
Charles Pierson

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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. Bush

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. 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). 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.

* 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).


The Administration made the case against Iraq in speeches by Vice President Dick Cheney on August 26, 2002, by Secretary of State Colin Powell before the U.N. Security Council on February 5, 2003, and in addresses by President Bush before the General Assembly of the United Nations on September 12, 2002 and on U.S. television on October 7, 2002. 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. Preemption supplants the containment strategy the United States had pursued against Iraq in the decade following the 1991 Persian Gulf War.

"Preemption," "preemptive self-defense," and "anticipatory self-defense" traditionally refer to a state’s right to strike first in self-defense when faced with...
imminent attack—to beat an adversary to the punch. 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?

collective self-defense under Article 51 of the United Nations Charter. 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." One of those "subsequent relevant resolutions" was Resolution 687, the Gulf War cease-fire, which required Iraq to disarm and submit to weapons inspections. Iraq's material breach of the cease-fire revived Resolution 678's authorization to use force. This conclusion proceeds from a number of rationales. One is to treat Security Council Resolution 687 as analogous to a treaty. Under the law of treaties, material breach of a treaty allows a "specially affected" party to suspend operation of the treaty. Another rationale is that the cease-fire was expressly

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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. The Security Council found Iraq in material breach of the cease-fire on numerous occasions.

The first President Bush relied upon the material breach argument to establish "no-fly" zones over northern and southern Iraq. 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. Nevertheless, U.N. Secretary General Boutros Boutros-Ghali declared that the strikes were pursuant to Resolution 678. President Clinton used the material breach argument to justify the December 1998 Operation Desert Fox bombing campaign against Iraq.

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. To that end Resolution 1441 provided for a resumption of weapon
inspections in Iraq interrupted since UNMOVIC inspectors left Iraq in 1998. The resolution warned that Iraq's failure to submit to renewed inspections would lead to "serious consequences," understood to mean war. 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.

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. 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. 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


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).

doctrine"). 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. 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. Thus, the Caroline criteria permit both reactive and anticipatory self-defense so long as necessity and proportionality are observed.

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.

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


35. U.N. CHARTER art. 51.

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. 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. The customary right allowed force to be used in advance of an armed attack so long as an attack was imminent. The United States follows the counter-restrictionist position.

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..." 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. Counter-restrictionists insist that the language "if an armed attack occurs" must not be misread as "if and only if." 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." Significantly, the French text of

37. See cf. MYRES S. MCDougAL & 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. Klimentko, 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.


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


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"). 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. 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.

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. Counter-restrictionists contend that the Article 51 *travaux préparatoires* do not support a conclusion that anticipatory self-defense is illegal under the Charter. Professor Timothy L. H. McCormack demonstrates that restrictionists offer only perfunctory analyses of the Article 51 *travaux préparatoires*. 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." 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-

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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.


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.


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 BROWNLINE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 275 (1963).
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. Professor McCormack suggests that the Article 51 drafters imported the words "armed attack" unreflectingly from the Act of Chapultepec. 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. But the travaux préparatoires show that this issue was not discussed.

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.

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. GOODRICH, EDVARD HAMBRO, & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 342-44 (3d rev. ed. 1969); MCDOUGAL & 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.


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

55. Id. at 7-8.

56. Id. at 8, 35.

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).


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 Deply 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. 

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. 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. 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. 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. 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); Wallock, 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.


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." 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.

Some restrictionists attempt to sidestep the need for anticipatory force by declaring that an attack occurs at the moment it is launched. 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. 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.

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. Some commentators have sought to distinguish "armed attack" from "preparations for armed attack." 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. How do we isolate the instant at which preparations end and an armed attack begins?

68. McDougal & 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.


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. McDougal & Feliciano, supra note 37, at 240.

75. Id.

76. McDougal & 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 McDougal & 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 the point of impact. See McDougal 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? 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. Counter-restrictionists argue that state practice has been to acquiesce to anticipatory self defense. 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.

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. The Administration's public
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.


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.


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


87. See supra, § V.
is no longer effective, if it ever was, in safeguarding the peace. 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. 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.

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. Soviet missiles ninety miles from Florida would have radically reduced U.S. response time to a nuclear attack, heightening U.S. vulnerability. The world acquiesced in this change in the law.

The Six Day War

On June 5, 1967 Israeli air strikes hit air bases in Egypt, Syria, and Jordan. The strikes were justified under theories of both reactive, and anticipatory, self-defense: reactive self-defense against the Egyptian blockade of the Straits of Tiran and anticipatory self-defense to forestall an imminent attack from Egyptian and Syrian armies massing on Israel’s frontier. 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.
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,
convincing 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.).
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. Professor Louis René Beres concludes that the Security Council’s failure to condemn Israel constituted “implicit approval” of Israel’s preemptive strike.

The Soviet bloc fared no better in the General Assembly where another four resolutions condemning Israel were rejected. 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, Israel’s June 7, 1981 air attack on Iraq’s Osiraq nuclear reactor provides support for the right of anticipatory self defense. Consider the following:

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

(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. Statements by other delegates held out the possibility that they might have approved preemption under different circumstances. 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.


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.


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 & Tsidon-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.


