

On June 5, 1967 Israeli air strikes hit air bases in Egypt, Syria, and Jordan.⁹⁴ The strikes were justified under theories of both reactive, and anticipatory, self-defense: reactive self-defense against the Egyptian blockade of the Straits of Tiran⁹⁵ and anticipatory self-defense to forestall an imminent attack from Egyptian and Syrian armies massing on Israel's frontier.⁹⁶ Statements from the Arab nations

88. See Chayes, *supra* note 83, at 556. This argument is developed in depth in sec. VII *infra*.

89. *Id.*

90. See Chayes, *supra* note 81, at 765.

91. See Wedgwood, *supra* note 16, at 732.

92. *Id.* at 733; Myres S. McDougal, *supra* note 68, at 601.

93. See Rostow, *supra* note 42, at 515; Brunson MacChesney, *Some Comments on the "Quarantine" of Cuba*, 57 AM. J. INT'L L. 592, 596 (1963). State acquiescence to a change in the law forms new customary law. See *supra* note 74 and accompanying text. A draft Soviet resolution condemning the quarantine was vetoed in the Security Council. See 22 U.N. SCOR (1351st mtg.) at 5, U.N. Doc. S/7951. Rev. 1 (1967), cited in Beth M. Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 205, 205 n.114 (1984). An additional argument for the legality of the Cuban Quarantine, that the quarantine fell outside UN Charter Article 2(4)'s general prohibition on the use of force, is considered *infra* at text accompanying notes 143 – 45.

94. See MARTIN GILBERT, *A HISTORY OF THE TWENTIETH CENTURY, VOLUME THREE: 1952-1999* 366 (1999). For a brief account of the Six-Day War, see GILBERT, *supra*, at 365-68; Amos Shapira, *The Six-Day War and the Right of Self-Defense*, in *THE ARAB-ISRAELI CONFLICT* 205, 205-08 (John Norton Moore, ed. 1975); Charles W. Yost, *The Arab-Israeli War: How It Began*, 46 FOREIGN AFFAIRS 304 (1967/68).

95. On May 22, 1967 Egypt announced that it would blockade the Straits of Tiran in the Gulf of Aqaba against Israeli ships. GILBERT, *supra* note 94, at 365; Shapira, *supra* note 91, at 207; Yost, *supra* note 94, at 315. Israel contended that the Egyptian blockade constituted an act of war against which it was entitled to act in self-defense. See MICHAEL B. OREN, *SIX DAYS OF WAR: JUNE 1967 AND THE MAKING OF THE MODERN MIDDLE EAST* 100 (2002); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 112-13 (2000); Michael Byers, *Terror and the Future of International Law*, in *WORLDS IN COLLISION: TERROR AND THE FUTURE OF GLOBAL ORDER* 118, 124 (Ken Booth & Tim Dunne, eds. 2002); Yost, *supra* note 94, at 316 (citing May 23, 1967 statement of Israeli Prime Minister Levi Eshkol).

96. See ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 233 (1986) ("all indications supported the imminence of this attack"). Accord Wall, *supra* note 59, at 100; Polebaum,

convinced Israel that it was in imminent danger.⁹⁷ The most ominous was the May 26, 1967 statement of Egyptian President Gamal Abdul Nasser that: "Our basic objective will be to destroy Israel."⁹⁸

Why did Israel act without Security Council authorization? One explanation is the failure of the Security Council in the crisis.⁹⁹ The Security Council's initial failure was its inability to halt El Fatah terrorist raids on Israel conducted from Syria. The raids led to escalating tension between Israel and the surrounding Arab states and finally war.¹⁰⁰ The danger to Israel was exacerbated by U.N. Secretary General U Thant's withdrawal of the United Nations Emergency Force (UNEF) from Sinai.¹⁰¹ The withdrawal of UNEF removed the buffer between Egypt and Israel and left Israel exposed.¹⁰² The earlier Soviet veto of the resolution against Syria demonstrated that Israel could not expect a U.N. enforcement action in her defense. The United Nations had made clear that Israel was on her own.

The legality of Israel's preemptive use of force was further bolstered by U.N. acquiescence to Israel's preemptive attack.¹⁰³ Following the end of the war the Soviet Union introduced no fewer than three resolutions in the Security Council condemning Israel. All were rejected.¹⁰⁴ While the Security Council fell short of endorsing the doctrine of anticipatory self-defense, significantly, there was no

supra note 93, at 192-94.

97. See Dinstein, *supra* note 44, at 161.

98. See GILBERT, *supra* note 94, at 366.

99. See ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 233 (1986); Ruth Lapidoth, *The Security Council in the May 1967 Crisis: A Study in Frustration*, 4 ISRAEL L. REV. 534, 545-50 (1969). The argument that the Charter restrictions on the use of force were premised upon Security Council effectiveness is discussed *infra* at sec. VII.

A not inconsiderable factor in Israel's decision to preempt was the fact that four-fifths of Israel's army was composed of civilians. See RANDOLPH S. CHURCHILL & WINSTON S. CHURCHILL, THE SIX DAY WAR 53 (1967). With the bulk of Israel's population mobilized to defend the nation by the end of May Israeli farms and factories were virtually at a standstill. The Arab nations, with their far greater populations, could afford to outwait the Israelis. Israel faced a choice between attacking first and economic collapse. *Id.*

100. See Yost, *supra* note 94, at 304-05 (on the El Fatah raids). See Draft Resolution, U.N. Doc. S/7575/Rev. 1 (3 Nov. 1966); Lapidoth, *supra* note 99, at 549 (A proposed Security Council resolution calling on Syria to restrain El Fatah was introduced by Argentina, Japan, the Netherlands, New Zealand, Nigeria, and Uganda on November 3, 1966. It was vetoed by the Soviet Union the following day.).

101. See 1967 U.N.Y.B. 177. The 1956 Suez Crisis ended with Israeli occupation of the Sinai Peninsula, Egyptian territory. See GILBERT, *supra* note 94, at 365 (Israel's withdrawal from Sinai was brokered by the United Nations in exchange for the placement in Sinai with Egyptian consent of a peacekeeping force, the United Nations Emergency Force (UNEF). The UNEF was created by UN Secretary General Dag Hammarskjöld pursuant to resolutions of the UN General Assembly.); G.A. Res. 998, U.N. GAOR, 11th Sess., U.N. Doc. A/3299 (1956); G.A. Res. 1000, U.N. GAOR, 11th Sess., U.N. Doc. A/3301 (1956); FREDERICK H. FLEITZ, JR., PEACEKEEPING FIASCOS OF THE 1990S: CAUSES, SOLUTIONS, AND U.S. INTERESTS 37-47 (2002).

102. See Lapidoth, *supra* note 96, at 536 n.9 (1969) (Egypt requested UNEF to withdraw on May 16, 1967); Yost, *supra* note 91, at 311, 313 (UNEF withdrew on May 18).

103. See Schwebel, *supra* note 43, at 481; Dinstein, *supra* note 44, at 162.

104. See Draft Soviet Security Council Resolutions S/7951, S/7951/Rev. 1, S/7951/Rev. 2. All three resolutions were rejected on June 14, 1967. See Shapira, *supra* note 94, at 219, 219 n. 32; Polebaum, *supra* note 93, at 193 n.38.

consensus in the Security Council against it.¹⁰⁵ Professor Louis René Beres concludes that the Security Council's failure to condemn Israel constituted "implicit approval" of Israel's preemptive strike.¹⁰⁶

The Soviet bloc fared no better in the General Assembly where another four resolutions condemning Israel were rejected.¹⁰⁷ Inasmuch as there is no veto in the General Assembly the General Assembly's refusal to condemn Israel is an even more reliable gauge of world approval of Israel's preemptive strike.

Osiraq

Paradoxically, although it was unanimously condemned in the Security Council,¹⁰⁸ Israel's June 7, 1981 air attack on Iraq's Osiraq nuclear reactor provides support for the right of anticipatory self defense.¹⁰⁹ Consider the following:

(1) *Security Council condemnation of the Israeli raid must be discounted because no sanctions were imposed on Israel.*¹¹⁰ Political considerations may require that the international community condemn what it secretly approves.¹¹¹ Security Council condemnation of the raid should not be accepted at face value because no sanctions were attached.¹¹² Failure to attach sanctions amounted to state acquiescence in Israel's conduct.¹¹³

(2) *Condemnation of the raid does not indicate a rejection of the doctrine of anticipatory self-defense but at most a finding that the requirements for anticipatory self-defense were not met in this particular case.* Less than half of the delegations condemned anticipatory self-defense outright.¹¹⁴ Statements by other delegates held out the possibility that they might have approved preemption under different circumstances.¹¹⁵ These delegates applied *Caroline* but thought that

105. See Arend, *supra* note 39, at 95. This would hold true with regard to the Security Council's response to Israel's June 7, 1981 raid on Iraq's Osiraq nuclear reactor. See *infra* note 116 and accompanying text.

106. See Beres, *supra* note 67, at 93. Accord JULIUS STONE, *THE MIDDLE EAST UNDER CEASE-FIRE* 6, 10 (1967), cited in Shapira, *supra* note 94, at 219-20, 220 n.33.

107. See Draft Soviet General Assembly Resolution A/L519 and Draft Albanian General Assembly Resolutions A/L521, A/L524, and A/L525. All four of these resolutions were rejected on July 4, 1967. See Shapira, *supra* note 94, at 219, 219 n.32.

108. See S.C. Res. 487, U.N. SCOR, 36th Sess., 2288th mtg., UN Doc. S/RES/487 (19 June 1981).

109. See Rivkin, Casey, and Bartram, *supra* note 79, at 18; and Louis René Beres & Col. Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 *TEMPLE INT'L & COMP. L.J.* 437 (1995). For background on the Israeli strike see RODGER W. CLAIRE, *RAID ON THE SUN: INSIDE ISRAEL'S SECRET CAMPAIGN THAT DENIED SADDAM THE BOMB* (2004).

110. See Rivkin, Casey, and Bartram, *supra* note 79, at 18; Anthony D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 *AM. J. INT'L L.* 584, 586 (1983); Beres & Tsiddon-Chatto, *supra* note 109, at 447, 439-40; Beres, *supra* note 67, at 93.

111. *Id.* at 586.

112. See D'Amato, *supra* note 110, at 586.

113. *Id.*

114. See U.N. SCOR 36th Sess., 2280th mtg. at 16, U.N. Doc. S/PV.2280 (12 June 1981) (Algeria); U.N. SCOR 36th Sess., 2286th mtg. at 4-5, U.N. Doc. S/PV.2286 (17 June 1981) (Somalia); U.N. SCOR 36th Sess., 2287th mtg. at 2, U.N. Doc. S/PV.2287 (17 June 1981) (Nicaragua).

115. See, e.g., U.N. SCOR 36th Sess., 2288th mtg. at 58-60, U.N. Doc. S/PV.2288 (1981) (United

Israel had failed to meet the *Caroline* criteria.¹¹⁶

Some delegates accused Israel of having failed to demonstrate that Iraq had an intent to produce bombs arguing that capacity to build bombs is not the same thing as intent to build.¹¹⁷ Astonishingly, the Council brushed aside the inescapable conclusion that Iraqi animosity was implied by Iraq's record of hostile acts toward Israel.¹¹⁸

And although some delegates scolded Israel for not approaching the Security Council before using force,¹¹⁹ conveniently passed over was the Security Council's earlier failure before and during the 1967 war to ensure Israel's security. The law does not require a futile gesture and Israel had good reason to believe the Security Council would not block future aggression towards Israel.