Israel had failed to meet the *Caroline* criteria.\textsuperscript{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.\textsuperscript{117} Astonishingly, the Council brushed aside the inescapable conclusion that Iraqi animosity was implied by Iraq’s record of hostile acts toward Israel.\textsuperscript{118}

And although some delegates scolded Israel for not approaching the Security Council before using force,\textsuperscript{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.\textsuperscript{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.\textsuperscript{121} Iraq’s post-Osiraq conduct—its instigation of the Iran-Iraq war and invasion of Kuwait, its violation of numerous Security Council resolutions,\textsuperscript{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?\textsuperscript{123}

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\textsuperscript{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).


\textsuperscript{118} A better test for intent has been formulated by Professor Ruth Wedgwood. See infra note 190.


\textsuperscript{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).


\textsuperscript{122} See supra note 20.

\textsuperscript{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.\textsuperscript{124} The raid was in response to a bomb explosion on April 5, 1986 in a West Berlin discothèque which killed one American serviceman and wounded other persons.\textsuperscript{125} The United States placed responsibility for the bombing on Libyan terrorists.\textsuperscript{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.\textsuperscript{127} While the impetus for the raid was the West Berlin bombing, the Libyan air strikes were a forward looking—thus, preemptive—measure\textsuperscript{128} designed, in the President's words, to "diminish Colonel Qadahafi's capacity to export terror."\textsuperscript{129} The President characterized the U.S. attack as a "preemptive action"\textsuperscript{130} and stated that the purpose of the raid was "to deter acts of terrorism by Libya."\textsuperscript{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.\textsuperscript{132} While international opinion at the time was critical of the 1986 Libya raid,\textsuperscript{133} a scant seven years later the very similar 1993 U.S. air strike on Iraq attracted generally favorable world reaction.\textsuperscript{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.


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 [Qadahafi] with incentives and reasons to alter his criminal behavior." See Reagan Address, supra note 124.
134. Id. at 103; Carsten Stahn, Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (%) 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.\textsuperscript{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 Millay\textsuperscript{136}

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."\textsuperscript{137} The 291 interstate conflicts fought since the United Nations' founding attest to the Council's ineffectiveness.\textsuperscript{138}

The Charter rules prohibiting force, chiefly Articles 2(4) and 51, were premised upon an effective Security Council.\textsuperscript{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.\textsuperscript{140} The burden of self-defense thus falls largely on each individual state

\begin{itemize}
\item \textsuperscript{135} See Baker, supra note 133, at 110-13.
\item \textsuperscript{136} EDNA ST. VINCENT MILLAY, MAKE BRIGHT THE ARROWS: 1940 NOTEBOOK 57 (1940).
\item \textsuperscript{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.
\item \textsuperscript{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.").
\item \textsuperscript{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).
\item \textsuperscript{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.\textsuperscript{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.”\textsuperscript{142} Since the purpose of the United Nations is to “maintain international peace and security,”\textsuperscript{143} preemption is legal under Article 2(4) if it advances these goals.\textsuperscript{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.\textsuperscript{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.\textsuperscript{146} The Security Council could not bring itself to take action, instead preferring to give Saddam an unending string of toothless warnings to disarm.\textsuperscript{147}

Far from being unlawful \textit{per se}, preemption may be “law-enforcing.”\textsuperscript{148}

\begin{itemize}
\item[141.] See Lung-Chu Chen, \textit{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.”).
\item[142.] See Stone, \textit{supra} note 139, at 95; D’Amato, \textit{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.
\item[143.] U.N. CHARTER art. 1.
\item[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 McDougal & Feliciano, \textit{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, \textit{supra} note 33, at 600.
\item[145.] See Turner, \textit{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).
\item[146.] See Bush’s Speech on Iraq: ‘Saddam Hussein and His Sons Must Leave,’ N.Y. TIMES, Mar. 18, 2003, at A14 (col. 1); \textit{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, \textit{supra} note 9, § 3(a).
\item[147.] See \textit{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, \textit{supra} note 59, at 101-02, 106 n.36. The result we know.
\item[148.] See Beres, \textit{After the Gulf War, supra} note 11, at 266; Beres & Tsiddon-Chatto, \textit{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.” \textit{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. 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.

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. 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. We have already cited Michael Glennon's reference to the 291 interstate conflicts fought since the United Nations' founding. 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. 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. 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."

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.


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


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 cmt. 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.

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 irremediable 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.
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.
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.” 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. U.S. intelligence has had a mixed record in detecting emerging nuclear arsenals. 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?

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. In the Cuban Missile Crisis imminence was recast from imminent attack to an imminent change in the balance of power.

Furthermore, the restrictive rule set out in Caroline is inapplicable in the context of Iraq. Caroline set out a highly restrictive standard for the anticipatory use of force. Under the circumstances, this restrictive view made sense. 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


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


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. 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." 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.

To cope with the danger presented by rogue states a more flexible standard is required than the one set out in Caroline. 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. 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. 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; (2) the likelihood of the threat being realized; (3) exhaustion of alternatives; and (4) whether under the circumstances preemption would be consistent with the Purposes of the United Nations Charter. 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. For ten years following the Persian Gulf ceasefire Saddam consistently

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

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

191. See Sofaer, supra note 176, at 223.
allows pre-emptive attack under circumstances akin to Operation Iraqi Freedom.