There was no consensus in the Security Council as to the legitimacy of anticipatory self-defense.¹²⁰ *Osiraq* leaves the door open to a conclusion that anticipatory self-defense may be legal under some circumstances. The Security Council's condemnation of the raid seems not to indicate a rejection of the right of anticipatory self-defense but merely a conclusion that the requirements for anticipatory self-defense were not met in this case. With the benefit of hindsight the Security Council very probably would reach a different conclusion.¹²¹ Iraq's post-*Osiraq* conduct—its instigation of the Iran-Iraq war and invasion of Kuwait, its violation of numerous Security Council resolutions,¹²² and its use of poison gas against the Iraqi Kurds—have forced a reevaluation of the 1981 raid. Could Saddam have been ousted from Kuwait if Israel had not prevented Saddam from developing nuclear weapons?¹²³

States) ("[O]ur judgment that Israeli actions violated the United Nations Charter is based *solely* on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute.") (emphasis added).

116. Other than the delegate from Israel, only the delegate from Uganda referred to *Caroline* by name and expressly identified the factors invoked as derived from the *Caroline* doctrine. U.N. SCOR 36th Sess., 2282nd mtg. at 6, U.N. Doc. S/PV.2282 (1981). Sierra Leone's delegate quotes Webster's formula without identifying it as the *Caroline* doctrine. U.N. SCOR 36th Sess., 2283rd mtg. at 57, U.N. Doc. S/PV.2283 (1981).

117. U.N. SCOR 36th Sess., 2281st mtg. at 7, U.N. Doc. S/PV.2281 (1981) (League of Arab States).

118. A better test for intent has been formulated by Professor Ruth Wedgwood. *See infra* note 190.

119. U.N. SCOR 36th Sess., 2288th mtg. at 11, U.N. Doc. S/PV.2288 (19 June 1981) (Mexico); U.N. SCOR 36th Sess., 2284th mtg. at 3, U.N. Doc. S/PV.2284 (16 June 1981) (Philippines); U.N. SCOR 36th Sess., 2283rd mtg. at 15, U.N. Doc. S/PV.2283 (15 June 1981) (Sierra Leone).

120. *See* AREND & BECK, *supra* note 36, at 79 (lesson of *Osiraq* is that there is no international consensus for or against anticipatory self-defense).

121. *See* CLAIRE, *supra* note 109, at 240 (quoting Cheney); Wall, *supra* note 59, at 100 (quoting U.S. Secretary of State Colin Powell approving *Osiraq* raid); George F. Will, *The F-16 Solution*, WASH. POST., Nov. 1, 2001, at A35 (quoting opinion of Dick Cheney, Secretary of Defense during Operation Desert Storm, that the Israeli raid on the *Osiraq* reactor made the coalition's task easier); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUSTON J. INT'L L. 3, 18 (1999) (consensus of scholars approves of *Osiraq* raid); Louis René Beres, *After the Scud Attack: Israel, "Palestine," and Anticipatory Self-Defense*, 6 EMORY INT'L L. REV. 75, 99 (1992).

122. *See supra* note 20.

123. *See* CHRISTOPHER HITCHENS, A LONG SHORT WAR: THE POSTPONED LIBERATION OF IRAQ 54

1986 U.S. Air Strikes on Libya

On April 14, 1986, the United States bombed targets in Libya.¹²⁴ The raid was in response to a bomb explosion on April 5, 1986 in a West Berlin discotesque which killed one American serviceman and wounded other persons.¹²⁵ The United States placed responsibility for the bombing on Libyan terrorists.¹²⁶

In a national television address following the raid, President Ronald Reagan justified the attack as self-defense under Article 51 of the United Nations Charter.¹²⁷ While the impetus for the raid was the West Berlin bombing, the Libyan air strikes were a forward looking—thus, preemptive—measure¹²⁸ designed, in the President's words, to "diminish Colonel Qadhafi's capacity to export terror."¹²⁹ The President characterized the U.S. attack as a "preemptive action"¹³⁰ and stated that the purpose of the raid was "to *deter* acts of terrorism by Libya."¹³¹

Even if the raid failed to meet the strictures of either Article 51 or custom, the Security Council, notably, failed to condemn the attack.¹³² While international opinion at the time was critical of the 1986 Libya raid,¹³³ a scant seven years later the very similar 1993 U.S. air strike on Iraq attracted generally favorable world reaction.¹³⁴ This may signal a shift internationally from a restrictionist to a counter-restrictionist reading of Article 51 in the years following the 1986 Libya

(2003); Beres & Tsiddon-Chatto, *supra* note 110, at 439. A further argument for the legality of the Osiraq raid, that the raid fell outside U.N. Charter Article 2(4)'s general prohibition on the use of force, is discussed *infra* at nn. 139-145.

124. President's Address to the Nation, United States Air Strike Against Libya, 1986 PUB. PAPERS 491 (April 14, 1986) [hereinafter *Reagan Address*]. President Ronald Reagan described the targets as "headquarters, terrorist facilities and military installations that support Libyan subversive activities." Letter from President Reagan to Congress, 1986 PUB. PAPERS 499 (April 16, 1986) [hereinafter *Reagan Letter*].

125. *Reagan Address*, *supra* note 124.

126. *Id.*

127. *Id.* The President said: "Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight, a mission fully consistent with Article 51 of the United Nations Charter." The raid was also described as self-defense under Article 51 in President Reagan's letter to Congress. See *Reagan Letter*, *supra* note 124.

128. See Glennon, *Preempting Terrorism*, *supra* note 58, at 25.

129. *Reagan Address*, *supra* note 124.

130. *Id.*; *Reagan Letter*, *supra* note 124.

131. *Id.* (emphasis added). According to President Reagan, the United States action would "provide [Qadhafi] with incentives and reasons to alter his criminal behavior." See *Reagan Address*, *supra* note 124.

132. Draft S.C. Res. Condemning 1986 Libya Strike, UN Doc. S/10784. The resolution won the nine votes needed to pass but was vetoed by the United States, France, and the United Kingdom. Australia and Denmark also voted against the resolution. U.N. SCOR 41st Sess., 2682nd mtg. at 43, U.N. Doc. S/PV.2682 (Apr. 21, 1986), 40 U.N. Y.B. 254 (1986). A resolution condemning the attack did pass in the United Nations General Assembly. See G.A. Res. 41/38 (XII) (20 Nov. 1986), 40 U.N. Y.B. 257-58 (1986). The General Assembly resolution passed 79-28-33. 40 U.N. Y.B. at 258.

133. See Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99, 105-06 (1994).

134. *Id.* at 103; Carsten Stahn, *Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27:2 FLETCHER FORUM 35, 36 (2003).

air strikes and a more accommodating international attitude toward the unilateral use of force.¹³⁵

VII. THE FAILURE OF THE SECURITY COUNCIL AND ITS CONSEQUENCES FOR LAW ENFORCEMENT

Longing to wed with Peace, what did we do?—

Sketched her a fortress on a paper pad

—Edna St. Vincent Millay¹³⁶

Has the Security Council failed? Abram Chayes has observed that “[e]vents since 1945 have demonstrated that the Security [Council] . . . was not a wholly viable institution. The veto has largely disabled it from fulfilling its intended role in keeping the peace.”¹³⁷ The 291 interstate conflicts fought since the United Nations’ founding attest to the Council’s ineffectiveness.¹³⁸

The Charter rules prohibiting force, chiefly Articles 2(4) and 51, were premised upon an effective Security Council.¹³⁹ In a world in which the Security Council fulfilled its role of preserving peace there would be no need for anticipatory self-defense. But if the Security Council cannot—or will not—maintain peace, it is senseless to demand that states strictly adhere to Articles 2(4) and 51.¹⁴⁰ The burden of self-defense thus falls largely on each individual state

135. See Baker, *supra* note 133, at 110-13.

136. EDNA ST. VINCENT MILLAY, *MAKE BRIGHT THE ARROWS: 1940 NOTEBOOK 57* (1940).

137. See Abram Chayes, *Law and the Quarantine of Cuba*, 41 *FOR’N AFF.* 550, 556 (1963). See also McDougal, *supra* note 33, at 599 (assessing the “continuing ineffectiveness of the general community organization to act quickly and certainly for the protection of states”). For the veto held by the Security Council’s five Permanent Members—the United States, United Kingdom, Russia, China, and France—see U.N. CHARTER art. 27, para 3.

138. See Glennon, *supra* note 42, at 540. See also Franck, *supra* note 61, at 51 (referring to Charter’s “fundamental promise to provide an effective system of collective measures to protect states against violators of the peace. This promise, unfortunately, has not been kept.”).

139. See JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 96-98 (1958). The Charter itself arguably recognizes that the Security Council may prove ineffective and provides for that contingency. Article 51 specifies that a state may act in self-defense “until the Security Council has taken measures necessary to maintain international peace and security.” U.N. CHARTER art. 51. This implies that if the Security Council adopts measures which do not maintain international peace and security then the defending state remains seized of the matter. See I OPPENHEIM’S *INTERNATIONAL LAW* 423 (Sir Robert Jennings and Sir Arthur Watts, ed., 9th ed. 1992); Rostow, *supra* note 42, at 511; Fawcett, *supra* note 58, at 361-62; Waldock, *supra* note 44, at 498 (“inadequate” United Nations action).

140. Professor Louis René Beres notes: “The argument against the restrictive view of self defense is reinforced by the apparent inability of the Security Council to provide collective security against an aggressor.” See Beres, *supra* note 67, at 93. *Accord* *Nicar. v. U.S.*, *supra* note 43, at 543-44 (Jennings, dissenting); WOLFGANG FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 260 (1964) (“[I]n the absence of effective international machinery the right of self-defense must probably now be extended to the defence against a clearly imminent aggression, despite the apparently contrary language of Article 51 of the Charter.”). Recall that fundamentally changed circumstances permit deviation from the terms of a treaty, including the United Nations Charter. See Kirgis, *supra* note 65.

with anticipatory self-defense as an indispensable tool for national survival.¹⁴¹

Anticipatory self-defense should not be seen as incompatible with the purposes of the United Nations Charter. U.N. Charter Article 2(4) is not a blanket prohibition on all unilateral use of force but only a prohibition on force which impairs another state's "territorial integrity or political independence" or which is "in any other manner inconsistent with the Purposes of the United Nations."¹⁴² Since the purpose of the United Nations is to "maintain international peace and security,"¹⁴³ preemption is legal under Article 2(4) if it advances these goals.¹⁴⁴ A careful reading reveals that preemption is built into the Charter. Professor Robert F. Turner points out that one of the purposes of the United Nations is to prevent threats *before* they mature.¹⁴⁵ By acting in the Security Council's stead the United States and its coalition partners were merely fulfilling a responsibility the Security Council had abdicated. President Bush has stressed that a major purpose of Operation Iraqi Freedom was to enforce Security Council resolutions mandating Iraqi disarmament.¹⁴⁶ The Security Council could not bring itself to take action, instead preferring to give Saddam an unending string of toothless warnings to disarm.¹⁴⁷

Far from being unlawful *per se*, preemption may be "law-enforcing."¹⁴⁸

141. See LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 319 (1989) ("In a world arena in which authoritative and effective power remains largely unorganized and decentralized, various lesser communities can hardly be expected to achieve even minimum security . . . if they are denied appropriate capabilities and measures of response.").

142. See STONE, *supra* note 139, at 95; D'Amato, *supra* note 110, at 584-86. Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

143. U.N. CHARTER art. 1.

144. Thus, according to Professors McDougal and Feliciano: "[P]ermitting defense against an imminently expected attack does not, any more than permitting defense against an actual current attack, impair or dilute the 'authority and responsibility' of the organized community 'to maintain or restore international peace and security.'" See MCDUGAL & FELICIANO, *supra* note 37, at 237. As Professor McDougal writes elsewhere: "[T]he customary right of defense, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purposes of the United Nations." McDougal, *supra* note 33, at 600.

145. See Turner, *supra* note 17, at 168; U.N. CHARTER art. 1, para. 1 (purpose of United Nations is "prevention and removal of threats to the peace") (*emphasis added*).

146. See *Bush's Speech on Iraq: 'Saddam Hussein and His Sons Must Leave,'* N.Y. TIMES, Mar. 18, 2003, at A14 (col. 1); UN SPEECH, *supra* note 7. The Joint Congressional Resolution of October 16, 2002 lists enforcement of UN resolutions and U.S. self-defense as the rationale for the authorization for the use of military force against Iraq. See Iraq Resolution, *supra* note 9, § 3(a).

147. See *supra* note 18. Compare the Security Council's comparable success in coping with the threat posed by the Taliban. From 1998 through mid-2001 the Council repeatedly demanded that the Taliban surrender Osama bin Laden and cease its support for international terrorism. See Wall, *supra* note 59, at 101-02, 106 n.36. The result we know.

148. See Beres, *After the Gulf War*, *supra* note 11, at 266; Beres & Tsiddon-Chatto, *supra* note 109, at 440. Beres and Chatto write: "In the absence of a centralized enforcement body, international law relies upon the willingness of individual states to act on behalf of the entire global community." *Id.* at 439. Individual law enforcement action is consistent with Article 24(1) of the Charter which gives the

Thus, Israel's 1967 preemptive strikes against Egypt and Syria, and her 1981 strike on the Osiraq nuclear reactor were in harmony with the purposes of the United Nations. The strikes protected a member state from aggression. By the same token the Cuban quarantine was not "inconsistent with the Purposes of the United Nations" because it defused Soviet aggression.¹⁴⁹ It was Cuba and the Soviet Union, not the United States, who violated Article 2(4) by the threat of force implicit in their attempt to install Soviet missiles in the Western Hemisphere.¹⁵⁰

Some writers go further and assert not merely that the Charter rules have been relaxed but that the Charter rules prohibiting the use of force are dead.¹⁵¹ Under the principle of desuetude, a treaty provision, such as Articles 2(4) and 51 of the U.N. Charter may lose its force through long-term disuse or nonobservance.¹⁵² We have already cited Michael Glennon's reference to the 291 interstate conflicts fought since the United Nations' founding.¹⁵³ Glennon also refers to the concept of *non liquet*. A *non liquet* ("it is not clear") occurs when the legal norms in an area of the law are so internally contradictory or confused that we cannot articulate the law.¹⁵⁴ Under the rule in *The S.S. Lotus* states may do as they please unless a restriction has been established by treaty or customary law.¹⁵⁵ Glennon concludes that since the Charter no longer works to maintain peace there is currently no law which restricts how states may use force. The U.S. attack on Iraq was legal because: "[T]here was no international law forbidding it. It was therefore impossible to act unlawfully."¹⁵⁶

To be worthy of the name, a system of law must be capable of disciplining nonconforming elements. And when a legal system consists largely of nonconforming elements, we ought to suspect that "system" is dead. Law is a system of norms which describes, predicts, and controls the conduct of actors in the system. But the Charter rules on force do not describe how states behave. The

Security Council "primary" not *exclusive* responsibility for maintaining international peace and security. See Turner, *supra* note 17, at 179, 184; U.N. CHARTER art. 24, para. 1.

149. See Eustace Seligman, *The Legality of the U.S. Quarantine Action under the United Nations Charter*, 49 A.B.A. J. 142, 142 (1963).

150. The Charter prohibits not only force but threats of force. U.N. CHARTER art. 2, para. 4.

151. For commentators taking this view, see, e.g., Arend, *supra* note 40; Glennon, *supra* note 42; Jean Combacau, *The Exception of Self-Defense in U.N. Practice*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* (A. Cassese ed., 1986); Thomas M. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809 (1970).

152. See Michael J. Glennon, *Why the Security Council Failed*, 82 FOR'N AFF. 16, 22 (2003); RESTATEMENT (THIRD), *supra* note 48, §102 reporter's note 4.

153. See *supra* note 135 and accompanying text. As Professor Glennon observes: "So many states have used force with such regularity in so wide a variety of situations that it can no longer be said that any customary norm of state practice constrains the use of force." See Glennon, *supra* note 151, at 554. For a brief catalog of uses of force conducted without Security Council authorization, see Arend, *supra* note 151, at 100.

154. See Glennon, *supra* note 151, at 555 n.49 ("*non liquet* refers to an insufficiency in the law, to the conclusion that the law does not permit deciding a case one way or the other").

155. See Glennon, *supra* note 152, at 23. This is the holding of the Permanent Court of International Justice in *The S.S. Lotus*, (1927) P.C.I.J. Reports, Ser. A, No. 9, at 18.

156. See Glennon, *supra* note 152, at 24. The larger conclusion is that we are now living in a post-Charter era.

rules neither constrain nor punish violators. And the rules do not predict how states will act (to the contrary, the best prediction is that states will ignore the rules whenever expedient). Instead, the Charter prohibitions on the unilateral use of force are “paper rules”: they have no real force.¹⁵⁷

Restrictionists, naturally, dispute that the Charter prohibitions on force are dead. Restrictionists cite dictum from the International Court of Justice to the effect that when states depart from the Charter rules these departures are not state practice supporting new legal norms—they are violations of international law.¹⁵⁸ These departures are not state practice supporting the emergence of new norms because *opinio juris* is lacking.¹⁵⁹ Restrictionists find support in the fact that states do not publicly repudiate the Charter rules.¹⁶⁰ But as Michael Glennon points out, states do not openly repudiate the rules because states avoid “needless confrontation.”¹⁶¹ What is more, to require express repudiation is to presuppose the existence of a rule under which an international norm ceases to be binding only once it is openly repudiated.¹⁶² But such a “rule” finds no support in state practice.¹⁶³

VIII. MUST AN ATTACK BE IMMINENT?

157. *Id.* at 31.

158. See Nicaragua case, at para. 186 (“instances of state conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule”), quoted in O’Connell, *supra* note 32, at 14.

159. *Opinio juris sive necessitatis* is the subjective component of customary international law. *Opinio juris* is defined as states’ conviction that they engage in, or refrain from, particular conduct because doing so is legally required rather than a matter of convenience. RESTATEMENT (THIRD), *supra* note 48, § 102 cm. c (1987). New customary law requires both state practice and supporting *opinio juris*. *Id.* § 102(2).

160. See O’Connell, *supra* note 32, at 15. Thus, Professor O’Connell points out that the Bush Administration has not publicly repudiated the Charter rules. *Id.* at 15. Professor O’Connell maintains that in the past the United States has consistently opposed preemption. *Id.* at 12-13, 15-17 (e.g., Eisenhower Administration opposed preemption by Britain, France, and Israel during the 1956 Suez Crisis).

161. See Glennon, *supra* note 152, at 24.

162. *Id.* at 23-24.

163. *Id.* at 24. Some critics argue that the Bush Administration *has* repudiated the Charter rules. At a news conference on the eve of the Iraq war President Bush was asked whether an invasion without Security Council authorization would violate the United Nations Charter. President Bush answered: “[W]hen it comes to our security if we need to act we will act. And we really don’t need the United Nations’ approval to do so. . . . [W]hen it comes to our security, we really don’t need anybody’s permission.” See *Excerpts from Bush’s News Conference on Iraq and Likelihood of War*, N.Y. TIMES, Mar. 7, 2003, A1, at 12. One commentator concluded that “It’s hard to see this remark as anything other than a *repudiation* of the framework of international law governing the use of force, as set out in the United Nations Charter.” See Anthony Dworkin, *Would War Be Lawful Without Another U.N. Resolution?*, at <http://www.crimesofwar.org/onnews/news-iraq2.html> (Mar. 10, 2003) (visited Mar. 15, 2004) (emphasis added). Professor Thomas M. Franck also maintains that the United States has repudiated the Charter restrictions on the use of force. See Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AM. J. INT’L L. 607, 617 (2003), reprinted in FUTURE IMPLICATIONS OF THE IRAQ CONFLICT 55, 65 (2003). On the other hand, the President’s comment may merely reflect the belief that Operation Iraqi Freedom was justified under Article 51 of the Charter, in which case Security Council “permission” to use force would not be needed.

The foregoing demonstrates that an actual armed attack is not a precondition for the exercise of self-defense. According to most scholars, the customary right of self-defense—which subsumes anticipatory self-defense—requires only that an attack be imminent.¹⁶⁴ Does the requirement of an imminent attack present an insuperable objection to the legality of Operation Iraqi Freedom? The Bush Administration never suggested that Iraq was about to attack in a week or a month. Even former CIA analyst Kenneth M. Pollack, a leading advocate of invasion, admitted prior to the invasion that Saddam was not an imminent threat.¹⁶⁵ Instead of characterizing Iraq as an imminent threat, the White House argued that the United States needed to act at once because waiting would only allow Iraq to become stronger.¹⁶⁶

Some commentators believe that the Bush Administration is seeking to expand the law.¹⁶⁷ Privately, some Administration supporters have admitted that they seek an extension of the law.¹⁶⁸ The National Security Strategy argues for the need to “*adapt* the concept of imminent threat to the capabilities and objectives of today’s adversaries.”¹⁶⁹ The President’s 2003 State of the Union address seemed to suggest abandonment rather than adaptation of the customary requirement of an imminent attack.¹⁷⁰

If the Administration is seeking to expand the law, there is good reason for so doing. Nuclear weapons and other WMD call into question the customary requirement of an imminent attack just as forcefully as they call into question the

164. See Zedalis, *supra* note 86, at 129. Under *Caroline*, anticipatory force in self-defense may be used where there is “no moment for deliberation.” See *supra* note 31.

165. See Pollack, *supra* note 5, at 148 (“Saddam is . . . probably several years away from being an irreparable danger.”)

166. The President said: “If we know Saddam Hussein has dangerous weapons today, and we do, does it make any sense for the world to wait to confront him as he grows even stronger and develops even more dangerous weapons?” Cincinnati Speech, *supra* note 1. The President added: “Some have argued we should wait, and that’s an option. In my view it’s the riskiest of all options because the longer we wait, the stronger and bolder Saddam Hussein will become.” *Id.* The same argument was made by Vice President Cheney in his Nashville speech. The Vice President assailed opponents of immediate action against Iraq as taking the position that “We just need to let [Saddam] get stronger before we do anything about it.” See Nashville Speech, *supra* note 5.

167. See Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 171, 179-83 (2003); Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT’L & COMP. L.Q. 401, 410 (2002).

168. See William Galston, *Perils of Preemptive War*, THE AM. PROSPECT, Sept. 27, 2002, at 24.

169. NATIONAL SECURITY STRATEGY, *supra* note 2, at 15 (emphasis added). Elsewhere, the NSS speaks of the need to pre-empt “emerging threats before they are fully formed,” phraseology which suggests action before threats become imminent. *Id.*, in President Bush’s Introduction.

170. The President said: “Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike?” President George W. Bush, State of the Union Address (Jan. 28, 2003) (transcript available at <http://www.gpoaccess.gov/sou>). A year earlier the President had made clear that he was not suggesting Iraq posed an imminent threat. In his 2002 State of the Union address President Bush described the Iraq threat not as imminent, but as a “grave and growing danger.” See President’s 2002 State of the Union Address, *supra* note 3. Later that year, before the United Nations General Assembly, the President called Iraq “a grave and gathering danger.” See UN SPEECH, *supra* note 7.

Charter requirement of an “armed attack.”¹⁷¹ States confront a radically different environment than existed before Hiroshima. The National Security Strategy observes that in the past an imminent threat was “most often [signaled by] a visible mobilization of armies, navies, and air forces preparing to attack.”¹⁷² These conventional threats took time to develop. Today, a terrorist state which acquires WMD can go practically overnight from posing no threat to posing an imminent threat. Indeed we can never know when an attack is imminent.¹⁷³ U.S. intelligence has had a mixed record in detecting emerging nuclear arsenals.¹⁷⁴ The greatest danger is that we will not know that an attack is imminent until it is too late. As Deputy Secretary of Defense Paul Wolfowitz and others have asked: When was 9/11 imminent?¹⁷⁵

In reality, the Administration has been knocking at a door that is already open. We have observed that state practice is to acquiesce in acts of preemption well in advance of an imminent threat of attack.¹⁷⁶ In the Cuban Missile Crisis imminence was recast from imminent attack to an imminent change in the balance of power.¹⁷⁷

Furthermore, the restrictive rule set out in *Caroline* is inapplicable in the context of Iraq.¹⁷⁸ *Caroline* set out a highly restrictive standard for the anticipatory use of force. Under the circumstances, this restrictive view made sense.¹⁷⁹ *Caroline* involved two friendly countries: the United States and Great Britain. The United States, the target of Great Britain’s preemptive attack, was not responsible for the incursions into Canada; in fact, the United States was willing and able to

171. See Condoleezza Rice, *The President’s National Security Strategy*, in THE NEOCON READER 79, 82 (Irwin Stelzer, ed., 2004) (“new technology requires new thinking about when a threat becomes ‘imminent’”).

172. NATIONAL SECURITY STRATEGY, *supra* note 2, at 15.

173. See DAVID FRUM & RICHARD PERLE, AN END TO EVIL: HOW TO WIN THE WAR ON TERROR 34 (2003) (need to balance the danger of striking too soon with waiting too long); Louis René Beres, *Preserving the Third Temple: Israel’s Right of Anticipatory Self-Defense under International Law*, 26 VAND. J. TRANSNAT’L L. 111, 124 (1993) (difficulty of distinguishing imminent from more remote threats).

174. See Henry Sokolski, *The Wrong Culprit*, WKLY. STANDARD, Feb. 16, 2004, at 19.

175. See *The Imminence Invention*, WALL ST. J., Aug. 5, 2003, at A8; François Heisbourg, *A Work in Progress: The Bush Doctrine and Its Consequences*, 26 WASH. Q. 75-76, 87, n.2 (2003) (quoting remarks of Deputy Secretary of Defense Paul Wolfowitz); Bill Keller, *The Sunshine Warrior*, N.Y. TIMES MAG., Sept. 22, 2002, 48, 50. As Professor Ruth Wedgwood urges: “In a world of nuclear danger, we may wish to permit anticipatory self-defense against overwhelming threats to national safety, even where the threat is not immediate.” See Wedgwood, *supra* note 59, at 619 n.40.

176. See *supra* sec. VI. Lawrence F. Kaplan and William Kristol write that “the legal basis for preemption has become so broad that it permits acts of anticipatory self-defense well before an attack becomes imminent.” See LAWRENCE F. KAPLAN & WILLIAM KRISTOL, THE WAR OVER IRAQ: SADDAM’S TYRANNY AND AMERICA’S MISSION 85-86 (2003). See also Wall, *supra* note 59, at 99 (state practice departs from *Caroline* criteria); Abraham Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT’L L. 209, 214 (2003), available at <http://ejil.org/journal/Vol14/No2/art1.pdf> (last visited Jan. 10, 2003).

177. See Zedalis, *supra* note 86, at 131.

178. See Sofaer, *supra* note 176, at 214.

179. *Id.*

restrain the Americans who were aiding the Canadian rebels.¹⁸⁰ Given these facts, Great Britain would have needed to employ anticipatory force only in extraordinary circumstances: only, as Secretary Webster wrote, where there existed “[a] necessity of self-defense, instant, overwhelming, and leaving no choice of means and no moment for deliberation.”¹⁸¹ The situations in which preemptive self-defense has been used in the modern era are entirely different from the facts in *Caroline*. Cuba and the Soviet Union in 1962, the Arab states in 1967, Iraq in 1981, Libya in 1986, and Iraq again in 2003—all these cases involved rogue states. Rogue states have no desire to restrain their aggression against the West or to restrain terrorist groups taking refuge within their borders.¹⁸²

To cope with the danger presented by rogue states a more flexible standard is required than the one set out in *Caroline*.¹⁸³ The standard remains that of necessity and proportionality but necessity must be analyzed in terms of the totality of the circumstances, that is to say, reasonableness.¹⁸⁴ Reasonableness in any particular case may or may not include a temporally proximate threat of attack.

Professor McDougal assessed the totality of the circumstances surrounding the Cuban Missile Crisis and concluded that the U.S. quarantine was necessary, hence legal.¹⁸⁵ Judge Sofaer suggests that the factors relevant to determining the necessity for exercising preemptive self-defense are: (1) the nature and magnitude of the threat;¹⁸⁶ (2) the likelihood of the threat being realized;¹⁸⁷ (3) exhaustion of alternatives;¹⁸⁸ and (4) whether under the circumstances preemption would be consistent with the Purposes of the United Nations Charter.¹⁸⁹ He concludes that Operation Iraqi Freedom passes muster under this test. Saddam’s track record of aggression both against his neighbors and his own people as well as his personal psychopathology made it highly likely that Saddam would commit aggression again.¹⁹⁰ For ten years following the Persian Gulf ceasefire Saddam consistently

180. *Id.* at 214, 219, 220.

181. THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, *supra* note 31.

182. Judge Sofaer explains the limited scope of the *Caroline* doctrine: “[Webster’s] exacting standard is valid, if anywhere, only where the action considered is to be undertaken in the territory of a state that is not responsible for the threat involved, and that is both able and willing to suppress it.” Abraham D. Sofaer, *Iraq and International Law*, WALL ST. J., Jan. 31, 2003, at A10.

183. Sofaer, *supra* note 176, at 214, 220. Professor McDougal observes that “a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies.” See McDougal, *supra* note 33, at 598.

184. Sofaer, *supra* note 176, at 212; McDougal, *supra* note 33, at 597. Reasonableness is the standard accepted by the United States government. See Sofaer, *supra*, at 213 n.18 and accompanying text.

185. See McDougal, *supra* note 33, at 601-03.

186. Sofaer, *supra* note 176, at 220.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 222-23. Compare Professor Ruth Wedgwood’s test for hostile intent which similarly takes into account the subject’s past aggression. Professor Wedgwood suggests that intent may be implied given: (1) a dictator or human rights violator; (2) who has a history of aggression; and (3) who is attempting to acquire or develop WMD. See *Attacking Iraq: Is Preemptive Self-Defense Lawful?*, AMERICAN SOCIETY OF INTERNATIONAL LAW BRIEFING SERIES (Oct. 29, 2002) (*available at*

violated Security Council resolutions demanding that he disarm.¹⁹¹ Operation Iraqi Freedom was consistent with the purposes of the United Nations because it enforced Security Council resolutions and eliminated a major threat to international peace and security.¹⁹²

IX. CONCLUSION

The Bush Administration has offered two arguments for the legality of Operation Iraqi Freedom. First, the Administration has argued that Iraq's material breach of Security Council Resolution 687, the Gulf War ceasefire, reactivates the authorization of force made in Security Council Resolution 678.

However, the argument which has received the most public attention is that Operation Iraqi Freedom was justified as preemptive self-defense. Pre-Charter customary law allowed preemption given satisfaction of the requirements of necessity and proportionality. Necessity signified an imminent attack and the unavailability of alternative, peaceful means to forestall the attack. Whether the customary right of anticipatory self-defense survives under the Charter is a matter of controversy. On its face the Charter presents a blanket prohibition on the use of force with only two exceptions: force authorized by the Security Council and, under Article 51, self-defense if an armed attack occurs.

Counter-restrictionists present four main arguments against literal application of Article 51's "armed attack" requirement: (1) the wording and drafting history of Article 51 indicate that the Charter drafters did not intend to cut down the customary right of anticipatory self-defense; (2) literal application of Article 51's "armed attack" requirement would require states to absorb the first blow in an attack; (3) state practice has acquiesced in acts of anticipatory self defense; and (4) the Charter prohibitions on the use of force were premised upon an effective Security Council but the Security Council has proven ineffective in maintaining international peace. These considerations necessitate the conclusion that self defense must, perforce, fall to individual states and coalitions of the willing.

While it is apparent that an actual armed attack is no longer required for permissible self-defense, what of the customary law requirement that self-defense is allowed only where an attack is imminent? As no one in the Bush Administration claimed that an Iraqi attack was imminent it might seem that Operation Iraqi Freedom preempted a merely potential, not imminent, threat. However, state practice supports a broad reading of what constitutes an imminent attack. Moreover, the *Caroline* doctrine, which established the imminence requirement, dealt with friendly states. A more flexible standard for self-defense is needed in today's struggles with terrorist groups and with rogue regimes. Finally, it may be that the Bush Administration is seeking to extend the law. If other nations acquiesce in the coalition's invasion of Iraq, new law will be formed which

<http://www.sais-jhu.edu/mediastream/debl.ram> - recorded debate at the John Hopkins University School of Advanced International Studies) (visited Mar. 22, 2003).

191. See Sofaer, *supra* note 176, at 223.

192. *Id.* at 223-24; Michla Pomerance, *The Legality of the Iraq War*, at <http://www.ajiac.org.au/review/2003/284/legal-iraq.html> (Apr. 2003) (visited Feb. 18, 2004).

allows pre-emptive attack under circumstances akin to Operation Iraqi Freedom.